ELENA ERMOLAEVA,

Grievant,

v. Docket No. 04-HE-299

SHEPHERD UNIVERSITY,

Respondent.

D E C I S I O N

Elena Ermolaeva ("Grievant"), employed by Shepherd University ("Shepherd"), filed a level one grievance on June 7, 2004, alleging she had been denied tenure contrary to the facts and recommendations, and based upon inappropriate considerations and malevolent opinions. For relief, Grievant requests that she be granted tenure. The grievance was denied at levels one, two, and three. Appeal was made to level four on August 6, 2004. An evidentiary hearing was conducted at the Grievance Board's Westover office on December 16 and 17, 2004, and January 5, 2005. Grievant was represented by Nancy Dalby, Esq., and Shepherd was represented by counsel, Alan Perdue. Thegrievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before March 18, 2005. (See footnote 1)

The following facts have been derived from the evidence made part of the record at hearings conducted at levels three and four.

Findings of Fact

1. Grievant was first employed by Shepherd College (now University) as an Assistant Professor of Sociology and Geography in August 1998, and has held that position continuously since that time.

2. Prior to her employment with Shepherd, Grievant served as a visiting professor at Frostburg State University during the 1997-98 academic year, and was an instructor and graduate teaching assistant at Johns Hopkins University from 1993-96. Grievant worked as a

researcher at the Institute of Sociology in Moscow, Russia, from 1978-1990. She holds a Ph.D. and a M.A. in Sociology from Johns Hopkins University, and a Ph.D. equivalent from the Institute of Sociology, Russian Academy of Sciences, in Moscow.

3. Consistent with Shepherd's policies, Grievant applied for tenure in fall or 2003, her sixth year of employment.

4. Obtaining tenure is a lengthy process which requires a number of reviews by various peers, committees, and administrators. Generally, this includes the applicant's departmental chair, departmental committee, school dean, school committee, and vice-president, all of whom make a recommendation to the President, who makes the final decision.

5. Shepherd University's Faculty Handbook includes,"Guidelines and Criteria for Promotion in Rank and Tenure." Section a, "General Statement," provides that:
[r]equests for granting of promotion or tenure will be evaluated on the basis of the following five areas of performance:

(1) The possession of the terminal degree . . . and/or the requisite number of graduate hours toward the doctorate . . .;

(2) Excellence in teaching as evidenced by recent and regular evaluation;

(3) Professional growth as evidenced by scholarly research or creative work appropriate to the discipline or field of appointment. Such evidence may include publication; presentation of scholarly papers at professional forums; participation and recognition in juried shows, concerts, recitals; or other achievements of significant professional stature;

(4) Evidence of excellence in professional service, manifested in activities that add to the efficiency and positive image of the discipline, the department, or school, Shepherd University, and the State of West Virginia, including involvement in professional organizations at the national, regional, and state levels;

(5) Attainment of the minimum educational and experience requirements . . . .

6. Section b of those Guidelines, "Procedures for Making Promotion and Tenure Recommendations," provides for an assessment of the applicant's performance in the areas

of:

a. Excellence in teaching;

b. Committee service at the University;

c. Professional activities such as research, publishing, public performance;

d. Significant service to the candidate's profession;

e. Professional service to the community and to the State;

f. Attainment of necessary education and experience;

g. Character reputation that reflects positively on the institution.

7. The candidate for tenure is expected to compile materials documenting her activities in these areas for the individuals and committees to review. These materials are to include, among other things, a curriculum vita, with a list of publications, grants, and any other evidence of scholarship; past annual evaluations; a representative sample of student evaluations, information about the candidate's teaching and service, and letters of support. The various committees or administrators do not perform a separate investigation but evaluate the documents to address the candidate's competencies.

8. Grievant's application for tenure included course syllabi for all the classes she had taught from 1998 through 2003, and student evaluations from two Fall semester classes from 1998 through 2002. The student evaluations improved after the first year and were generally very good to excellent since 2001.

9. Some students voiced complaints to other faculty members over the years regarding Grievant's tardiness in arriving for class. Her late arrivals were sometimes noted by a faculty member.

10. Grievant had no work published during her six years at Shepherd. Her application lists a book as “forthcoming,” however, the contract with the publisher was dated in 1997. Another work was “under review” by a refereed journal, and a third wascharacterized as “research in progress.” Grievant also listed ten Russian publications between the years 1982 and 1992. Other scholarly work indicated by Grievant is the presentation of two scholarly

papers at national symposiums in August 2000, and she served as a textbook referee in 1998 and 2001.

11. Grievant's service activities consist of participation on a number of college committees, serving as Advisor of the Sociology Club since 2002, and Co-Advisor of the Sociology Honor Society. She has also obtained two in-house grants and held membership in a number of professional organizations since 1998.

12. In October 2002, Grievant attended a Halloween party at a private home near the Shepherd campus, and parked in an area shared by the school and community. At approximately 3:00 a.m. Shepherd security found Grievant, dressed as a military guerilla and carrying a toy gun, attempting to get into her car. After she refused to give her name, and observing her to be inebriated, security took her to the city police station where a breathalyser test indicated her blood alcohol level to be .369. Grievant was then charged with obstructing an officer, and transported to the Central Regional Jail for the night. Grievant was not disciplined for this incident.

13. The first step in the process was a review of the submitted materials by the Chair of the Sociology and Geography Department, Dr. Momodou N. Darboe. Dr. Darboe recommended that Grievant not be awarded tenure based upon student comments regarding her tardiness and demeanor, which made her inapproachable, and her failure to adhere to the hierarchical administrative structure.

14. The Promotion and Tenure Committee of the School of Business and Social Sciences also recommended that Grievant not be granted tenure. This committeedetermined that Grievant had "provided a modicum of service to the Department...and to the College...[but had] not successfully established collegial relationships with all members of her department. [Additionally,] deficiencies in the areas of ... teaching and professional development, as well as character reputation, outweigh any merits...."

15. After concluding his own review of the matter, V.J. Brown, Jr., Dean of the School of Business and Social Sciences, determined that the "good-facts" outweighed the "bad-facts," and recommended that Grievant be granted tenure.

16. The College Professional Status Committee next reviewed Grievant's petition for tenure. This Committee determined that Grievant had not demonstrated excellence in

teaching, citing the minimal number of student evaluations presented, and her failure to remedy shortcomings. Professional growth and academic achievement was found to be Grievant's weakest area, with no publications since her arrival at Shepherd. The committee members noted that Grievant had established a strong record of service to the school, which they qualified "by her apparent unwillingness to follow basic administrative procedure in her interaction with both the Department Chair and the School Dean." The committee recommended that tenure not be awarded.

17. Vice President for Academic Affairs, Mark Stern, recommended that Grievant not be awarded tenure, finding that her application did not establish a basis for future success in the competencies expected of a successful faculty member.

18. By letter dated May 21, 2004, Dr. David L. Dunlop, President of Shepherd, notified Grievant that her request for tenure was denied. Dr. Dunlop determined that Grievant had failed to demonstrate excellence in the areas of teaching, scholarly work, or service. Dr. Dunlop also expressed concern relating to Grievant's character reputation andprofessional demeanor. He specifically cited her interaction with students, her limited contribution to the atmosphere of collegiality in the School, and her arrest in October 2002 on the Shepherd campus.

Discussion

Grievant argues that she has demonstrated excellence in teaching, research and publications, and service, and that the decision to deny her tenure was arbitrary and capricious. (See footnote 2) **Shepherd denies that Grievant demonstrated excellence in any of the categories reviewed, and did not act in an arbitrary and capricious manner when it denied her application for tenure.**

This Grievance Board's review of an institution of higher learning promotion and tenure decisions are "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or

clearly wrong." Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984); See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ., Docket No.93-BOT-391 (Aug. 26, 1994). Thus, a grievant attempting to prove wrongful denial of promotion or tenure must demonstrate the action was arbitrary and capricious, clearly wrong, or a violation of college policy. See Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-104 (Dec. 29, 1995)

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982)." Trimboli, supra.

A review of the evidence presented establishes that the question of whether the denial of Grievant's promotion and tenure was arbitrary and capricious must be answered in the negative. It is the applicant's burden to provide evidence of excellence in the variouscategories when compiling her application for tenure. It is curious that Grievant did not submit student evaluations for any of the spring semesters. While the fall evaluations were very good, the absence of a more complete history of her work would have been more supportive. It appears from the limited evidence that Grievant is probably a good teacher; however, it was not arbitrary and capricious for Shepherd to find Grievant had not

demonstrated excellence in the area of teaching.

In the area of research and scholarly work, it was not arbitrary and capricious for Respondent to review Grievant's production since her appointment to her tenure-track position. See Schiavone v. HEPC/Marshall Univ., Docket No. 02-HEPC-152 (Nov. 22, 2002); Miller v. Higher Educ. Interim Gov. Bd., Docket No. 01-HE-037 (June 29, 2001). Grievant's pre-Shepherd publications indicate that she is capable of scholarly work, but there was no evidence of any significant research, and no publications during her time at Shepherd. Grievant notes Dr. Stern's testimony that consideration had been given to prior publications in other tenure cases. He further stated that the consideration had been erroneous. This issue could be clarified by simply amending the "Handbook" to state that the work must be produced while at Shepherd. If prior publications were erroneously considered, Shepherd is not required to misapply that consideration here. Additionally, Grievant's research and publication record was established when she was employed as a researcher. As a tenured faculty member, Grievant is expected to produce scholarly works while teaching and meeting the remaining criteria. Her failure to produce while at Shepherd may indicate an inability to be simultaneously productive. Finally, Grievant has established no record of service to the community. Given the deficiencies in the areas of teaching, publication, and service, it was not arbitrary and capricious for Shepherd to deny Grievant's request for tenure.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. This Grievance Board's review of an institution of higher learning promotion and tenure decisions are "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

2. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984); See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective

determination made by the official[s] administering the process." Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994).

3. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools forthe Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982)." Trimboli, supra.

4. Grievant has failed to prove that the decision to deny her tenure was contrary to Shepherd College policy, or was arbitrary and capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: APRIL 15, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Ms. Dalby filed a "Motion To Reopen Evidence" with her proposals, including an attachment with an unsworn statement from a student referred to in testimony. Mr. Perdue objected to the submission as untimely, and it has not been considered.

Footnote: 2

²At hearing, Grievant alleged discrimination based on national origin; however, there was no reference to that claim in her proposed findings of fact and conclusions of law, and the issue is deemed abandoned.