

BEFORE THE ARBITRATOR

In the Matter of the
Arbitration between

University Education Association

And

BMS Case No. 14-PA-0568

University of Minnesota-Duluth

ARBITRATION AWARD

Appearances:

Attorneys Meg-Luger Nikolai and Anthony Sheehan on behalf of Education Minnesota and the UEA.

Attorney Shelley Carthen Watson, Associate General Counsel, on behalf of University of Minnesota.

The above-captioned parties, hereinafter referred to as UEA and the University respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in Duluth, Minnesota on September 30, 2014. No stenographic transcript was made. Briefs were filed and the hearing was declared closed on November 17, 2014. All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

ISSUE:

The parties could not agree as to the framing of the issues. They proposed as follows:

UEA

Did the University violate Section 201.480 of the collective bargaining agreement by employing unenumerated criteria in consideration of the applications for promotion of Dr. Robert Weidner and Dr. Mary Caprioli? If so, what is the appropriate remedy?

University

Were the standards of review for promotion clearly communicated to the grievants?

Is the denial of promotion arbitrable pursuant to Section 201.480 of the collective bargaining agreement?

Are the grievants entitled to any remedy other than the reconsideration of the decision set forth in the collective bargaining agreement?

The undersigned, after careful consideration, frames the issues as follows: Is the matter arbitrable? If so, did the University violate Section 201.480 of the collective bargaining agreement by employing unnamed and unstated criteria in consideration of the applications for promotion of the grievants for Full Professor? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

Section 201.458 Review and Recommendation by EVCAA

After receipt of the Principal Administrator's recommendation and the Member's File, the EVCAA shall review the Member's File and shall state in writing whether s/he agrees or disagrees with the Principal Administrator's recommendation and h/her reasons(s) therefor. The EVCAA, upon the Member's written request, shall confer with the Member before making h/her recommendation to the Chancellor. After H/her review and conference with the Member, if any, the EVCAA shall state in writing to the Chancellor whether s/he supports or does not support the award of Indefinite Tenure and/or promotion for the Member and s/he shall state h/her reason(s) therefor. The EVCAA's recommendation, including the reason(s) for the recommendation shall become part of the Member's File.

Section 201.480 Personnel Policies/ Procedure for Promotion and Conferral of Indefinite Tenure/ Regents' Decision Final and Binding

The decision of the Regents whether to promote or to confer Indefinite Tenure shall be final and binding. The decision, the criteria upon which such decision was made, all recommendations leading up to the decision, and the reasons for such recommendations shall not be grievable. The Member may bring a grievance alleging that the procedure for promotion or conferral of Indefinite Tenure described in this Section 201.400 was not followed, except as otherwise provided in this Agreement. If the arbitrator finds that the procedure for promotion or conferral of Indefinite Tenure was not followed, the arbitrator's sole remedy for the grieving Member shall be an order requiring the Employer to reconsider the Member's request in the Academic Year in Question or in the following Academic Year and to follow such procedure upon such reconsideration. Any such award shall not have the effect of automatically conferring the Member with Indefinite Tenure. The Employer and the Association recognized that the criteria by which decisions are made to promote or confer Indefinite Tenure and the decisions themselves are not negotiable; however, the Employer and the Association also recognize the Members' need to be informed as to the criteria used by the Employer for decisions to promote or confer Indefinite Tenure. In recognition of the Members' need to be

informed, the Employer shall undertake reasonable steps to communicate to the Association the criteria used for promoting and conferring Indefinite Tenure.

RELEVANT TENURE CODE PROVISIONS:

Section 2. Applicability of Regulations to Employment Contracts.

These regulations govern the relationship between the Board of Regents and faculty members, except as inconsistent with the provisions of collective bargaining agreements. These regulations are part of the contract between the Board of Regents and faculty members.

7.1 Criteria for Decision.

7.11 General Criteria. What the University of Minnesota seeks above all in its faculty members is intellectual distinction and academic integrity. The basis for awarding indefinite tenure to the candidates possessing these qualities is the determination that each has established and is likely to continue to develop a record of academic achievement that is the foundation for a national or international reputation or both [FN2]. This determination is reached through a qualitative evaluation of the candidate's record of scholarly research or other creative work, teaching, and service [FN3].

The relative importance of these criteria may vary in different academic units, but each of the criteria must be considered in every decision [FN4]. Demonstrated scholarly or other creative achievement and teaching effectiveness must be given primary emphasis; service alone cannot qualify the candidate for tenure.

Interdisciplinary work, public engagement, international activities and initiatives, attention to questions of diversity, technology transfer, and other special kinds of professional activity by the candidate should be considered when applicable. The awarding of indefinite tenure presupposes that the candidate's record shows strong promise of his or her achieving promotion to professor.

7.12 Departmental Statement. [FN5]

Each department or equivalent academic unit must have a document that specifies (1) the indices and standards that will be used to determine whether candidates meet the threshold criteria of subsection 7.11 ("General Criteria" for the awarding of indefinite tenure); (2) the indices and standards that will be used to determine whether candidates meet the threshold criteria of subsection 9.2 (Criteria for promotion to Professor"); and (3) the goals and expectations to be used in evaluating faculty members' performance under subsection 7a (Review of the Performance of Faculty Members"). The document must contain the text and footnotes of subsections 7.11 and 9.2, and must be consistent with the criteria given there but may exceed them. Each departmental statement must be approved by a faculty vote (including both tenured and probationary members), the dean,

and other appropriate academic administrators, including the senior vice president for academic affairs and provost. The chair or head of each academic unit must provide each probationary faculty member with a copy of the Departmental Statement at the beginning of the probationary service.

(Interpretation of Subsection 7.12: Review of Departmental Statements)

The faculty of an academic unit are expected to periodically review their criteria for awarding indefinite tenure and for promotion in rank and reflect any new criteria in a revision of their subsection 7.12 Statement. The new criteria and subsection 7.12 Statement must be adopted in accordance [with] (sic) the established procedures of the University, after consultation as required by those procedures. Current probationary faculty in the unit may elect to be evaluated on the criteria for tenure and promotion in the previous subsection 7.12 Statement or on the new criteria. This option is also available to current tenured faculty in their evaluation for promotion to the next level. Probationary or tenured faculty must make this decision within one year of the date of the administrative approval of the new criteria.

Section 9. Personnel Decision for Associate Professors and Professors

9.2 Criteria for Promotion to Professor. The basis for promotion to the rank of professor is the determination that each candidate has (1) demonstrated the intellectual distinction and academic integrity expected of all faculty members, (2) added substantially to an already distinguished record of academic achievement, and (3) established the national or international reputation (or both) ordinarily resulting from such distinction and achievement [FN7]. This determination is reached through a qualitative evaluation of the candidate's record of scholarly research or other creative work, teaching, and service [FN8]. The relative importance of these criteria may vary in different academic units, but each of the criteria must be considered in every decision. Interdisciplinary work, public engagement, international activities and initiatives, attention to questions of diversity, technology transfer, and other special kinds of professional activity by the candidate should be considered when applicable. But the primary emphasis must be on demonstrated scholarly or other creative achievement and on teaching effectiveness, and service alone cannot qualify the candidate for promotion.

Regents Policy on Faculty Tenure Application to the UEA-D Contract

Application of the Policy on Faculty Tenure approved by the Board of Regents June 10, 2011 to Faculty Covered by UEA-D Contract

Please note that a section of the Regents Policy on Faculty Tenure may be inapplicable because it is in conflict with explicit provisions of the collective bargaining agreement, or because the subject matter is addressed in the collective bargaining agreement in detail without mention of the specific issue addressed in the Regents Policy on Faculty Tenure, or because the section of the new policy deals with terms and conditions of employment, hence negotiable. Thus, the fact that a section of the Regents Policy on Faculty Tenure is

inapplicable to UEA faculty does not necessarily mean that the collective bargaining agreement calls for a different result in a specific situation.

Personnel Decisions Concerning Probationary Faculty

7.11 Applicable

7.12 Applicable except (3) of the first sentence and the third and fourth sentences to read “Each department statement must be approved by a faculty vote (including both tenured and probationary members) and the Dean; after review by the Executive Vice Chancellor for Academic Affairs and the Senior Vice President for Academic Affairs and Provost, each department statement must be approved by the Chancellor. The Principal Administrator of each academic unit must provide each probationary faculty member with a copy of the Departmental Statement at the beginning of the probationary service.”

7.2 Inapplicable

7.3 Inapplicable

7.4 Inapplicable

7.5 Inapplicable

7.5 Inapplicable

7.61 Inapplicable

7.62 Inapplicable

7.63 Inapplicable

7.7 Inapplicable

7a.1 Inapplicable

7a.2 Inapplicable

7a.3 Inapplicable

7a.4 Inapplicable

7a.5 Inapplicable

Appointment of Associate Professors and Professors with Indefinite Tenure

9.1 Inapplicable

9.2 Applicable except for reference to footnote 8.

FACTS:

The grievants, Mary Caprioli and Robert Weidner, are Associate Professors in their respective departments, Political Science and Sociology and Anthropology at the University of Minnesota-Duluth. They are represented by the UEA for purposes of collective bargaining. Each applied for promotion from Associate Professor to Full Professor.

Upon submitting a request for the consideration of a promotion to the principal administrator of their department by September 30, the department chair convenes a five member promotion committee of professors with indefinite tenure and greater seniority

than the applicant to review the files of the applicant seeking the promotion. The committee after review of the files votes and the convenor of the committee submits the ballots to the department's principal administrator, often a dean, along with a statement regarding the committee's recommendation. The statement includes the vote tally, the committee's rationale for its recommendation and a minority report, if warranted. The convenor also submits a separate statement indicating whether he or she agrees or disagrees with the recommendation.

After these recommendations are sent to the principal administrator, the principal administrator reviews the applicant's file and makes a recommendation to the Executive Vice Chancellor for Academic Affairs, hereinafter referred to as the EVCAA. The EVCAA also reviews the applicant's file and makes a recommendation to the UMD's Chancellor. The Chancellor makes his recommendation to the Board of Regents of the University of Minnesota whose decision is final and binding.

Both of the grievants timely submitted their applications for promotion. In both cases they sought the rank of full professor. In both cases the reviewing committee and the dean recommended granting the promotion. In both cases, EVCAA Andrea Schokker did not recommend promotion to full professor at that time. With respect to Dr. Weidner, she stated that "the number of publications since receiving tenure is quite low." She suggested re-applying once the publications that he had in progress have been completed. With respect to Dr. Caprioli, EVCAA Schokker wrote "the majority of her publications were before her last promotion" suggesting that although she was producing good research, she had not produced enough recently. In neither case were the grievants offered a quantitative minimum number of publications necessary to satisfy the EVCAA's concerns.

Both grievants responded to the EVCAA's failure to recommend their promotion in letters to or a meeting with Schokker and Chancellor Black, who accepted Schokker's recommendations to deny the promotions, and stood by his decisions. When their requests for promotion were denied, they filed grievances which have been consolidated for hearing before the undersigned.

POSITIONS OF THE PARTIES:

UEA

The UEA argues that the grievances concerning the University's failure to provide notice of criteria for promoting faculty is arbitrable, notwithstanding the University's contention that they are not. Arbitrability is for the arbitrator to decide and here it is the procedure which is at issue. In the UEA's view, the contract obligates the university to provide faculty with notice of the criteria that it will use in reviewing their applications for tenure and promotion. The grievants are not grieving the use of quantity of publications as a dispositive, stand-alone criterion for judging their academic records but rather the University's failure to provide notice of that criterion in advance of their application for a promotion. The grievance is both arbitrable and meritorious.

The crux of the grievance, in the view of the UEA, is that, although EVCAA Schokker denied their promotions because she did not believe that they had published frequently enough, this criterion is nowhere to be found in the documents that faculty members rely on in ascertaining how their application will be evaluated. The University is obligated to notify faculty members when it is going to alter the standards by which an application for promotion will be judged.

The UEA believes that the University's action violated the plan language of the collective bargaining agreement. Here, where the language is clear, the arbitrator need not resort to interpretive aids or extrinsic evidence in determining whether the provision has been violated. The University is under an unambiguous obligation to notify UEA and its members of the criteria it uses to promote faculty. Neither of the 7.12 Statements implicated by the grievance contains language suggesting that the sheer quantity of publications is a metric upon which a promotion will be judged. To the contrary, both statements make clear that the quality of the publications and the work of the professor in general is the primary focus of the reviewing committee.

Citing the enthusiastic endorsement of their committee members and Dean Maher, the UEA asserts that Schokker's quantitative benchmarks, if they predated the two reviews, would have been known to committee members and Den Maher at the time of the reviews. Given the enthusiastic endorsements, this was not the case. Schokker's imposition of this new criterion that is not in the 7.12 Statements, and not in the Tenure Policy, appears to be one of her own invention and is inappropriate.

According to the UEA, the University's actions have deprived the UEA of the benefit of its bargain with the University. It cites arbitral precedent to this effect. The bargain that the parties struck here is clear. The UEA agreed that the University would retain discretion to set its own criteria for promotions. In exchange, the University agreed to ensure that faculty would be informed about the criteria it used. Here, with respect to both grievants, the University completely failed to uphold its end of the bargain. It points to Schokker's contention that "there is the 7.12, but it doesn't give specifics." Although the UEA could have insisted upon a separate process for ensuring job security, in exchange for agreeing to operate with the confines of the Tenure Policy, the University agreed to make the process under that policy transparent. Transparency does not exist when the EVCAA applies a criterion absent from the 7.12 statements which resulted in a completely different conclusion from that of the committee reviewers and the dean.

UEA maintains that there is no past practice supporting the use of a stand-alone criterion regarding the quantity of publications of a faculty member. The University has not established any of the elements to support the existence of a binding past practice. Furthermore, past practice is only relevant when contract language is general, indefinite or ambiguous. Express, clear and specific provisions may not be modified by past practice. There is no clear practice of denying promotions based upon quantity of publications as a stand-alone criterion because there is no evidence that the criterion was

ever communicated to the UEA at all. All of the correspondence is between the individual grievant and the EVCAA or Chancellor and it is all marked confidential. There is no evidence that the UEA received notice of the University's proffered rationale.

The UEA submits that there is no evidence of consistency in application concerning the number of times the criterion was used versus the number of time that it was not mentioned.

The University's records custodian did not testify that the evidence that it presented represented all of the promotion and tenure files from every candidate throughout a seven year period. To the contrary, the evidence presented was a cherry-picked set of correspondence supportive of the University's argument.

There is no evidence of mutuality here either. The UEA has never overtly or tacitly concurred with EVCAA Schokker's publication quantity criterion.

The UEA stresses that it has not waived its right to grieve in this instance simply because it has not grieved other references to quantity in tenure and promotion review. The non-exercise of a contractual right does not amount to a negative past practice or a forfeiture of it in the future. Therefore, here the UEA has not waived its right to grieve the University's failure to properly notify it of the criteria used for tenure and promotion decisions by failing to grieve past denials of tenure or promotion. No evidence was presented to show that the UEA was aware of the use of publication quantity as a single disqualifying criterion. The language at issue is clear and cannot be waived by a contrary practice, even if the University had established that such a practice existed. Finally the instances cited by the University are distinguishable from the grievants' portfolios. At least two of the denials occurred in a department in which the 7.12 Statement does incorporate a quantitative element regarding publication. In all but one other case, the reviewing committee voted to deny tenure or promotion. In several of the cases, other weaknesses were identified. These applicants are not similarly situated to the grievants.

The UEA insists that EVCAA Schokker essentially nominated herself as the creator of a new specific criterion while reviewing the grievants' files. This does not comport with the collective bargaining agreement. The 7.12 statements are not unclear and provide reasonable goalposts. If the University wishes to set a baseline requirement for the quantity of publication that a candidate for promotion must have produced, it is free to do so. However, it must do so through the promulgation of new 7.12 statements in the departments in which that criterion is not already established.

The UEA requests that the arbitrator direct the University to reconsider and to re-evaluate both applications for promotion relying on the criteria actually set forth in the 7.12 statement of their respective departments.

University

The University asserts that the UEA is seeking through these grievances to obtain through arbitration that which it was unable to obtain through both negotiation and litigation. In an attempt to circumvent the clear prohibition against grieving the merits of the denial of the promotion, the UEA has resorted to grieving the promotional process itself, claiming that the denial was based upon criteria that was not communicated to the grievants as required by the collective bargaining agreement. The claim is specious at best. The UEA is attempting to subvert the clear contract language by arguing that since the department committees and the Dean applied the stated criteria and recommended promotion, the conclusions reached by the EVCAA and the Chancellor to the contrary mean that they failed to apply the stated criteria, thus establishing new criteria which were not communicated to the grievants, and evaluation standards which were not the same at all levels of review.

The University asserts that the promotion reviews were carried out in accordance with the collective bargaining agreement and are not grievable. In its view, these grievances go to the recommendations, the reasons for the recommendations, and ultimate decisions, and as such are not grievable. Notwithstanding that the Minnesota Supreme Court has recognized and confirmed that application of the criteria is not grievable, the UEA is attempting to subvert the clear language of the contract by characterizing the University's denial of promotion as arbitrary, a mistake in process, and a procedural error. The UEA claims that Schokker's recommendations were arbitrary and that she did not give proper weight to the grievants' publications and research reports. Under the guise of a process objection, the grievants are challenging the weight given to their scholarship by Schokker and the Chancellor. This speaks directly to the application of the criteria and subsequent evaluation as well as the decision to recommend denial of promotions, which is prohibited as a subject of the grievance procedure by the collective bargaining agreement.

The criteria for review and promotion are clearly established and governed by the Board of Regents Policy on Faculty Tenure. They are set for in the Tenure Code and a 7.12 Statement developed and approved by each department pursuant to the Tenure Code. Section 9.2 of the Tenure Code contains additional criteria. Pursuant to the Tenure Code, both Departments have developed different but detailed 7.12 Statements. Furthermore, the Political Science Department's Criteria Statement is slightly different from that of the Department of Sociology & Anthropology.

The University insists that continued, substantial, scholarly productivity has always been part of the analysis of professional distinctions of scholarly works when determining whether a promotion is warranted. In its view, the application of this criterion has been so consistently applied that it rises to the level of a past practice. The University's witnesses established that there needs to be a significant difference between the record of publication used for promotion to Associate Professor and the record used for promotion to full professor and that this standard is applied on a University wide basis, not just at UMD. Acknowledging that no specific number of publications is

specified, the University alleges that the reviewer must have a substantial body of work to evaluate and that quantity of publications, while not a deciding factor for departments, is nevertheless used to determine the quality of a publication record. Citing files provided with respect to Applicants A, B, C, and D, it claims that the promotion and tenure files of other applicants corroborate this interpretation. Promotional review of other applicants in which the grievants participated proves that scholarly productivity is a legitimate part of the promotional criteria. Caprioli evaluated Employee E and F where extensive or prolific publication was noted. Weidner evaluated Employees G and H noting a remarkable record of publication of quality work for one and prolific and high-quality scholarly productivity for the other.

The grievants are not the first to be denied promotion due to concerns about research productivity as other evidence offered establishes. Consistent sustained scholarly production has always been part and parcel of evaluating a promotional candidate's publication record and the grievants are no exception.

According to the University, there is no question that the promotional criteria, including the requirement of post-promotion publications, has been repeatedly communicated to the grievants. As departmental chairs, both were involved in the promotional process under 9.2 of the Tenure Code. They had the option to elect which version of 7.12 Statement under which they wished to be evaluated should the department make a change to its statement. Both made such an election, Weidner selecting the newest version while Caprioli selected the former department 7.12 standards.

The University properly applied the criteria in evaluating the grievants. UEA makes two arguments with respect to Caprioli. First it argues that EVCAA Schokker changed the criteria for promotion without notifying the UEA in violation of the collective bargaining agreement setting a standard on the number of publications which no one knows about. Second, the UEA claims that the promotion criteria in the 7.12 statement should be the criteria used by Schokker in her recommendation to Chancellor Black and that Caprioli met the standard of "professional distinction" as set forth in the department's 7.12 Statement.

In response, the University points to Schokker's testimony that there was no minimum or hidden number of publications as a target and that Caprioli had one book and three referred articles since her promotion to Associate Professor in 2007. While she had strong publication record prior to 2009, she had done little to nothing in the last three to four years.

Neither Schokker nor Black cited a specific number of publications as being necessary but recommended that Caprioli continue to build her portfolio in the area of research and scholarship. The collective bargaining agreement grants to administrators the exclusive managerial right to determine the weight of scholarship of promotional candidates and Schokker's assessment was that neither Caprioli nor Weidner met the standards.

UEA's claim that the EVCAA and Chancellor's decisions set a precedent where strong scholars with many publications for tenure are held to a higher standard of further promotion than that of other similarly situated scholars is without merit because it is based upon a flawed premise. The Tenure Code requires continuing substantial scholarship for promotion to full professor. Grievant Caprioli's claim that all of her publications from 2007 to the present should be considered as post tenure publications should also be rejected because a review of her publications demonstrates the paucity of her publications since her last promotion.

With respect to Weidner, the UEA claims that within the Political Science Department, there is no specific number of publications required after, in contrast to before, the tenure process. A clear criterion is the use of the faculty member's research by other scholars, and these were the guidelines communicated to Weidner. This Assertion, the University contends, ignores the criteria set for in 9.2 which provides that "The basis for promotion to the rank of professor is the determination that...(2) added substantially to an already distinguished record of academic achievement,..."

As to Weidner's grievance, the UEA makes the same first argument. Secondly, it argues that Schokker was not viewing Weidner's portfolio in the right way because he had finished three research reports since his tenure and research reports are very different from academic journal articles, each research report being the equivalent of several journal articles. The evidence establishes that his file did not provide a strong enough case for promotion due to his low number of publications, especially the low number in progress. Although he had a number of publications in the pipeline, they are not counted until they are in press. The University asserts that the weight to be given to technical research reports is an inherent management right and not grievable. Schokker and Black believed that research and technical reports simply do not carry as much weight as peer-reviewed journal articles. Research and technical reports which formed the bulk of Weidner's publications are typically not peer-reviewed. His portfolio demonstrates the same lack of productivity since his last promotion.

The UEA's tortured interpretation aside, the criteria for promotion to full Professor is clear and has been consistently applied. While both of the grievants had substantial records when they were promoted to Associate Professor, for some reason that productivity did not continue and they came up short in the process for promotion to full Professor.

Finally, the University maintains that just because the that lower levels of portfolio review recommended promotion does not mandate that higher levels do the same. Although the department committees and the Dean recommended promotion utilizing the criteria, this does not establish that the EVCAA and Chancellor did not apply the criteria properly when they reached the opposite conclusion weighing the same criteria. Such an argument disregards the University's exclusive management right to determine the weight of scholarship for promotional applicants in determining and applying that criteria. However, more importantly, the UEA is attempting to use

arbitration to challenge the promotional process which is explicitly prohibited in the collective bargaining agreement.

There are five levels of review in the promotional process, each level being independent and each level having the right to reach an independent or different conclusion after applying the criteria. The EVCAA, Chancellor and Provost are not, and have never been, just a rubber stamp of the department and Dean's conclusions. There have even been some cases where all review levels prior to the Provost recommended tenure or promotion and the Provost said "no". If the recommendations of the Departmental committee and Dean were the only considerations, there would be no need for additional review at higher levels.

The only remedy available under the contract is a reconsideration of the decision and not the overturning of EVCAA Schokker and Chancellor Black's decisions. It is the sole remedy. Therefore, should the grievants prevail, the remedy must be limited to reconsideration of the decision. However, the University requests that the grievance be denied in its entirety.

DISCUSSION:

The first issue to be determined is whether or not the instant grievances are in fact arbitrable. As both parties have appropriately pointed out, Section 201.480 of the collective bargaining agreement expressly provides that "The decision of the Regents whether to promote or to confer Indefinite Tenure shall be final and binding. The decision, the criteria upon which such decision was made, all recommendations leading up to the decision, and the reasons for such recommendations shall not be grievable." This language is clear and unambiguous and prohibits any substantive challenge to the promotion decisions at question here.

The collective bargaining agreement does permit an affected faculty member to "bring a grievance alleging that the procedure for promotion or conferral of Indefinite Tenure described in this Section 201.400 was not followed, except as otherwise provided in this Agreement." Even if a procedural violation is found, the sole permissible remedy for the grieving Member "shall be an order requiring the Employer to reconsider the Member's request in the Academic Year in Question or in the following Academic Year and to follow such procedure upon such reconsideration."

The undersigned reads this language to mean that she is constrained from evaluating the substantive merits of the Board of Regents' promotion decision and is only empowered to determine whether a serious procedural violation in the consideration of the members' application for promotion has occurred.

The crux of the UEA arguments is that Schokker and the Chancellor considered a new specific criterion never previously applied in decisions with respect to promotion, i.e., number of recently published scholarly articles or books. The undersigned must

agree with the University that this argument is unfounded. The UEA is attempting to circumvent the clear contract prohibition by arguing that since the department committees and the Dean applied the stated criteria and recommended promotion, the opposite conclusions reached by the EVCAA and the Chancellor mean that they failed to apply the stated criteria, and established a new criterion which was not communicated to the grievants. Here the UEA is really challenging the criteria applied in evaluating the promotion applications which it is contractually barred from grieving.

The EVCAA and the Chancellor did not apply a new criterion unknown to the UEA and the grievants. As much as the UEA and grievants might wish to have an express number of requisite publications established for promotion, the EVCAA, Chancellor, and Board of Regents is well within its contractual right to establish general guidelines as to the necessary amount of publication post-tenure and to communicate these general guidelines to faculty members which it has done pursuant to Section 9.2 of the Tenure Code. The evidence at hearing established that all levels of promotion review evaluate the substantive and quantitative academic publishing record of applicants from the time they received tenure to the time of their application.

Only a serious breach in procedure is subject to arbitral review and the undersigned does not find, based upon the evidence before her, that such a serious breach has occurred.

Accordingly, it is my decision and

AWARD

- 1. That the grievances are not arbitrable.**
- 2. That the grievances are denied and dismissed in their entirety.**

Dated this 4th day of December, 2014, in Madison, Wisconsin.



Mary Jo Schiavoni, Arbitrator