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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOHN BOLA,

Plaintiff and Appellant,

v.

UNIVERSITY OF SOUTHERN
CALIFORNIA,

Defendant and Respondent.

B229519

(Los Angeles County
Super. Ct. No. BC123883)

APPEAL from an order of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Rohde & Victoroff and Stephen F. Rohde for Plaintiff and Appellant.

Paul Hastings, J. Al Latham, Jr. and Melinda A. Gordon for Defendant and Respondent.

INTRODUCTION

Appellant John Bola appeals from an order denying his petition for writ of administrative mandate, by which he sought to reverse the decision of respondent University of Southern California (USC) denying him tenure. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was hired by Dean Marilyn Flynn as an assistant professor on the tenure track at the USC School of Social Work (SW) in 1999. Appellant's Professional Development Plan identified his focus as the non-pharmacological treatment of early episode schizophrenia and also discussed his goal of seeking federal grants from the National Institute of Mental Health (NIMH) through his first four years at USC to support his research in this area.

There are three levels to the SW tenure review process. First, the SW Faculty Council makes a recommendation to the dean based on a report from the Tenure Review Committee, an internal advisory committee. Before the Tenure Review Committee makes its recommendation, the faculty member is notified by the dean that the review is to take place, and the faculty member is given an opportunity to indicate confidentially whether there are any faculty members the candidate would prefer not to have on the committee. After receiving the report, the dean then makes a recommendation to the provost. Finally, the provost, who is advised by the University Committee on Appointments, Promotion, and Tenure (UCAPT), makes a final decision on the president's behalf. Under the UCAPT manual promulgated by the provost, there should be only a single tenure review process, and the denial of tenure is a final decision, notwithstanding the rare possibility of tenure reconsideration based on new evidence. Nevertheless, appellant was considered for tenure on three separate occasions.

Appellant's first opportunity to obtain tenure was in 2005, the date specified in his contract. At this point, appellant had obtained five small research grants from sources

within USC. After reviewing appellant's research, scholarship, and publications, the Tenure Review Committee made a favorable report to the Faculty Council, which in turn recommended tenure to Dean Flynn. While Dean Flynn also supported appellant's request for tenure, she acknowledged that his work raised significant questions "by two external reviewers and [her] own disappointment in the relatively small number of refereed publications he has produced since coming to USC. . . ." Even with Dean Flynn's support, the provost denied appellant tenure stating, the "quantity of scholarship is not strong enough to merit promotion and tenure."

After the 2005 denial of tenure, Dean Flynn discussed with appellant the possibility of requesting reconsideration from the provost. Appellant subsequently published three additional peer-reviewed articles, including one that was a sole-authored article in *Schizophrenia Bulletin*, and received a congratulatory letter from the provost regarding New York Times coverage of that article.

In 2006, Dean Flynn initiated reconsideration of appellant's tenure. To support the reconsideration, she presented an updated dossier and additional external reviews that reflected appellant's comprehensive accomplishments. When she did this, appellant had 16 qualifying publications, more than the SW Handbook criterion of 12-14 publications, and he had convinced the dean that he had met USC's tenure criterion of "impact on the field." Acknowledging that appellant's work would likely never gain a consensus among his colleagues in psychology, psychiatry and social work, Dean Flynn noted that "his work *will* have to gain sufficient scientific support to assure external funding from the best and most competitive external sources—principally the National Institute of Mental Health—and this still remains to be demonstrated." Due to the promising achievements appellant made after his 2005 tenure review process and the controversial nature of his research, the dean recommended that appellant be promoted to associate professor, with a review for tenure to be considered in two years. The provost followed the dean's recommendation and promoted appellant to associate professor on the tenure track, agreeing to make a final tenure decision in 2008.

The dean subsequently told appellant that obtaining significant “external funding” would be critical to his receiving tenure. Then, in 2007, appellant received a NIMH R03 grant for \$163,000 to study individualizing treatment in schizophrenia. Dean Flynn acknowledged that while this did not guarantee that he would make tenure, obtaining this grant “removed the last obstacle” to securing tenure. She also expressed that this would be the appropriate time for appellant to teach a year abroad in Korea before taking a sabbatical the following spring to reorient himself before the next stage of his career.

Appellant’s decision to teach in Korea disappointed Dr. John Brekke, one of the SW’s most prestigious senior faculty members and appellant’s mentor. When appellant was first hired at the SW, Dr. Brekke and appellant worked closely together and enjoyed a healthy professional relationship. When appellant did not follow his advice to pursue larger NIMH grants, Dr. Brekke grew more distant and less available to appellant. Even though appellant had practically finished his 2008 tenure portfolio before leaving for Korea, Dr. Brekke strongly believed that appellant should pursue his R01 grant from the NIMH rather than leaving to teach abroad.

Meanwhile, appellant was getting cautionary advice from his external mentor, Dr. Nina Schooler, that was adverse to Dr. Brekke’s recommendation. Both Dr. Schooler and a NIMH program officer advised appellant that he should wait to finish the preliminary findings on his R03 grant before he submitted an application for a larger grant, so as to not reduce his scientific credibility. However, recognizing the importance of receiving a larger grant after his appointment to associate professor, appellant admitted to Dr. Schooler that “getting funding would be the key to [his] tenure decision in two years.”

Appellant submitted his portfolio in January 2008 for review by the Tenure Review Committee. Appellant never sought or was presented with the opportunity to object or comment on any members of his Tenure Review Committee. Having not inquired about the members of the committee, appellant first learned Dr. Brekke served on the Tenure Review Committee in January 2009. Dr. Brekke served as chairperson of the committee, after having been the sole member of appellant’s Development

Committee from 2001-2008. The SW Handbook at the time did not allow members of the candidate's Development Committee to serve on the Tenure Review Committee; had appellant objected to Dr. Brekke's presence on the committee, Dean Flynn would have respected that decision.

Later in January, after appellant submitted his portfolio, the Tenure Review Committee "recommended with reservations that [appellant] be granted tenure." The committee report included a minority report written by Dr. Brekke. The minority report, which was provided to the provost prior to his decision to deny tenure, reflected Dr. Brekke's concern with the direction of appellant's research. The report stated that "an R01 is entirely dependent on the results of his R03." Appellant's contradictory testimony explained that a NIMH program officer had told him a number of different ways to obtain R01 funding regardless of the results of his R03. The minority report explained that if appellant's current R03 did "not play out, it will be nearly impossible for [appellant] to further his research agenda with a significant research project. . . . In essence, his program of research will end." The minority report also erroneously stated that appellant had a 50 percent reduced teaching load.

Dean Flynn's 2008 memorandum to the provost summarized appellant's 89 percent support from external reviewers and noted the weaknesses of his application for tenure. Despite the acknowledged limitations on appellant's portfolio, Dean Flynn recommended tenure. However, on April 30, 2008, the provost again denied appellant's application. In the letter in which appellant was denied tenure, the provost wrote that "[w]hile it is evident that the candidate has done some important and original scholarly work, his productivity record is low despite an extended probationary period." The provost added that appellant's "research portfolio is narrow and the potential for future research projects is uncertain."

On February 2, 2009, appellant filed a grievance, contending that his tenure decision was based on unfair treatment. On June 4, 2009, appellant and Dean Flynn presented evidence and testimony to the USC Grievance Panel, comprised of three USC faculty peers. Appellant claimed that based on faculty rights in the 2008 USC Faculty

Handbook, “he was not fairly evaluated because of procedural defects (including inadequate procedural considerations) that materially inhibited the review process,” and also that he “was not fairly evaluated on the merits because the decision was based significantly on considerations violative of academic freedom or because of bias or prejudice” Evidence was presented as to whether the SW Handbook was a source of responsibilities that was binding on appellant and USC, as well as whether appellant was aware that gaining significant external funding was crucial to obtaining tenure.

In a memorandum to President Steven B. Sample, the Grievance Panel presented its findings, unanimously concluding that appellant’s contentions were without merit. While they found that the minority report did err in stating that appellant taught at a 50 percent reduced teaching load, the panel concluded that “this error in summarizing one aspect of his teaching record” did not have a “material impact on the case.” The panel further concluded that “from the beginning with his 1999 developmental plan, [appellant] was aware of the expectations of the field, the School and the University that pursuing substantial external grant support was crucial to his research success.” Moreover, “while the Dean did not state in writing that an NIMH R01 grant was an ‘ultimate criterion’ for tenure, we are convinced that the importance of this grant was common knowledge in the School and the University. Discussions with the Dean and other faculty evidenced his awareness.” In addition, the panel found that “[e]vidence did not support a finding of bias or prejudice providing unfair review of the merit of [appellant’s] work.”

Appellant appealed the Grievance Panel’s decision. On August 28, 2009, President Sample provided a ten-page letter to appellant, affirming the Grievance Panel’s decision, upholding tenure denial, and addressing each of appellant’s concerns. Pointing out that appellant had the burden of proof at the grievance hearing and that the panel heard the witnesses, the president found no error in the panel’s consideration of the evidence.

In his letter to appellant, the president explained that the USC Faculty Handbook provides that a grievance may be based on violation of rights provided by law, established university policies that include the USC Faculty Handbook, or a faculty

member's contract. Appellant's contract with USC stated that "the duties of the Faculty Member shall be in accordance with . . . the department(s) of appointment, in accordance with the policies set out in the [USC] Faculty Handbook. . . ." Those policies include the UCAPT Manual, which is "promulgated as policy by the provost under authority delegated by [the President]." The UCAPT Manual requests that school clarifications for promotion and tenure to be keyed to the manual and encourages the school "to develop, as needed, published clarifications for particular fields of the criteria for promotion and tenure."

The SW Handbook, keyed to the UCAPT Manual, details the promotion and tenure criteria as "Criteria for Promotion to Associate Professor," which follows the recommendation of the Social Work Faculty Council and a full faculty vote and details numerous criteria that would compose a preferred tenure candidate. The criteria include different ways to make up an acceptable scholarship record, including "funded research proposals." In addition, the Tenure Review Committee "evaluates quality by the extent to which a candidate demonstrates growing intellectual leadership." Other indicators of scholarly achievement are listed, including "emerging scientific impact" and a "continuous record of scholarship," among others.

Whether a member of appellant's Development Committee could be appointed to his Tenure Review Committee was a contested issue at the grievance hearing and in the trial court. A September 2005 version and a subsequent April 2008 version of the USC Faculty Handbook states, "No development committee member may serve on the mentee's third year or mandatory six year review committee." However, this section was removed in an August 25, 2008 version of the handbook.

As to this issue, President Sample also explained in his letter to appellant that the SW's internal documents are guidelines, not university policy, because they were not approved by the provost, the president, or by the trustees, as required by the USC

published policy.¹ However, the president did not make a distinction between USC policies and SW guidelines because the Grievance Panel did not choose to make that distinction.

Additionally, President Sample found that appellant proved neither “personal animosity” nor “prejudg[ing]” by Dr. Brekke. Rather, Dr. Brekke’s allegedly biased conduct, including “advis[ing] [appellant] to conduct larger research projects,” did not actually indicate bias and instead “amount[ed] to mentoring.” Regardless of the true intent behind Dr. Brekke’s comments, the president found that “the provost’s reasons for denying tenure were not derived from the minority report to the school council.” In sum, the president found that appellant “had not established any basis to question the fairness or procedural regularity of the decision on [his] tenure.”

Appellant filed his petition for writ of mandate in November 2009, seeking to have USC’s decision to deny him tenure set aside and to require USC to afford him “all of his rights and remedies under USC’s rules, procedures and policies.”

Following a hearing on the matter, the trial court denied appellant’s administrative mandate petition. It first noted that in reviewing a private university’s tenure decision, extreme deference is given to the university’s decision, and it will be reversed only for discrimination or procedural unfairness. The court observed that appellant contended “that error occurred at each stage of the administrative process, and he thinks that he can collect all such errors and add them up to make a case that he was denied a fair hearing somewhere along the line in the administrative process.” However, the court reviews “only the final administrative decision and the final administrative hearing that [preceded] it.” Appellant “fail[ed] to show that there was any unfairness in the grievance procedure that was made available to him, nor does he present any evidence that the

¹ In the summer of 2009, after the Grievance Panel’s report but before the president’s letter to appellant, the name of the SW Handbook was changed from “The School of Social Work Faculty *Handbook*” to “The School of Social Work Faculty *Guidebook*” (italics added).

president of the University acted unfairly in arriving at his substantive evaluations concerning [appellant's] fitness to be a tenured professor at the University.”

DISCUSSION

A. *Standard of Review*

Administrative mandate review generally considers “whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subd. (b).)

The remedy of administrative mandate is provided “to those who feel wronged by procedural defects in the tenure process—as opposed to those who disagree with substantive evaluations—a remedy.” (*Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 977-978.) Thus, “[a]bsent discrimination, judicial review of tenure decisions in California is limited to evaluating the fairness of the administrative hearing in an administrative mandamus action.” (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1726.)

The “ultimate determination of whether the administrative proceedings were fundamentally fair is a question of law to be decided on appeal.” [Citation.]” (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.) In addressing whether an administrative agency was procedurally and fundamentally unfair and whether the agency’s findings are supported by substantial evidence, we review the administrative record de novo and are not bound by the trial court’s conclusions. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479.) However, recognizing that academic institutions are best suited to make comprehensive assessments of a candidate’s chosen field of study and about the particular needs of an institution, we

review the record with deference to the administrative agency's "academic expertise." (*Pomona College v. Superior Court, supra*, 45 Cal.App.4th at p. 1725.)

B. Fair Trial

Appellant contends that he did not get a "fair trial" within the meaning of Code of Civil Procedure section 1094.5 because he was subjected to arbitrary and biased proceedings. He further contends that the failure to adhere to published procedures and the use of changing, unapproved criteria created a "moving target" of tenure criteria.

The "'fair trial' requirement is equivalent to a prescription that there be a fair administrative hearing." (*Pomona College v. Superior Court, supra*, 45 Cal.App.4th at p. 1730.) "An employee grievance proceeding may be a 'hearing' which triggers the availability of mandamus review. [Citation.]" (*Ibid.*)

Appellant first asserts he did not receive a fair hearing because existing written published policies and procedures at the university were not followed. Specifically, appellant claims the appointment of Dr. Brekke to his Tenure Review Committee was expressly prohibited by published university policy because Dr. Brekke served as one of his former Development Committee members, and appellant never had the chance to object or comment on Dr. Brekke as a member of his Tenure Review Committee. He also argues that published university tenure criteria did not include significant external funding as a determinative factor for gaining tenure.

Appellant argues that these errors at each stage of his administrative process, taken as a collective whole, demonstrate that he was denied a fair hearing. However, as the trial court stated, appellant is entitled to only one fair hearing in the administrative proceeding, not a multiplicity of such opportunities at each stage of the administrative process. (*Kramer v. State Board of Accountancy* (1962) 200 Cal.App.2d 163, 175.) Therefore, we only evaluate the fairness of the final administrative hearing and the subsequent final administrative decision by the president. Further, since we review the administrative record de novo and the trial court's conclusions are not determinative on

appeal, we will not address appellant's claim that the trial court was misled by USC's "specious arguments."

A fair trial is one held "before an impartial tribunal. Such a trial requires that the person or body who decides the case must know, consider and appraise the evidence." (*Le Strange v. City of Berkeley* (1962) 210 Cal.App.2d 313, 325.) Whether a trial is "fair" encompasses both the actual proceeding in which evidence is received and considered, as well as the posthearing actions of the agency. (*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 273.)

In *Vollstedt*, the court found that the plaintiff employee did not receive a "fair trial" when a city commissioner upheld his demotion without reviewing the evidence prior to making a decision. (*Vollstedt v. City of Stockton, supra*, 220 Cal.App.3d. at p. 273.) Unlike the employee in *Vollstedt*, appellant was given the opportunity to support his claim at his grievance hearing that "procedural defects . . . materially inhibited the review process." The Grievance Panel, made up of three objective faculty members, heard evidence and testimony from both parties, represented by counsel, regarding whether the SW Handbook was binding on appellant and USC, as well as whether appellant was aware that obtaining significant external funding was crucial to receiving tenure.

Further, in his letter to appellant detailing the final administrative decision, President Sample went beyond his obligations by detailing his rejection of appellant's concerns regarding the Grievance Panel report. Therefore, as the Grievance Panel and the president reviewed all of the evidence presented to them during and before the hearing, and there is no evidence that the Grievance Panel showed signs of bias or procedural unfairness in its decision making process, the record does not support appellant's claim that he was denied a fair hearing.

We further conclude that the Grievance Panel did not make a procedural error in failing to reverse the tenure decision based on Dr. Brekke's appointment to the Tenure Review Committee. The Tenure Review Committee actually supported appellant's application for tenure, even if it recognized weaknesses in his application in its report.

We recognize that the Dr. Brekke’s minority report to the dean included at least one misrepresentation. However, the Grievance Panel made it clear that the misrepresentation did not have “material impact on the case.”

Moreover, at the grievance hearing, appellant did not explicitly raise the issue of whether Development Committee members should be allowed to serve on the Tenure Review Committee. Appellant’s only complaint as to Dr. Brekke was that his former mentor tainted the report to the dean by introducing bias and incorrect information. Nevertheless, when the specific grounds relied upon on appeal are known, or should have been known, at the time of the administrative hearing and when the hearing procedures allow those issues to be raised, then they must be raised at the administrative level or they will be forfeited. (See, e.g., *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 826; *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 117.) Before and after the grievance hearing, appellant had access to the USC policy that prohibited Development Committee members from serving on a Tenure Review Committee. The removal of that provision from the SW Handbook, and the prior change of the book’s title from “handbook” to “guidebook,” suggests that this was not a critical requirement of a fair tenure review process. In any event, since our review is limited to assessing the procedural fairness of the administrative review process, by not specifically raising that issue at the grievance hearing, appellant forfeited his right to raise that issue on appeal.

Appellant also contends that he did not receive a fair hearing since the Grievance Panel and the president did not reopen his tenure review process after he presented evidence that published USC criteria for tenure did not include significant external funding. We disagree.

The Grievance Panel and the president gave appellant a fair opportunity to present evidence and testimony on this issue. The weight given to individual tenure criteria, such as the requirement for significant external funding, is a matter that should be determined by the academic institution. Tenure decisions in an academic setting “require[] an assessment of whether the professor’s conduct is consistent with or contrary to academic norms, which only academic peers . . . are qualified to determine.” (*Gutkin v. University*

of *Southern California*, *supra*, 101 Cal.App.4th at p. 978; *Pollack v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1426.) Therefore, we cannot find procedural error in the administrative review process solely because one of the factors suggested for tenure in the SW Handbook was not explicitly included in the USC Faculty Handbook.

Reviewing the record de novo, we hold that appellant had a “fair trial” because both the Grievance Panel and the president demonstrated procedural and fundamental fairness in their review of the tenure proceedings.

C. Prejudicial Abuse of Discretion

On appeal of an order denying a writ of administrative mandate, a prejudicial abuse of discretion is established if (1) the agency has not proceeded in a manner required by law, (2) its decision is not supported by its findings, or (3) if its findings are not supported by substantial evidence in the record. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

Appellant claims that USC abused its discretion because the provost, the Grievance Panel, and the president made findings that are not supported by the evidence. We disagree.

Appellant first claims that the provost made two findings derived from incorrect facts in Dr. Brekke’s minority report. As previously stated, we are not reviewing the provost’s findings. We are concerned only with the decision of the Grievance Panel and the final administrative decision by the president. (See *Kramer v. State Board of Accountancy*, *supra*, 200 Cal.App.2d at p. 175.)²

Appellant also contends that the Grievance Panel and president abused their discretion by not reopening his tenure review process in that, by not including significant

² We are mindful that since the Grievance Panel and the president reviewed the findings of the Tenure Review Committee, including the minority report written by Dr. Brekke, appellant was afforded a fair administrative hearing. (*Pomona College v. Superior Court*, *supra*, 45 Cal.App.4th at p. 1730.)

external funding as a criterion for tenure, USC created a “moving target” for appellant to receive tenure. While significant external funding is not explicitly mentioned in the USC Faculty Handbook, the SW Handbook describes many different factors that could establish an acceptable academic scholarship record, including “funded research proposals.” Additionally, since the Tenure Review Committee “evaluates quality by the extent to which a candidate demonstrates growing intellectual leadership,” the committee could have assigned greater weight to appellant’s need for a significant external grant given the controversial nature of his research. Although appellant’s R03 grant and other scholarly achievements certainly demonstrate relative success in the fields of psychology, psychiatry and social work, the quality of a candidate’s scholarly portfolio is a decision most appropriately made by faculty peers. (*Gutkin v. University of Southern California*, *supra*, 101 Cal.App.4th at p. 978; *Pollack v. University of Southern California*, *supra*, 112 Cal.App.4th at p. 1426.)

Moreover, appellant knew of the importance of receiving significant external funding before his 2008 tenure review. In Dean Flynn’s 2006 memorandum to the provost recommending appellant for associate professor, the dean indicated that appellant still needed to demonstrate the ability to gain external funding from the NIMH. Even after appellant received a R03 grant from the NIMH, Dean Flynn told him that receiving significant external funding would be crucial to obtaining tenure. Further, in a 2006 letter to Dr. Schooler and in his 2008 Tenure Review Personal Statement, appellant identified his limited amount of federal research funds as a weakness in his portfolio.

Clearly, appellant was well aware that obtaining significant external funding was an important criterion in the decision whether he would receive tenure. The fact that this was not a criterion for tenure in the USC Faculty Handbook does not establish an abuse of discretion by the Grievance Committee or the president in upholding the decision to deny tenure.

Appellant also claims that the Grievance Panel’s finding that there were no procedural errors in the tenure review process is unsupported by substantial evidence, as the evidence shows Dr. Brekke was improperly included on the Tenure Review

Committee, and appellant was not given the opportunity to request that he be excluded. As previously discussed, appellant had the opportunity to challenge Dr. Brekke and appellant forfeited his claim by failing to raise it at the grievance hearing.

In sum, we hold that USC did not abuse its discretion because the Grievance Panel and the president made findings that are supported by substantial evidence.

DISPOSITION

The order is affirmed. USC is to recover its costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.