

[Cite as *McKeny v. Ohio Univ.*, 2017-Ohio-4459.]

TIMOTHY SCOTT MCKENY, Ph.D.

Plaintiff

v.

OHIO UNIVERSITY

Defendant

Case No. 2014-00984

Judge Dale A. Crawford

DECISION

{¶1} This case came to be heard on a trial to the Court held on December 12-14, 2016.¹ On January 4, 2017, the parties filed simultaneous post-trial briefs. Plaintiff filed an amended post-trial brief on January 25, 2017 to comply with the Court's January 19, 2017 order requiring a post-trial brief no longer than 20 pages and in compliance with formatting specifications.

{¶2} At the beginning of trial, the Court addressed both Defendant's motion to exclude the expert testimony of Heinz Ickert and the stipulation regarding the pay of Dr. Christine Bhat from 2011-2017. The Court granted Defendant's motion to exclude, noting that it would take judicial notice of mathematical formulas and present values of Plaintiff's pension as well as the statutory life expectancy tables. The Court accepted the stipulation. At the close of trial, the Court dismissed Plaintiff's discrimination claims. Accordingly, the only remaining claims are breach of contract and violation of contractual due process.

{¶3} The following constitutes the Court's Findings of Fact and Conclusions of Law.

¹On October 23, 2015, the Court issued an immunity decision finding that Dean Renee Middleton, Provost Pam Benoit, and President Roderick McDavis were entitled to immunity pursuant to R.C. 2743.02(F) and 9.86. After the immunity hearing, the parties filed a stipulation on January 14, 2016 that the testimony presented at the hearing would be considered with the testimony presented at the trial on the merits of the case.

{¶4} Beginning in September 2006, Plaintiff Timothy McKeny, was an assistant professor in mathematics education in the College of Education at Ohio University. Plaintiff submitted a tenure and promotion dossier as part of his application for tenure on November 14, 2011. The dossier was sent to external reviewers, and eventually, the department recommended Plaintiff for tenure.

{¶5} Plaintiff's tenure application included one published monograph, one published refereed article, one in-press refereed article, seven referred articles in-review, one in-press refereed book review, four technical reports, five national refereed presentations, two regional refereed presentations, seven state refereed presentations, and three local presentations. Plaintiff also had \$770,989 in grant funding.

{¶6} At the time of the application, the College of Education did not have its own criteria for tenure. Therefore, the only binding document governing Plaintiff's tenure and promotion application was the department's Policy 60.111.

{¶7} The application was referred to and denied by Dean Renee Middleton on April 1, 2012. The basis of her denial was set forth in a letter and explained that Plaintiff's record of scholarship did not meet expectations for tenure, including the fact that Plaintiff did not have enough peer-reviewed publications. Plaintiff's Exh. 41. Dean Middleton also noted that Plaintiff had been advised consistently to strengthen his scholarship, and that two external reviewers also did not recommend tenure because of insufficient scholarship. *Id.*

{¶8} Plaintiff's application was submitted for reconsideration and was denied again on June 8, 2012. Dean Middleton reiterated the same reasons as in her first denial. Plaintiff's Exh. 46. Plaintiff appealed Dean Middleton's decision to Provost Pam Benoit, who denied the appeal on October 2, 2012, finding that there were no due process concerns. Plaintiff's Exh. 47. Plaintiff then appealed the decision to the Faculty Senate, which endorsed his appeal and submitted its decision to Dean Middleton for reconsideration. Dean Middleton denied the second reconsideration on January 28,

2013 for the same reasons as her prior two denials. She also indicated that his scholarship fell below the average application for tenure at the college. Plaintiff's Exh. 51. The application returned to Provost Benoit for reconsideration behind the faculty senate's support and Provost Benoit reaffirmed her prior denial on April 29, 2013. Plaintiff's Exh. 55. Subsequent to Provost Benoit's denial, Plaintiff was granted a hearing before a special senate committee, which brought Plaintiff's application to President Roderick McDavis. President McDavis denied the appeal on November 27, 2013, and again on reconsideration on December 20, 2013. Plaintiff's Exhs. 60, 61. The basis of the denials were based on lack of scholarship and the acknowledgement that the Dean, Provost, and President may interpret departmental criteria differently than the department faculty.

{¶9} In order to recover for breach of contract, Plaintiff must prove the existence of a contract, performance by Plaintiff, breach by Defendant, and damages or loss as a result of the breach. *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340 (10th Dist). In the case at bar, Plaintiff alleges that the contract breached in this case was Policy 60.111, a supplement to the Faculty Handbook. Defendant does not dispute the applicability of the policy to Plaintiff.

{¶10} Policy 60.111, "Procedures, Criteria and Worksheet for Evaluating Tenure and Promotion for Group I Faculty by T&P Committee," states that scholarship "includes such activities as research publications, the delivery of papers and other invited presentations in professional settings; plus curriculum/product development including software, multimedia forms, and testing/evaluating instruments. The scholar shares his or her research findings individually or collaboratively with professional peers and in so doing subjects such findings to peer evaluation and criticism." Plaintiff's Exh. 13. Furthermore, the policy states that "[e]xpectations for **TENURE** require invited and/or peer-reviewed products of scholarship of discovery, integration and/or teaching that result in dissemination to an identifiable audience." *Id.* Noticeably absent from the

policy, however, is any indication of how much weight should be allocated to publications.

{¶11} Plaintiff presented the testimony of numerous professors from the faculty committee to discuss Plaintiff's tenure application and process. Dianne Gut, an associate professor of special education, testified that, in her opinion, Plaintiff had met the requirements of Policy 60.111. Teresa Franklin, a retired professor, also testified that she believed Plaintiff was qualified to receive tenure. Linda Rice, a professor of English and collaborator with Plaintiff on a grant project, testified that she believed Plaintiff was qualified to receive tenure, but she had cautioned Plaintiff that self-published works should not be relied on for tenure purposes. Clayton Drabold, a professor of physics, testified that he disagreed with the Dean's decision to deny tenure, but that the decision is subjective. Beth Quitslund, a professor of English, testified that she wished that President McDavis had not overruled the faculty committee's recommendation, but also acknowledged that the President may make his own decision regarding tenure and promotion. Several of the witnesses testified that the Dean, Provost, and President had the latitude to exercise independent judgment in their review of Plaintiff's tenure application. The Court notes that although Plaintiff presented extensive testimony that his colleagues supported his application for tenure, their opinions are ultimately irrelevant to the determination of this case. Their testimony has no bearing on the Dean, Provost, and President's individual evaluations or on whether Defendant breached its contract with Plaintiff.

{¶12} There was also evidence presented that Plaintiff had been advised to work on bolstering his publications for his tenure application in his annual reviews. Plaintiff's Exhibits 17–22. In addition, the Tenure and Promotion Committee stated in its review of Plaintiff's "Midpoint Progress Toward Tenure" dossier that his scholarship did not meet expectations.

{¶13} Trial courts are “required to defer to academic decisions of [a] college unless [those decisions are] perceived [to represent] such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.” *Bleicher v. Univ. of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 308 (10th Dist. 1992). “The standard of review is not merely whether the court would have decided the matter differently but, rather, whether the faculty action was arbitrary and capricious.” *Id.* See also *Staton v. Miami Univ.*, 10th Dist. Franklin No. 00AP-410, 2001 Ohio App. LEXIS 1421 (Mar. 27, 2001). Thus, the Court will not substitute its judgment for that of the Dean, Provost, or President, nor will it determine what the process should be.

{¶14} Based on the foregoing, the Court finds that Defendant’s decision to deny Plaintiff’s tenure was not made in bad faith, arbitrary, or capricious. Plaintiff was advised on numerous occasions that he needed to strengthen his scholarship prior to his tenure review. Although Plaintiff’s peers testified that they personally believed he should have been granted tenure, they also acknowledged that the reviews by the Dean, Provost, and President were subjective and independent of the committee. Furthermore, Provost Benoit testified that when she reviewed Plaintiff’s application, she determined that his application was given adequate consideration and that his due process rights were not violated. Upon review of the evidence, the Court finds that Plaintiff has produced no evidence to support a violation of due process claim. With regard to Policy 60.111, the language of the Policy required invited and/or peer-reviewed products of scholarship of discovery, integration and/or teaching that result in dissemination to an identifiable audience and did not specify how scholarly works should be weighed. Therefore, the Court finds that the decisions by the Dean, Provost, and President, although contrary to the faculty committee’s recommendation and what Plaintiff had hoped for, were compliant with the Policy and not a breach.

Accordingly, judgment shall be rendered in favor of Defendant.

DALE A. CRAWFORD
Judge

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JUDGMENT ENTRY

{¶15} This case was tried to the Court on the issues of liability and damages. The Court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of Defendant. Court costs are assessed against Plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

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Filed April 24, 2017
Sent to S.C. Reporter 6/23/17