

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**DONALD PETERSON,**

**HF No. 1 G, 2006/07**

**Grievant,**

v.

**DECISION**

**SOUTH DAKOTA BOARD OF REGENTS  
and UNIVERSITY OF SOUTH DAKOTA,**

**Respondent.**

This matter comes before the Department of Labor based on a grievance complaint filed by Donald Peterson (Peterson) pursuant to SDCL 3-18-15.2. Anne Plooster represented Peterson. Thomas H. Frieberg represented the South Dakota Board of Regents (BOR) and the University of South Dakota (USD). A hearing was held before the Division of Labor and Management on December 12, 2006, in Vermillion, South Dakota. At the conclusion of the hearing, the administrative record was left open in order for Peterson to call an additional witness. On December 19, 2006, the Department conducted a telephonic hearing and at the conclusion of the testimony, the administrative record was closed.

At hearing, Exhibits 1 through 15 were offered and received into evidence. Four witnesses, including Peterson, Dan Van Peurse, Royce Engstrom and Gale Wiedow, were called and presented sworn testimony. The sole issue presented was whether USD, BOR and/or its agents violated, misinterpreted or inequitably applied policies, rules or regulations, or the negotiated agreement between the South Dakota Board of Regents and the Council of Higher Education (COHE Agreement) in denying Peterson's application for tenure.

**FACTS**

Based upon the Department's record and the live testimony at hearing, the following facts have been established by a preponderance of the evidence.

Peterson was a tenure track professor at USD since 1999 in the Health, Physical Education and Recreation Department, which is part of the School of Education. During the 2003-04 academic year, Peterson was encouraged to apply for tenure and he assembled his application for tenure consideration.

Peterson's application was subject to four levels of tenure review, including by the School of Education Promotion and Tenure Committee, the Institutional Promotion and Tenure Committee, the Vice President for Academic Affairs, and the President of USD, who makes the final tenure recommendation to BOR. In order to be granted tenure, an applicant must display a high level of performance in two of the three areas of teaching, service and research (also referred to as scholarship) and display at least an acceptable level of performance in the third.

Peterson's 2003-04 application for tenure received unanimous approval/recommendation from the School of Education's Promotion and Tenure

Committee. The Institutional Promotion and Tenure Committee also recommended Peterson receive tenure. During the next step of review, the Vice President for Academic Affairs, Donald Dahlin, discovered, due to a miscalculation, that Peterson did not have enough years of tenure track service to be considered for tenure without requesting that his case be treated as an exception. Peterson agreed to withdraw his application for tenure and resubmit it during the 2004-05 academic year.

In the fall of 2004, Peterson submitted his application for tenure. Peterson supplemented his previous application with additional student evaluations, state publications, at least three national presentations and his most recent evaluation.

In accordance with the COHE Agreement, Peterson's application for tenure was initially reviewed by the School of Education's Promotion and Tenure Committee. On November 1, 2004, the School of Education Committee notified the Dean of Education that the committee "were split on their vote (2-2) regarding the recommendation that Dr. Peterson be granted tenure." The School of Education Committee used criteria outlining eligibility requirements according to the COHE Agreement, which included Articles 12 and 13 and Appendices G, O, and P.<sup>1</sup> The School of Education Committee found Peterson exceeded expectations in the areas of teaching and service. However, the School of Education Committee was divided on whether Peterson's research "supports a rating of 'meets expectations' in this area for associate professor." The School of Education Committee expressed concern "about [Peterson's] national referred [sic] publication record." The School of Education Committee considered Peterson's "numerous presentations at the state, regional, and national levels" and noted Peterson received and administered several grants. But, "the committee does not see these as having substantial national impact equivalent to national referred [sic] publications[.]"

Peterson's application for tenure was reviewed next by the Institutional Promotion and Tenure Committee. The Institutional Committee evaluated Peterson's application using the eligibility requirements as provided by the COHE Agreement, including Articles 12 and 13 and Appendix G.<sup>2</sup> The Institutional Committee voted not to support Peterson's application for tenure. Peterson received high ratings in teaching and service, but the Institutional Committee concluded "Dr. Peterson's research productivity did not meet an acceptable level of performance." The Institutional Committee encouraged Peterson "to strengthen his program of research and seek publication in national refereed journals."

Next, Royce Engstrom, the current Vice President for Academic Affairs, reviewed Peterson's application for tenure. Engstrom was "unable to support the tenure application of Dr. Peterson." Engstrom expressed concerns about Peterson's level of research. Engstrom stated, "[Peterson] has published several articles in journals that circulate primarily within the state, and he has not submitted work that has stood up to the rigors of national peer review."

Finally, President James Abbott did not recommend Peterson for tenure to BOR. President Abbott stated, "[y]our research portfolio consists solely of work that was

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<sup>1</sup> The School of Education Promotion and Tenure Committee also referenced eligibility requirements as provided under the BOR Policy Manual Section 4:10 and 4:11 and the USD 2004-2005 Faculty Handbook. Neither the BOR Policy Manual nor the USD Faculty Handbook was offered into evidence as there was no dispute concerning language contained in either document. The sole dispute here concerns language contained in Appendix G of the COHE Agreement.

<sup>2</sup> The Institutional Promotion and Tenure Committee also utilized the USD FY04 Faculty Handbook.

published in local journals that do not make use of national peer review. The awarding of tenure is based upon the demonstration that the candidate is capable of, and will continue to have, a vigorous research program that will stand up to the most rigorous peer review.” Therefore, President Abbott concluded that Peterson’s “research productivity does not meet expectations.”

BOR subsequently denied tenure to Peterson. The sole reason provided to Peterson was failure to have nationally peer reviewed publications in his application. Peterson filed a Petition for Hearing on Grievance with the Department and the hearing followed. Peterson was a credible witness at the hearing. This is based on his consistent testimony and based on the opportunity to observe his demeanor at the hearing. Other facts will be developed as necessary.

## ISSUE

WHETHER USD, BOR AND/OR ITS AGENTS VIOLATED, MISINTERPRETED OR INEQUITABLY APPLIED POLICIES, RULES OR REGULATIONS, OR THE COHE AGREEMENT IN DENYING PETERSON’S APPLICATION FOR TENURE?

SDCL 3-18-1.1 defines a grievance as:

[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 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.

SDCL 3-18-15.2 provides, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided for in § 3-6A-38, it may be appealed to the Department of Labor, if notice of appeal is filed with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. 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’s decision by the department in a grievance review under SDCL 3-18-15.2.” Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868 (S.D. 1994). The burden of proof is on Peterson, the party alleging the violation. Ringer v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

Article VII of the COHE Agreement pertains to contract disputes. Section 7.8(2) provides:

If the grievance concerns nonrenewal, denial of promotion, or denial of tenure, the grievance review will be limited to determining whether the decision was the result of failure to follow procedures, unless otherwise provided in this agreement. The burden of proof, in such cases, shall rest with the grievant.

This language is consistent with SDCL 3-18-15.2. The Department cannot grant tenure. However, the Department has the authority to conduct an investigation to determine if BOR followed the procedures delineated in the COHE Agreement for tenure recommendation.

As previously stated, an “award of tenure requires that candidates display a high level of performance in two of the three areas of teaching, research, and service, and at least an acceptable level of performance in the third.” There is no dispute that Peterson exceeded expectations in the areas of teaching and service. BOR determined Peterson did not meet expectations in the area of research because of his application for tenure lacked national peer reviewed publications.

Article XIII, Section 13.3, of the COHE Agreement provides the procedures for tenure recommendations. This section states, in part:

Faculty unit members who wish to be considered for tenure will notify their immediate supervisor in writing no later than October 5. Such notification will allow the promotion and tenure committees, instituted under § 12.4, access to the faculty unit members personnel files. It is the responsibility of the faculty unit member to prepare, assemble, and submit all favorable documentation which is appropriate and upon which the faculty unit member relies for favorable action. Each institution may stipulate certain desired elements or format for the documentation, which shall be made available to faculty unit members in written form. The immediate supervisor, and any other administrators, including the president, who review the file in order to make independent recommendations, may supplement the material assembled by the faculty with information obtained from 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 unit 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, whichever is applicable, no later than November 5.

Successful applicants will receive a tenure contract the following year. Unsuccessful applicants and faculty unit members who complete their sixth year of tenure track service without applying for tenure will be offered a single term contract for the appointment year following that in which tenure is denied. This term contract is not subject to renewal, and the faculty unit member will be ineligible for reappointment after it expires.

An institutional recommendation to grant tenure to a faculty unit member will be based upon an assessment of the candidate's past contributions and promise of future contributions to the goals and missions of the institution. The performance record of a faculty unit member considered for tenure will be based in part upon the performance evaluations conducted by the administration during all years of service credited toward tenure qualification.

Appendix G of the COHE Agreement contains seven pages titled "Statement Concerning Faculty Expectations." BOR argued Appendix G was not submitted as part of the record before the Department. Contrary to BOR's argument, Appendix G is a part of the Department's record. Appendix G is contained within the COHE Agreement, which was marked and received as Exhibit 1.

The first paragraph of Appendix G states:

All faculty will be significantly active in the broad areas of teaching, scholarship and service. The qualitative and quantitative expectations for activity in each area depend broadly on the mission of the university, the faculty unit member's discipline and its role within the university, and on specific past and present role assignments of individual faculty responsibility. Given the relationship between the expectations for individual activity and the mission of a person's university, department, discipline, and assignments, a variety of activities may warrant recognition in each area.

The section titled "Institutional Selection of Activities" of Appendix G provides:

The universities have substantial autonomy to select and determine the relative importance of various activities in the areas of teaching, scholarship and creative activity and service.

Faculty unit members have a legitimate interest in knowing which professional activities are to be recognized and their university's determinations of the relative importance of the recognized activities. To that end:

- each university shall select the teaching, scholarship, and service activities, consistent with those activities and principles identified herein, that are to be recognized in the evaluation and promotion processes;
- each university shall determine the relative importance of the three areas of professional activity and the relative importance of selected activities within each category;
- the university's selections shall be consistent with the mission and programs of the university as approved by the Board;
- the selection of activities and the relative importance of the activities may vary within a university, and across the system;
- After selecting activities and determining their relative importance, each university shall adopt standards that describe the facts and circumstances

that will be considered when evaluating the range of individual faculty member activities and the quality of effort that faculty members achieve.

- the university's selections shall be consistent with the guarantee of academic freedom as provided to faculty members in Article XIV;
- the university's selection of activities and determinations of relative importance shall be disclosed in writing to each faculty unit member as soon as possible, but not later than the end of May 2005.

The parties recognize that it may be necessary from time to time to review and to revise institutional priorities. It is expected that the modification of institutional statements shall not result in the change in expectations of a faculty unit member during the then-current annual evaluation cycle.

The section titled "Scholarship and Creative Activity" in Appendix G states:

The mission of a university requires of each faculty unit member a serious commitment to scholarship. Scholarship, broadly defined, is a prerequisite for competent and current teaching, contributes to the expansion of knowledge and the development of the arts, and enhances the services provided to the public. Each faculty unit member is expected to continue learning in his or her discipline through appropriate journals and books and to participate in the discipline's professional deliberation.

The product of scholarly activity may take a variety of forms, but, with the exception of faculty members employed on term contracts who teach the full fifteen hour load, it cannot be only for the classroom or take place only in the classroom; it must involve the presentation of one's ideas and works to one's professional peers or the learned public for debate and judgment. Such presentations may occur in a variety of settings, but to be worthy of recognition, it is expected at a minimum that a faculty unit member initiate a proposal to present or be invited to present and that the proposal be accepted for outside presentation to a learned audience.

The recognition and importance of the different forms and presentations of scholarship will vary depending upon the mission of the university's functions and the individual faculty unit member's assignment. Thus, although scholarship and creative activity includes the following and similar activities, not all of these need be recognized or judged to be important or sufficient for each faculty unit member:

- publication of the results of research, scholarship, and creative endeavor in scholarly journals and books, textbooks, chapters in professional books, abstracts, book reviews;
- publication of poems, novels, plays, musical compositions, etc.;
- exhibition of works of art;
- musical performance;

- delivery of invited lectures, papers, speeches, or presentations at other universities, professional meetings, conventions, and conferences;
- creative application of existing technologies;
- patents on inventions;
- application for patents;
- application for research or development grants;
- presentations of recognized original works to colleagues or the campus community;
- national recognition as an expert in a field related to the faculty unit member's professional responsibilities;
- contribution as a co-author or co-presenter of one's own research results to joint research projects involving other professionals.

BOR must abide by the terms of the COHE Agreement. See Wessington Springs Educ. Ass'n v. Wessington Sch. Dist. No. 36-2, 467 N.W.2d 101, 104 (S.D. 1991). "Disputes over the meaning of terms in [a policy or negotiated agreement] are resolved under the general principles of contract law." Gettysburg Sch. Dist. 53-1 v. Larson, 2001 SD 91, ¶ 11. Terms in a contract are to be given "their plain and ordinary meaning." Harms v. Northland Ford Dealers, 1999 SD 143, ¶ 12 (citation omitted). "When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subject that it is expected to cover, 'there is no need to go beyond the four corners of the contract.'" Wessington Springs, 467 N.W.2d at 104 (citation omitted). The COHE Agreement is clear and unambiguous and the terms shall be given their plain and ordinary meaning.

Peterson's 2004-05 tenure application was denied solely on the basis of his failure to have national peer reviewed publications. Article XIII and Appendix G of the COHE Agreement do not require national peer reviewed publications. This is not a specific criteria set forth by the COHE Agreement. "Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out." Gettysburg, 2001 SD 91, ¶ 11. "A [ ] board cannot rewrite an incompletely specified agreement, inserting or deleting to make it mean more than its words plainly declare." Id. at ¶ 14 (citation omitted). Appendix G references "professional peers" or "the learned public" or "a learned audience." Appendix G does not distinguish between national peer reviewed articles and local peer review articles. BOR cannot add words or new requirements to the COHE Agreement and Appendix G.

The only document received into evidence that references national peer reviewed publications was Exhibit 11, Expectations of the Faculty at the University of South Dakota dated May 2005. This document set forth new expectations for promotion and tenure. However, these new standards went into effect after Peterson's 2004-05 application for tenure was submitted and cannot be used to determine if Peterson should be granted tenure.

Peterson's research satisfied criteria delineated in Appendix G, as his 2004-05 application for tenure contained peer review, grants, and national presentations. Even so, BOR used an improper procedure to deny Peterson's application for tenure. BOR denied Peterson's 2004-04 tenure application utilizing criteria not contained within the COHE Agreement and Appendix G. Neither specifically provides a requirement for national peer review publications.

USD, BOR and/or its agents violated, misinterpreted and inequitably applied the COHE Agreement and Appendix G. Peterson's grievance is granted in all respects. This matter is remanded to BOR to reconsider Peterson's 2004-05 application for tenure using the proper criteria set forth in the COHE Agreement and Appendix G, which does not include a requirement of national peer reviewed publications.

Peterson shall submit Findings of Fact, Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. BOR shall have ten days from the date of receipt of Peterson's Findings 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, Peterson shall submit such Stipulation, along with an Order in accordance with this Decision.

Dated this 13<sup>th</sup> day of June, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge