

June 20, 2019

Dr. Thomas Orr
1108 S. Jay St.
Aberdeen, SD 57401

Decision on Motion to Dismiss

Paul B. Beran
South Dakota Board of Regents and
Northern State University
306 E. Capitol Ave., Suite 200
Pierre, SD 57501

RE: HF No. 4G, 2018/19 – Dr. Thomas Orr v. South Dakota Board of Regents and Northern State University

Dear Dr. Orr and Mr. Beran:

Submissions:

This letter addresses the following submissions by the parties:

January 30, 2019	Respondent's Answer and Motion for Dismissal;
February 25, 2019	Respondent's Stipulations and Request for Investigation;
April 23, 2019	Petitioner's Letter Response
May 8, 2019	Respondent's Brief

Facts:

The facts of this case, as reflected by the submissions are as follows:

1. Dr. Thomas Orr (Dr. Orr or Petitioner) served as an assistant professor in the School of Education at Northern State University. In the 2017-18 academic

year, Dr. Orr went before the Promotion and Tenure Committee to seek promotion to associate professor and the award of tenure.

2. Dean Kelly Duncan was previously appointed by the President of Northern State University to serve as a management member of the Committee during the year of Dr. Orr's candidacy for promotion and tenure.
3. Dean Duncan did serve throughout Dr. Orr's candidacy and did not recuse herself.
4. Dr. Orr did not achieve a majority vote in favor of his candidacy.
5. On March 23, 2018, Dr. Orr was notified that his request for tenure and promotion was denied based upon a review of his portfolio, recommendation of the committee and advice of the provost. Per the COHE agreement, Dr. Orr received a final contract for the 2018-2019 academic year.
6. On April 13, 2018, Dr. Orr requested the reasons he was being denied promotion and tenure.
7. On April 30, 2018, Dr. Orr was informed of the reasons for the denial.
8. On May 21, 2018, Dr. Orr filed a Step 2 grievance.
9. On May 25, 2018, Dr. Orr was notified that he had failed to assert how his COHE right had been violated and provided him ten (10) working days to file supplemental materials to provide a specific statement of grievance.
10. On July 13, 2018, after not receiving a timely response regarding the supplemental materials, Dr. Orr submitted a Step 4 grievance.
11. On July 13, 2018, the Board office informed Dr. Orr that the grievance moved to a Step 3 not Step 4. A non-unit investigative panel was convened to review the merits of the grievance. The panel found no evidence of procedural error.
12. On October 22, 2018, Dr. Orr was informed that the grievance was denied, and he would not be recommended for promotion and tenure.
13. On November 2, 2018, Dr. Orr filed a Step 4 grievance.
14. On December 13, 2018, Dr. Orr was notified that his Step 4 grievance was denied.
15. On January 10, 2019, Dr. Orr brought this grievance before the Department of Labor and Regulation (Department).

Motion to Dismiss:

The Department's role in reviewing grievances is defined under SDCL 3-18 which states in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . the grievance may be appealed to the Department of Labor and Regulation . . . The department shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employee and the governmental agency. However, the department, upon the motion of any party, may dispose of any grievance, defense, or claim:

(1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law; or

(2) At the close of the evidence offered by the proponent of the grievance, defense, or claim if the department determines that the evidence offered by the proponent of the grievance, defense, or claim is legally insufficient to sustain the grievance, defense, or claim.

Nothing in this section gives the department power to grant tenure or promotion to a faculty member employed by the Board of Regents.

SDCL 3-18-1.1 defines "grievance" as:

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.

Dr. Orr brought this grievance before the Department of Labor and Regulation (Department) alleging that the collective bargaining agreement between the South Dakota Board of Regents and the Council of Higher Education (COHE) was violated when Dean Kelly Duncan failed to recuse herself from the Committee. The Committee consists of four tenured faculty members and four administrative appointees. Majority is required to receive promotion and tenure. Appeals from the Committee are handled by the administration.

COHE Article 13.1.4 states:

The parties recognize that the integrity of the promotion and tenure review process requires not only that it be fair, but also that it be regarded as fair.

Therefore, individual committee members will recuse themselves whenever their ability to make a disinterested judgment might reasonably be called into question.

Dr. Orr has asserted that he had a difficult history with Dean Duncan which should have resulted in her self-recusal. He alleges that he asked for Dean Duncan's bias to be addressed during several meetings and discussions with the administration. He had challenged her annual assessment of his teaching and concluded that she was not objective in her assessment. However, there is no evidence to prove that such issues were raised by Dr. Orr. He has also asserted that Dean Kelly's letter of support negatively assessed him and is proof of her bias. However, although the letter assesses Dr. Orr's research as insufficient, both the teaching and service assessment were positive.

Dr. Orr has also made allegations of retaliation for whistleblowing and violation of civil rights. While these are serious allegations, these matters are beyond the scope of the grievance process. The grievance process as directed by SDCL 3-18-1.1 is limited to alleged violation, misinterpretation, or inequitable application of contracts. In this grievance procedure, the Department does not have the jurisdiction to address Dr. Orr's allegation of retaliation.

Dr. Orr was informed that the reason for the denial of promotion and tenure was related to deficiency in scholarship. Dr. Orr has argued that he has offered strong evidence that his scholarship did meet the levels of research required. Dr. Orr was then told that the issue was not scholarship but instead that he "did not fit with the university very well." Dr. Orr has argued that the subjective standard of "non-fit" is troubling and reveals issues with the process of promotion and tenure. However, issues related to the rationale of the committee are not resolved through this grievance process.

The COHE has established that recusing oneself from the promotion and tenure review process is based on the assessment of whether one's own ability to make a disinterested judgment might reasonably be called into question. By not recusing herself, Dean Duncan did not violate the procedure outline by the contract. She was provided the option to assess whether her "ability to make a disinterested judgment might reasonably be called into question." The fact that Dr. Orr has raised questions about her potential bias does not prove that her initial decision not to recuse was a violation of the contract. COHE Article § 13.1.4 is a subjective standard that requires the committee member in question to decide for himself or herself whether to engage self-recusal.

The Committee is made up of eight individuals, and a majority is required to grant tenure. Considering the necessity for majority, there is no evidence proving that Dean Duncan's presence on the committee prejudiced Dr. Orr. Nor is there evidence to show that Dean Duncan's vote was the deciding factor or that she held undue influence in Dr. Orr's denial of promotion and tenure.

The Supreme Court of South Dakota has upheld a denial of tenure stating, “[w]e 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.” *Beville V. University of South Dakota/Board of Regents*, N.W.2d 9, 14 (S.D) 1988). Similarly, in this matter, the procedures were substantially complied with and there has been no evidence shown of prejudice by Dean Kelly’s failure to self-recuse.

Conclusion:

The Department hereby grants Respondent’s Motion for Dismissal for the above stated reasons. This case is dismissed with prejudice. This letter shall constitute the Order in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw".

Michelle M. Faw
Administrative Law Judge