THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

KATHLEEN MIEZIO,

Grievant,

v. **Docket No. 06-HE-402**

Sue Keller

Senior Administrative Law Judge

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Kathleen Miezio ("Grievant"), employed by Marshall University ("Marshall") as an Associate Professor of Safety Technology, filed a level one grievance on May 30, 2006, in which she alleged that she had been denied tenure in violation of Greenbook policy. For relief, Grievant requested that she be awarded tenure, or in the alternative, to extend the period for which she can apply for tenure and be provided mentoring to assist her in attaining tenure. The grievance was denied at all lower levels, and appeal to level four was made on November 20, 2006. An evidentiary hearing was conducted in the Grievance Board's Charleston office on January 30, 2007. Grievant appeared *pro se*, and Marshall was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General. The parties filed proposed findings of fact and conclusions of law on or before March 5, 2007. Subsequent to the resignation of Chief Administrative Law Judge Paul Marteney who had heard the case, the grievance was reassigned to the undersigned on May 7, 2007.

Synopsis

Grievant was denied tenure based upon a finding that she had failed to demonstrate excellence in her elected area of emphasis, as well as in her remaining areas ofresponsibility. Grievant was given notice of the decision by letter dated April 28, 2006, and did not file at level one until May 30, 2006. Marshall raised the issue of whether the matter was timely filed at all levels. Absent any explanation by Grievant for the delay, the grievance was denied for failure to comply with the statutory time lines.

The following facts have been derived from a preponderance of the credible evidence made part of the record, including the Grievant's application file, the level three transcript, the level four audio proceedings, and all exhibits.

Findings of Fact

1. Grievant was initially employed by Marshall in December 2001 as an Associate Professor of Safety Technology in the College of Information Technology and Engineering ("CITE"). At the time of her appointment, Grievant was placed on an expedited, three-year, tenure track after being given credit for accumulated academic service at another institution.

2. During the 2004-2005 year one of the four CITE faculty members suffered a heart attack. As a result, Grievant assumed additional teaching duties, and Marshall extended her tenure application period by one year.

3. The Marshall *Greenbook* is the official Faculty Handbook. The *Greenbook* provides to be awarded tenure requires that a candidate must have demonstrated effective performance and achievement in all of his or her major areas of responsibility. Additionally, the candidate must have demonstrated excellence in either teaching and advising or in scholarly and creative activities.

4. Grievant applied for tenure in Fall 2005, designating teaching/advising as her area of excellence. 5. CITE has not developed any quantitative standards for excellence, but relies on the general standards set forth in the Greenbook.

6. Dr. Allan Stern, Chair of the Division of Applied Science and Technology, recommended that Grievant be granted tenure, but did not state that she had attained excellence in any area. Dr. Stern stated that he found Grievant to be a "very congenial colleague" who interacts well with faculty and students, and has "the best interest at heart for her students and the safety technology program." He noted that she had written a few grants and presented several papers at national conferences, as well as serving on a variety of university/college committees. He concluded, "I believe she will continue to conduct research and writing in the future and it is up to the promotion and tenure committee to make the final judgment as to her application based upon what evidence she has presented."

7. The members of the CITE Promotion and Tenure Committee unanimously did not recommend Grievant for tenure, stating Grievant did not demonstrate professional performance in all her major areas of responsibility and has clearly not demonstrated exemplary performance in either

teaching and advising, or scholarly and creative activities. The basis for the determination included the fact that Grievant had not received any “excellent” ratings in teaching and advising on her annual reports, and that the “good” rating did not demonstrate “exemplary” performance in her chosen area. Further, the course evaluations for the 2004-2005 year were not as good as those from the previous years. The committee found Grievant's application portfolio disorganized and contained a great deal of information that had little relevance for her application. While rating her service as relatively very good, the Committee noted that she had received no grants, andhad only one scholarly paper accepted for presentation at a conference, and no publications while at Marshall.

8. After her own review of Grievant's portfolio, Betsy Dulin, Dean of CITE, concurred with the Promotion and Tenure Committee that Grievant's application did not meet the requirements for tenure. Dean Dulin also noted there was a lack of evidence that Grievant had attained excellent or exemplary performance at any time during the review period.

9. The Provost and Senior Vice President for Academic Affairs, Dr. Sarah N. Denman, did not recommend Grievant for tenure.

10. Marshall President, Dr. Stephen J. Kopp, notified Grievant by certified mail that her application for tenure was denied.

11. CITE raised the issue of whether the grievance was timely filed in the level two decision, and during the level three hearing. The hearing evaluator rejected the issue due to the fact that significant testimony had been taken before it was raised. Marshall again raised the issue at level four.

Discussion

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997); *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97- DPS- 018; *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997). *W. Va. Code* § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most

recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

Marshall argues that notice of the grievable event was provided by letter dated April 28, 2006, and the grievance form clearly indicates that the grievance was not filed until May 30, 2006, nearly month later. Marshall further asserts that the level two and three appeals were untimely filed. Grievant offered no reason for the delay in filing the grievance or the subsequent appeals. Therefore, Marshall has proven the grievance was untimely filed.

Although the grievance was not timely filed, a brief discussion of the merits would likely provide some edification for Grievant. The 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. ofTrustees/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.*

Grievant argues that she was never provided the requirements and guidelines for tenure, and contrary to a *Greenbook* directive, CITE has failed to develop promotion andtenure criteria for its faculty. Grievant asserts that without specific criteria, she had no way of judging her performance, or of knowing how others would judge it. Finally, Grievant argues that Marshall erred in only considering student evaluations to determine her performance in teaching and advising, but that comments included the chair and dean on her evaluations establish that she achieved the standard of excellence in that area, and that her performance in the remaining areas was sufficient to qualify her for tenure.

Although Grievant would clearly prefer a listing of specific qualitative and quantitative criteria required for tenure, the general criteria provided in the *Greenbook* provides notice of what is expected of an individual seeking tenure. Additional information or direction may be requested by an individual if there is concern. Although Grievant now asserts that she was not aware of exactly what was expected of her, there is no evidence that she sought more explicit direction during the four years prior to applying for tenure. Grievant's arguments reveal other erroneous concerns regarding the tenure process. First, she questions the use of student evaluation scores to evaluate her teaching performance. Certainly, other methods of evaluating teaching performance may be utilized, but student evaluations are frequently used as a substantial basis for evaluation in this area. *Brozik, supra. See Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995). It cannot be seen as arbitrary and capricious for the academic leaders and evaluators to decide to weigh this evidence rather heavily since Grievant was seeking to obtain tenure within the academic structure, and she was required to demonstrate excellence in teaching and advising. *Schiavone v. Marshall Univ.,* Docket No. 02-HEPC- 152 (Nov. 22, 2002). Grievant's second misunderstanding relates to her reliance on her annual evaluations to indicate that she was on track for tenure. The purpose of annual evaluations is to assess performance at the current academic rank. Adequate performance as

an Associate Professor does not insure that the higher standards required for tenure are being met.

In conclusion, although the decision making process for awarding tenure is subjective, Grievant was evaluated by competent professionals who were able to make the required subjective judgment. There is no evidence that the decision was contrary to any policy or was arbitrary and capricious.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997); *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97- DPS- 018; *Buck v. Wood County Bd. of Educ.*, Docket No. 96-54-325 (Feb. 28, 1997).

2. A grievance be filed within ten days of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. *W. Va. Code* § 29-6A-4(a). 3. Marshall has proven that the level one grievance was not filed within the statutory time frame, and Grievant has offered no reason for the delay.

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. 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: JUNE 19, 2007

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE