

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**DR. DA-QING YANG,**  
**Grievant,**

**HF No. 11 G, 2008/09**

**v.**

**DECISION**

**UNIVERSITY OF SOUTH DAKOTA**  
**SANFORD SCHOOL OF MEDICINE,**  
**Respondent.**

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This matter comes before the Department of Labor based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Grievant, Dr. Yang appeared personally and through his attorney, Craig Kennedy. Thomas Frieberg represented Respondent University of South Dakota, Sanford School of Medicine. The Department of Labor conducted a hearing in Vermillion, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby denied.

**Issue**

Did Respondent violate, misinterpret, or inequitably apply the Agreement and applicable policies when Dr. Yang was denied promotion and tenure at the University of South Dakota, Sanford School of Medicine?

**Facts**

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

Grievant, Dr. Da-Qing Yang (Yang) was employed at the University of South Dakota, Sanford School of Medicine (SSOM) as an assistant professor in the Division of Basic Biomedical Sciences for close to seven and a half years at the time of hearing. Dr. Yang's position at SSOM was a tenure track position.

Dr. Yang applied for promotion and tenure in 2007. The application process required that he prepare a dossier to submit to the Primary Review Committee. Dr. Ronald Lindahl, Dean of the Basic Biosciences at SSOM worked with input from Dr. Yang to appoint a Primary Review Committee. Dr. Evelyn Schlenker was appointed as the Chair of the Committee. The Primary Review Committee, comprised of five professors, made a recommendation in favor of promotion and tenure based on Dr. Yang's qualifications in the areas of research, teaching, and service. The Primary Review Committee unanimously recommended to the Promotion and Tenure Committee of SSOM that Dr. Yang receive tenure and be promoted to associate professor. Dr. Lindahl was not part

of the Primary Review Committee. Dr. Lindahl made an independent recommendation to the Promotion and Tenure Committee of SSOM that Dr. Yang's application for promotion and tenure be denied.

The Promotion and Tenure Committee of SSOM reviewed Dr. Yang's dossier, the recommendation of the Primary Review Committee and the recommendation of Dr. Lindahl. Dr. Yang was also given the opportunity to speak on his behalf and address the negative recommendation made by Dr. Lindahl. After a review of all the testimony presented, Dr. Yang's dossier, and recommendations of the Primary Review Committee and Dr. Lindahl, the Promotion and Tenure Committee of SSOM concluded, "the School of Medicine would be better off if Dr. Yang received tenure and promotion than if he was denied it." The Promotion and Tenure Committee of SSOM voted 8-1 to grant both promotion and tenure to Dr. Yang.

The recommendations of the Primary Review committee, the Promotion and Tenure Committee of SSOM and Dr. Lindahl were forwarded to Dean Rodney Parry, Dean of SSOM. Dean Parry recommended that Dr. Yang not be granted promotion and tenure. The ultimate recommendation for promotion and tenure is to be made by the University President, James Abbott. President Abbott reviewed Dr. Yang's application for promotion and tenure as well as the recommendations of the Primary Review Committee, the Promotion and Tenure Committee of SSOM, Dr. Lindahl, and Dean Parry. President Abbott recommended against promotion and tenure to the Board of Regents. The final decision whether to grant or deny tenure lies exclusively with the Board of Regents.

Following his denial of promotion and tenure, Dr. Yang began the grievance process. Being unsuccessful in Steps I, II, and III, this matter has been submitted to the Department of Labor.

Other facts will be determined as necessary.

### **Analysis**

***Did Respondent violate, misinterpret, or inequitably apply the applicable policies when Dr. Yang was denied promotion and tenure?***

SDCL 3-18-1.1 defines a grievance:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment.

Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a “grievance” and is not subject to this section.

The Department’s role in resolving a grievance is defined by SDCL 3-18-15.2. SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency...Nothing in this section may be interpreted as giving the department power to grant tenure or promotion to a faculty member employed by the Board of Regents.

Deference is not given to the Board of Regents decision in a grievance review under SDCL 3-18-15.2. Rather, “the Department issues a binding order based upon its own investigation and hearing.” *Cox v. Sioux Falls Sch. Dist.*, 94 SDO 279, 514 NW2d 868, 872 (SD 1994).The burden of proof is on the grievant. *Rininger v. Bennett County Sch. Dist.*, 468 NW2d 423 (S.D. 1991).

Dr. Yang argues that SSOM failed to follow its own policies in the Primary Review Committee’s review of Dr. Yang’s application for promotion and tenure. Dr. Yang argues that there was a violation of SSOM policy because Dr. Lindahl was not a member of the Primary Review Committee and he offered an independent recommendation to the Promotion and Tenure Committee of SSOM. Dr. Yang contends that because the policy was not followed, his application for promotion and tenure was not properly considered. Dr. Yang further argues that because Dr. Lindahl did not participate in the Primary Review Committee, Dr. Yang was not afforded an opportunity to question Dr. Lindahl directly regarding his negative recommendation.

The Sanford School of Medicine of USD Faculty Handbook 2006-07 (Faculty Handbook) §3.00 provides the policies and criteria related to tenure. §3.01:02 of the Faculty Handbook provides the procedures for initial review for granting of tenure as follows:

The review will be conducted by a Primary Review Committee appointed and chaired by the chairperson of the department or dean of the division in which the faculty member has the individual primary appointment. (In cases where the chairperson is being considered for tenure the Dean shall appoint the Primary Review Committee and designate its chairperson.) The committee may include faculty both tenured and non tenured and may include appropriate student representatives.

The Faculty Handbook §3:01:03 sets forth the conditions under which the primary review should be done. §3:01:03 provides in relevant part,

- (d) A notice of a hearing including time and place shall be given to:
  - i. The candidate, in writing with a creipt requested, two weeks in advance of the hearing.
  - ii. All departmental faculty by individual memorandua
  - iii. All other interested parties by notice posted in an appropriate, conspicuous place.

(e) The candidate shall have the right to be present at the review hearing to testify in his or her own behalf and the right to confront and question all witnesses either personally or through his/her designated representative.

(f) A complete record of the review hearing shall be kept. These records must be filed with the faculty member's dossier and held in security for protection of privacy. No more than the original may be kept. The candidate is entitled to a copy of this record if desired.

After the Primary Review Committee hearing a recommendation will be made either in support or in opposition to the granting of tenure. The recommendation will be supported by documentation and a summary statement of the rationale used to arrive at such a recommendation. This recommendation will be delivered to the Chairperson of the PT Committee with a copy to the Vice President/Dean not later than November 1.

Respondent argues that the Division of Basic Biomedical Sciences (Division) at SSOM has established its own guidelines for appointment, promotion and tenure. Respondent argues that the Division guidelines are authorized under §1.04 of the Faculty Handbook and the Board of Regents (BOR) Policy Manual § 4:10.

The BOR Policy Manual §4:10.2.B provides,

Special conditions and accreditation requirements of the Medical and Law schools necessitate special guidelines for promotion, tenure, minimum ran qualifications, minimum promotion eligibility criteria and in makeup of the campus Promotion and Tenure Committee. Specific guidelines for both the Medical School and the Law School are published and available to faculty at the University of South Dakota.

The BOR Policy Manual §4:10.5 provides in part,

The immediate supervisor, and any other administrators, including the president, who review the file in order to make independent recommendations, may

supplant the material assembled by the faculty member with information obtained by other sources, and they may base their recommendations upon such additional information, provided that such additional information is included in the file together with the materials assembled by the faculty member. This documentation and the recommendations of the department head (and of the departmental promotion and tenure committee, if any) will be forwarded by the department head to the administrator responsible for the process at the college/school level or institutional level[.]

The Faculty Handbook § 1.04 provides,

Each Department or free standing Section (herein referred to as Department) shall abide by the policies and general criteria as presented in this document but shall, in addition, establish guidelines as to how these criteria should best be interpreted and met, according to its individual needs. The Promotion and Tenure Committee (PT) will examine each department's document and advise the Vice President/Dean concerning the approval/disapproval of such departmental guidelines. The final approval of all such guidelines will reside with the Vice President/Dean of the School of Medicine. The document shall be maintained by both the PT Committee and the Department with any revisions being subject to approval. These guidelines will be used by the Department, the Promotion and Tenure Committee, the Appointment Advisory Committee and the Vice President/Dean when considering requests and recommendations for Appointments, Promotion and Tenure.

The Division guidelines in §1.04.B.1.a provides that the policies and procedures for appointments, promotions, and tenure set forth by Faculty Handbook will be followed, however the Division guidelines will supersede those of the Faculty Handbook wherever the Division criteria are more specific and/or rigorous.

The Division guidelines in §1.04.C.1 provides in relevant part,

b. For each faculty member under consideration for promotion, the Dean of Basic Biomedical Sciences will appoint a Primary Review Committee consisting of at least three members. The Dean or the Dean's designee will chair the committee; the second member will be chosen by the Dean or by the committee chair, if the chair is not the Dean, and the third member will be chosen by the faculty member under consideration. Other members may be added by agreement between the committee chair and the faculty member under review. This committee will ensure that all criteria for promotion have been met and that documentation is present and accurate. The committee will submit a written report including its recommendation and the justification for that recommendation to the Promotion and Tenure Committee.

c. In addition to the report of the Primary Review Committee, the Dean of Basic Biomedical Sciences will submit a separate and independent recommendation to the Promotion and Tenure Committee based upon review of the candidate's dossier, interactions with the candidate over the years, and the candidate's yearly evaluations.

Dr. Yang argued that the Division guidelines were never properly approved pursuant to the Faculty Handbook §1.04. Dr. Yang's argument is rejected; he offered no evidence to show that the Division guidelines were not accepted and in use at the time he applied for promotion and tenure.<sup>1</sup> In the alternative, Dr. Yang argues that even if the guidelines were properly adopted, the Division guidelines cannot supersede the SSOM rules for tenure, however when the policies and guidelines of the BOR, SSOM and the Division are read together, they present a process for review of each application for promotion and tenure that is thorough and in the spirit of the SSOM mission. There is nothing in the Division guidelines that supersedes the SSOM policies regarding promotion and tenure.

At the hearing, Dr. Yang was asked about the formation of his Primary Review committee. Dr. Yang testified that he assisted Dr. Lindahl in the formation of that committee and he understood that Dr. Lindahl would not be chairing the committee, but that Dr. Schlenker would be the chair. Dr. Yang acknowledged that was the standard procedure used in the Division of Basic Biomedical Sciences and that was the procedure used by other professors. In regard to Dr. Lindahl making an independent recommendation, Dr. Yang testified that he was aware that Dr. Lindahl would be making an independent recommendation to the Promotion and Tenure Committee. Dr. Yang never objected to Dr. Lindahl not participating in the Primary Review Committee until learning that Dr. Lindahl recommended against promotion and tenure.

The Primary Review Committee recommendation along with Dr. Lindahl's recommendation was sent to the Promotion and Tenure Committee of SSOM. Dr. Yang spoke to the committee for nearly 40 minutes on his behalf regarding the recommendation from Dr. Lindahl. The Promotion and Tenure Committee made their recommendation to Dean Parry based on their review of Dr. Yang's application, all prior recommendations and Dr. Yang's testimony at the meeting and ultimately voted in favor of promotion and tenure.

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<sup>1</sup> At the Grievance hearing before the BOR, a draft of the Division guidelines was offered into evidence. Dr. Yang objected as it was a draft copy, the Respondent testified that the Division guidelines were kept as part of the business records and were approved even though they said draft. The record was supplemented with a document that did not say draft. At the hearing before the Department, Respondent offered Exhibit 12, a copy of the Division Guidelines for Appointment, Promotion, and Tenure along with testimony that the guidelines were in fact voted on and approved by the Division.

Dr. Yang failed to meet his burden to show a violation of any rule, policy, or regulation when Dr. Lindahl did not participate in the Primary Review Committee but rather offered an independent recommendation to the Promotion and Tenure Committee of SSOM.

Dr. Yang argued that there were other procedural violations regarding his application for promotion and tenure. Dr. Yang argued that no record of the Primary Review Committee was kept in his dossier as required by the Faculty Handbook § 3.01:01:03(f) which requires “a complete record of the review hearing shall be kept.”

The Primary Review Committee met on October 30, 2007 and made their recommendation to the Promotion and Tenure Committee of SSOM by letter dated October 31, 2007. The letter not only gave a recommendation in favor of Dr. Yang, it included a list of the members of the committee in attendance, a detailed recollection of the meeting and the discussion of Dr. Yang’s Qualifications in each of the required areas. This letter, which was made a part of Dr. Yang’s dossier, is sufficient to constitute a complete record of the review hearing. Dr. Yang’s argument that no record was kept is rejected.

Dr. Yang also argues that there was a procedural violation when five letters in support of Dr. Yang’s application for promotion and tenure were removed from Dr. Yang’s dossier prior to sending it to President Abbott. President Abbott ultimately was given the opportunity to review those letters and did not change his recommendation concerning promotion and tenure.

In *Beville V. University of South Dakota, South Dakota Board of Regents*, 420 NW2d 9 (SD1988), the South Dakota Supreme Court discussed procedural violations in a denial of tenure. The Court in *Beville* held that the review process was fair despite several procedural irregularities, stating,

We will not second –guess the experienced, professional judgment of the University and Board of Regents when the applicable procedures were substantially complied with and substantial interests of the parties were satisfied. The review need not be perfect, but fairly and fully conducted to protect an individual’s source of livelihood--employment.

Id. at 14(citations omitted). The procedures by which Dr. Yang’s application for promotion and tenure was considered were fairly and fully conducted and afforded Dr. Yang his due process rights. Dr. Yang has failed to meet the burden of proof that any procedural irregularities resulted in the denial of his application for promotion and tenure.

Respondent shall submit proposed Findings of Fact, Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this

Decision. Grievant shall have ten (10) days from the date of receipt of Respondent's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 12<sup>th</sup> day of November, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M Dockter  
Administrative Law Judge