

NOT DESIGNATED FOR PUBLICATION

No. 114,292

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EDINA HARSAY,
Appellant,

v.

THE UNIVERSITY OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Douglas District Court; ROBERT W. FAIRCHILD, judge. Opinion filed July 29, 2016.
Reversed and remanded with directions.

Edina Harsay, of Lawrence, appellant pro se.

Sara L. Trower, associate general counsel and special assistant attorney general, for appellee.

Before GREEN, P.J., MCANANY and ATCHESON, JJ.

Per Curiam: Dr. Edina Harsay, a former assistant professor in the Department of Molecular Biosciences at the University of Kansas (University), appeals the ruling of the district court finding no legal impropriety in the University's decision to deny her promotion to associate professor with tenure.

Dr. Harsay joined the University's faculty in January 2004 as an assistant professor in the Department of Molecular Biosciences on track for a possible tenured position. The University's tenure track is a 7-year up-or-out process. Under this process, Harsay was on probation for a period of 7 academic years. During 2009, the sixth year of her employment, the University conducted a review to determine her eligibility for tenure.

The University denied tenure, so Harsay was terminated from her position at the end of her seventh year, the 2010-2011 academic year.

Tenure Review Process

At the time of Dr. Harsay's promotion and tenure review, the University's procedure involved a multi-level review process set forth in the University's Faculty Senate Rules and Regulations (FSRR), Article VI. In Dr. Harsay's case, the Department of Molecular Biosciences conducted the initial review of her application for promotion and tenure; the College of Liberal Arts and Science's College Committee on Appointments, Promotion, and Tenure (College Committee) conducted the intermediate level review; and the University Committee on Promotion and Tenure (University Committee) conducted the university level review. After the university level review, Dr. Harsay's complete promotion and tenure application, including the recommendations of each review committee, was forwarded to the University's chancellor for a final determination on tenure. The chancellor's decision was the final agency action, and no further administrative review was permitted following the chancellor's decision.

The FSRR required that Dr. Harsay's application receive an independent review at each review level:

"Each level of review, including the initial review, the intermediate review . . . , and the university level review, conducts an independent evaluation of a candidate's record of performance and makes independent recommendations to the Chancellor. Later stages of review neither affirm nor reverse earlier recommendations, which remain part of the record for consideration by the Chancellor. It is the responsibility of each person involved in the review process to exercise his or her own judgment to evaluate a faculty member's teaching (or professional performance), scholarship, and service based upon the entirety of the data and information in the record. No single source of information, such as peer review letters, shall be considered a conclusive indicator of quality."

The provost was required to provide "guidelines for compiling and evaluating a candidate's record." FSRR § 6.3.4. Under FSRR § 6.3.4.2, those guidelines were to include

"a summary evaluation section to be prepared by the committee at each level and shared with the candidate upon completion of the initial review and intermediate review, if one is conducted. The evaluation section shall include:

"(a) the recommendation of the committee, its rating of the candidate in the areas of teaching (or professional performance), scholarship, and service, and a statement of the reasons for those ratings."

The University's promotion and tenure standards provide:

"6.2.3. *Scholarship*. Scholarship is an essential component of the University's mission as a center of learning, and the award of tenure and/or promotion in rank must be based on a record of accomplishment reflecting a sustainable program of scholarly activity. Evaluation of scholarship must be undertaken in light of the expectations of the discipline."

Under section 6.2.3.1, scholarship includes "traditional academic research and publication." Under section 6.2.3.2, in considering a promotion to a tenured position the reviewers consider the quality and quantity of the candidate's publications, "external reviews of the candidate's work by respected scholars or practitioners in the field, the candidate's regional, national, or international reputation, and other evidence of an active and productive scholarly agenda."

The departmental review criteria further provide:

"A ranking of 'very good' in research requires publication of original work in peer-reviewed journals. It is essential that this work includes research that was carried out at [the University], or is otherwise distinguishable from studies conceived by the

faculty member's doctorate and post-doctorate advisors. The quality and quantity of the published work needs to be sufficiently high to establish the faculty member as an important contributor to his or her field. It is also essential that the faculty member has demonstrated success at obtaining extramural funding to support his/her research program and that there is a reasonable level of assurance that they will maintain a productive research program of high scholarship for the foreseeable future."

Departmental Review

In 2009, consistent with the University's promotion and tenure procedures, Dr. Harsay submitted an application for promotion and tenure with supporting materials showing her record of achievement. In her application, Dr. Harsay stated that since her appointment at the University she had

- 1 published journal article
- 1 "paper in press"
- 1 submitted manuscript.

With respect to research grants, she reported the following five funded grants:

1. National Institutes of Health (NIH) R21 NS061754-01 (\$138,934 total cost; \$25,000 additional direct cost pending approval of second stage of project; 9/30/07—8/31/09 plus requested extension)
2. American Heart Association, 0760054Z (\$143,000 total cost; 1/1/2007—12/31/2008)
3. NIH X01MH077628-01 (resource award, 5/10/2006—1/31/2007)
4. NIH RO3 NS050784 (\$70,000 total cost; 9/30/2004—8/30/2006)

5. NIH P20 RR15563 (\$250,000 total cost; 8/1/2004—4/30/2007).

She reported three additional pending research grants:

1. NIH 1R01GM (\$1,795,027 total cost; 04/01/2010—03/31/2015)
2. National Science Foundation (\$1,388,027 total cost; 01/01/2010—12/31/2014)
3. Department of Defense (\$404,329 total cost; 01/01/2010—12/31/2011).

She also had submitted eight grant proposals that had not been funded. These were to the American Cancer Society, the Prevent Cancer Foundation, the National Science Foundation, and five to the NIH.

Dr. Harsay also provided with her application the evaluations of seven external reviewers, who had commented on her application for promotion and tenure. The reviews were generally favorable to Dr. Harsay, though several reviewers were concerned her publication rate was low for a tenure candidate in her field. A reviewer also expressed that it may be difficult for Dr. Harsay to maintain an externally funded research program with a low publication rate.

The six-member Departmental Committee voted five to one in favor of tenure. A majority of the committee members rated Dr. Harsay's teaching and research records as "Very Good," and the committee unanimously rated her service record as "Very Good."

In its recommendation letter to the College Committee, the Departmental Committee discussed Dr. Harsay's research record:

"Dr. Harsay currently has one paper published based on research she has performed at [the University].

....

"In addition, she has two manuscripts currently submitted for publication. A revised version of [one of the manuscripts] is currently undergoing review. The editor of the paper has written our department chair, Dr. Robert Cohen, explaining his great interest in publishing the manuscript, and his expectation that the current version will be accepted for publication. . . .

....

"A third manuscript has been submitted to [another academic journal]. This is also a substantial paper, with a total of 10 figures and tables. . . .

....

". . . Dr. Harsay has also been successful at obtaining significant grant support for her research. She has been funded by the Cancer Experimental Therapeutics COBRE as a project [primary investigator], and by the American Heart Association grant. Her high throughput screening and characterization of the compounds she identified has been funded by an NIH R03 award, an NIH X01 Resource Award, and is currently funded by an NIH R21. She currently has proposals under review at the NIH, the NSF, and the Department of Defense."

In its evaluation, the Departmental Committee concluded:

"Overall, Dr. Harsay's major publication record consists of 2 strong papers submitted for publication, (of which one seems very likely to be accepted) and one extremely strong published paper. Her outside review letters confirm that Dr. Harsay's contributions are of extremely high quality. At the same time, the outside reviews all mention that Dr. Harsay's productivity . . . could be higher. She has thus far been successful at obtaining sufficient grant support to maintain a laboratory with an active research program capable of generating data of extremely high quality, and that has had a significant impact on her field."

On October 14, 2009, the Departmental Committee gave its recommendation to the tenured faculty members of the Molecular Biosciences Department. The faculty members voted 11 to 6 to recommend promotion to associate professor with tenure. Two

of the favorable votes were cast as "exceeds expectations," and nine of the favorable votes were cast as "meets expectations."

When the Departmental Committee advised the College Committee of this action, the department's chair, Dr. Robert Cohen, provided to the College Committee an evaluation of Dr. Harsay's application and discussed her research record. Dr. Cohen commented: "The question of quantity versus quality was . . . at the center of the Department's discussion of Dr. Harsay's promotion and tenure dossier."

College of Liberal Arts and Sciences Review

At the intermediate level of review, the nine-person College Committee performed an initial review of Dr. Harsay's application and determined she did not meet the criteria for promotion and tenure, noting its decision was "largely based on research productivity."

On December 9, 2009, before issuing a final recommendation, the College Committee contacted Dr. Cohen and requested updated information concerning Dr. Harsay's research papers, either submitted or accepted for publication, and the status of any pending research proposals.

On December 14, 2009, Dr. Cohen responded to the College Committee's inquiry. In the letter, he explained that Dr. Harsay had two published journal articles and a third article which had been rejected despite generally favorable reviews. The publication's editor encouraged her to resubmit the paper after addressing the reviewers' comments. Dr. Cohen noted that Dr. Harsay planned to resubmit the third article within the month. With regard to research grants and proposals, Dr. Cohen provided an update on Dr. Harsay's research grants:

"Three grants, one each to the NIH, NSF, and Department of Defense (DOD), were listed as pending on Dr. Harsay's Blue Book

"The NIH and DOD grants were not funded.

"Dr. Harsay's NSF grant is still pending. My understanding is that she spoke to her program administrator yesterday and was told that a decision on the grant should be rendered within a month."

On December 15, 2009, Dr. Harsay also submitted a written response, which further discussed her research record and sought reconsideration of the committee's initial determination.

The College Committee voted seven to zero, with two abstentions, to recommend against a promotion to associate professor with tenure. In making its recommendation, the committee rated Dr. Harsay's teaching as "Very Good"/"Good," her service as "Good," and her research scholarship as "Marginal"/"Poor."

In his December 28, 2009, letter, Dr. Corbin informed Dr. Harsay of the College Committee recommendation and explained:

"The committee arrived at our assessment of your work after a careful consideration of your statements on the blue form, your record of teaching, research, and service, peer evaluations of your teaching, and outside reviews of your scholarship. We concluded that your record of teaching evaluations, teaching materials, and other assessments show work that exceeds departmental standards for promotion and tenure. Your record of service also met criteria for promotion and tenure. However, [the College Committee] determined that your level of research accomplishment is insufficient and did not meet the criteria for promotion to Associate Professor. For these reasons, the committee has not recommended you for promotion to associate professor with tenure."

On December 28, 2009, Interim Dean Gregory Simpson concurred with the College Committee's negative recommendation. In his letter to the University Committee but not to Dr. Harsay, he stated:

"Although Professor Harsay's teaching and service meet the criteria for promotion and tenure, her research does not. Her scholarly output has been low (two articles while at [the University]), and she has not been successful in securing significant extramural funding to support her research (although she has received two smaller grants). She works in an area in which such funding is necessary to sustain a productive research program, and the failure to obtain such resources further hurts her ability to publish her work at an appropriate rate. Her external reviewers all noted that her research output was low."

Interim Dean Simpson concluded, based on her "relatively weak research record at this point in her career," Dr. Harsay did not qualify for promotion to associate professor with tenure.

Also on December 28, 2009, Dr. Victoria Corbin, the chair of the College Committee, advised the University Committee of the College Committee's recommendation, stating:

"[T]he [College Committee] agreed with outside evaluators in her discipline who commented on low research productivity (2 published paper) as an issue in her tenure application. In addition, [the College Committee] notes that she has been unable to successfully compete for significant extramural funding, although she did have two small external grants from the National Institutes of Health. The department expectations include ' . . . the faculty member's ability to obtain the funding needed to support his or her research program in the long-term.' Lacking sufficient, long term extramural funding in molecular biosciences means fewer scholarly publications can be produced which in turn negatively affects the ability of the investigator to remain competitive for future funding. . . . [The College Committee] believes that this overall low level of scholarly

accomplishment is insufficient and does not meet expectations for promotion to the rank of Associate Professor."

In reporting these results to Dr. Harsay, the College Committee only provided the conclusory statement that her research accomplishments were insufficient. On the other hand, the College Committee provided a more detailed explanation to the University Committee. The College Committee reported that Dr. Harsay had "been unable to successfully compete for significant extramural funding, although she did have two small external grants from the National Institutes of Health."

University Review

At the university level of review, the University Committee, comprised of 10 voting members broadly representative of the faculty, reviewed Dr. Harsay's application for promotion to associate professor with tenure. After completing an initial review of the prior recommendations, the University Committee informed Dr. Harsay that it had voted that she did not meet the criteria for promotion and tenure based on her record of research productivity.

On February 11, 2010, in order to aid in reaching a final determination, the committee requested the following additional information: (1) a report on the status of Dr. Harsay's NSF application; (2) a basis for the department's evaluation of Dr. Harsay's research as "very good" considering her low research productivity and the evaluation of the external reviewers; and (3) an assessment of the sustainability of Dr. Harsay's research program in the absence of external funding.

On February 17, 2010, Dr. Cohen provided the University Committee with the requested additional information. Dr. Cohen, the acting chair of the Department of Molecular Biosciences, stated the NSF grant application was still pending but noted Dr.

Harsay "should be able to finish two ongoing projects within the next year, each leading to the publication of a peer-reviewed research article." Dr. Cohen also noted that Dr. Harsay's research was gaining momentum in terms of excitement and had a good chance of being funded in the near future. With regard to the Departmental Committee's rating, he explained: "There is a persuasive sentiment in the department that Dr. Harsay is capable of hitting a homerun. She is totally dedicated to her science." He further explained that Dr. Harsay's research had produced seminal or near-seminal publications and her current research appeared likely to boost her career and greatly enhance her prospects for future funding.

In February 22, 2010, Interim Dean Simpson hand delivered to the interim provost the additional documents the College Committee had collected regarding Dr. Harsay.

The University Committee voted nine to zero to deny promotion to associate professor with tenure, with one committee member abstaining.

On March 4, 2010, Interim Provost and Executive Vice Chancellor Danny Anderson informed Dr. Harsay of the University Committee's negative recommendation. In the letter, he advised Dr. Harsay of her options to either provide the chancellor a written response to the negative recommendation or file an appeal with the University's Faculty Rights Board. Anderson stated: "This recommendation has been forwarded to Chancellor Gray-Little for her review and final decision." The parties do not cite, and we do not find, any specific findings by the University Committee to support its recommendation other than a reference to Dr. Harsay's deficient "record of research productivity."

Faculty Rights Board Appeal

On March 15, 2010, Dr. Harsay appealed the University Committee's decision to the Faculty Right's Board, claiming "the lack of fair representation by natural scientists [in the review process] . . . resulted in the use of inappropriate review criteria . . . in violation of [her] academic freedom rights." At this point, she was not aware of the mistake made by the College Committee in reporting to the University Committee her history of research grant funding.

The Board reviewed Dr. Harsay's appeal on April 2, 2010, and ultimately denied it, finding no substantive violations to faculty rights as defined in the University's rules and regulations.

Chancellor Review

On April 23, 2010, Interim Provost Anderson informed Dr. Harsay of the chancellor's decision. The substantive portion of the letter is as follows:

"After careful review, Chancellor Gray-Little has decided to accept the recommendation of the University Committee on Promotion and Tenure not to award you tenure or promotion to Associate Professor at the University of Kansas.

"In accordance with the policies of the Kansas Board of Regents and the Rules and Regulations of the Faculty Senate, I am notifying you that your appointment for the 2010-2011 academic year will be a terminal appointment."

District Court Review

Dr. Harsay filed a petition for judicial review in the Douglas County District Court. About 2 years later, on June 21, 2012, the case was dismissed without prejudice

for failure to prosecute. Almost 6 months later, on December 4, 2012, Dr. Harsay refiled her petition in the district court seeking judicial review of the University's action. The University filed its responsive pleading in mid-January 2013. A scheduling order was entered the next month, and Dr. Harsay filed her supporting brief on April 8, 2013. In her supporting brief, Dr. Harsay contended the University's decision to deny her promotion to associate professor with tenure was not supported by substantial evidence and was otherwise unreasonable, arbitrary, or capricious.

The University filed its brief in June 2013, and Dr. Harsay filed her reply brief the following month. The district court then took the matter under advisement. Almost 2 years later, on June 24, 2015, the district court issued a memorandum decision ruling in favor of the University. The district court found that the University's action was supported by substantial evidence and was not unreasonable, arbitrary, or capricious.

Dr. Harsay appeals. The appeal was perfected and briefing was complete in March 2016. The matter was placed on the first available Court of Appeals docket in May 2016. Thus, our first opportunity to consider the issues raised by Dr. Harsay is 6 years after the chancellor's decision.

Analysis

On appeal, Dr. Harsay asserts: (1) the University's action was unreasonable, arbitrary, or capricious; (2) the district court erred in ruling that substantial competent evidence supported the University's decision; and (3) the University misinterpreted or misapplied the law in denying her promotion to associate professor with tenure.

The Kansas Judicial Review Act (KJRA) governs an appellate court's review of an agency decision. K.S.A. 77-601 *et seq.*; *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 361-62, 212 P.3d 239 (2009). An appellate court presumes the

agency action was valid; on appeal, the party claiming an invalid action of the agency has the burden of establishing such invalidity. K.S.A. 2015 Supp. 77-621(a)(1); *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 880, 317 P.3d 124 (2014). An appellate court exercises the same statutorily limited review of an agency action as does a district court—as though the appeal had been made directly to the appellate court. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010); *Romkes*, 49 Kan. App. 2d at 880.

Dr. Harsay argues that because the explanations that were given for recommending the denial of promotion and tenure were contradicted by the facts in the record, the University's decision to deny her promotion to associate professor with tenure was not supported by substantial evidence and was unreasonable, arbitrary, or capricious.

The Agency's Findings

In advising Dr. Harsay of the chancellor's decision, the interim provost stated: "The University of Kansas is an agency of the State of Kansas, and this letter is intended to serve as a notice of a final agency action by the University of Kansas." K.S.A. 77-526(c) requires:

"A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings."

Meaningful appellate review is precluded when an administrative agency's factual findings and legal conclusions are inadequate to disclose the controlling facts or the basis

of the agency's findings. *Jones v. Kansas State University*, 279 Kan. 128, 142, 106 P.3d 10 (2005).

Dr. Harsay disclosed in her application for a promotion and tenure that she had one published journal article, one revised manuscript that was currently undergoing review and was likely to be published, and one manuscript that had been submitted for publication. She also disclosed five funded research grants while working at the University plus three additional pending grant applications. In recommending a promotion and tenure, the Departmental Committee recognized these scholarly works and her grant-funded research projects.

The matter was then sent to the College Committee. The College Committee initially voted against tenure and requested that Dr. Cohen, acting chair of the Department of Molecular Biosciences, provide an update on Dr. Harsay's publications and research grants.

Dr. Cohen responded that Dr. Harsay now had two published articles; and although the third paper had been rejected for publication, Dr. Harsay was planning to resubmit it later that month after making revisions in line with the reviewers' comments. With regard to pending research grant applications, Dr. Cohen reported that two had been turned down and the third was still pending and should be decided on within a month.

The College Committee then recommended to the University Committee that Dr. Harsay not be promoted, noting Dr. Harsay's two published papers and Dr. Harsay's inability "to successfully compete for significant extramural funding, although she did have two small external grants" from the NIH. This report of Dr. Harsay's grant funding was materially in error to Dr. Harsay's disadvantage on a point of substantial importance in the University's tenure decision.

The matter was then sent to the University Committee. The University Committee requested an update from Dr. Cohen on Dr. Harsay's pending NSF grant application. Dr. Cohen reported that the NSF grant application was still pending. The University Committee recommended to the chancellor that tenure be denied "based upon [Dr. Harsay's] record of research productivity." The University Committee made no other findings in support of its decision.

In the final agency action, the chancellor "decided to accept the recommendation of the University Committee." The chancellor did not specify the basis for the decision to deny tenure.

We could piece together the bases for the chancellor's decision from the analysis of the recommendation of the University Committee if the University Committee had made findings that were specific and consistent with the record. Such was the case in *Romkes v. University of Kansas*, 49 Kan. App. 2d 871, 888, 317 P.3d 124 (2014). But here, the sole expressed basis for the University Committee's recommendation was Dr. Harsay's "record of research productivity." That record apparently came from the College Committee's recommendation which was based on incorrect information.

We recognize that decisions on tenure involve a "large mix of factors, from the subjective qualities of the candidate to institutional priorities having nothing to do with the candidate." *Pyo v. Stockton State College*, 603 F. Supp. 1278, 1282 (D. N.J. 1985). "[P]ractical considerations make a challenge to the denial of tenure at the college or university level an uphill fight—notably the absence of fixed, objective criteria for tenure at that level." *Blasdel v. Northwestern University*, 687 F.3d 813, 815 (7th Cir. 2012). As a result, courts are loath to interfere in tenure decisions.

If the chancellor had before her the correct information on Dr. Harsay's scholarly works and funded research grants over her years at the University, would the chancellor

have made the same decision? The chancellor very well may have arrived at the same conclusion that Dr. Harsay should be denied tenure because of an inadequate record of research productivity. As stated in *Blasdel*, 687 F.3d at 816, "In some academic fields . . . research requires costly laboratories financed by grants from the federal government or from foundations. Proficiency in obtaining grants is a highly valued capability in such fields; and scholars differ in their ability to obtain grants." But it is not for us to speculate on whether the chancellor's decision would have been different if she had before her a recommendation from the University Committee based on accurate information. Such speculation would turn our court into a "Super-Tenure Review Committee." *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980).

As a result, we see no alternative but to remand this case for further consideration by the University's various tenure committees, starting with the Departmental Committee, based on Dr. Harsay's correct history of research productivity and scholarly works. See *Jones*, 279 Kan. at 142 (citing *Gas Service Co. v. Kansas Corporation Commission*, 4 Kan. App. 2d 623, 626, 609 P.2d 1157, *rev. denied* 228 Kan. 806 [1980]) ("The appropriate remedy for inadequate findings in a final order of an administrative agency is to remand for additional findings of fact and conclusions of law.").

The timing of such an order is admittedly troublesome. This comes over 6 years after the chancellor's decision, and at least part of the delay can be attributed to Dr. Harsay's inaction. An award of tenure has significant ramifications for both the candidate and the educational institution, resulting in something of an academic marriage. The relationship is not a commitment to be entered into lightly or based on a courtship from bygone years. Thus, it would be improvident and unfair to both parties to suggest the decision should now be based simply on a review of the record compiled and considered in 2009 and 2010. Without some further consideration by the University, we would be forced to rely on our own view of the current record and our sense of the significance of

Dr. Harsay's actual research productivity. And this we cannot do. Indeed, it would be the worse available choice.

Rather, the tenure determination should be returned to the initial stage at the departmental level. Dr. Harsay should then supplement the existing materials with a detailed account of her relevant professional activities after leaving the University. Dr. Harsay's candidacy for tenure then may be evaluated through the customary process by academics and administrators regularly charged with that duty, using a base of correct information freshly assembled to facilitate the making of their decision.

Reversed and remanded for further proceedings.