

**IN THE COURT OF APPEALS OF IOWA**

No. 8-839 / 08-0345  
Filed December 31, 2008

**DAVID E. MELTZER,**  
Petitioner-Appellant,

**vs.**

**BOARD OF REGENTS, STATE OF IOWA,**  
**and IOWA STATE UNIVERSITY,**  
Respondents-Appellees.

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Appeal from the Iowa District Court for Polk County, Robert J. Blink,  
Judge.

David Meltzer appeals from the district court's ruling on judicial review  
upholding the denial of his promotion to associate professor with tenure.

**AFFIRMED.**

Victoria L. Herring, Des Moines, for appellant.

Thomas J. Miller, Attorney General and David S. Gorham, Assistant  
Attorney General, for appellees.

Heard by Vaitheswaran, P.J., and Potterfield, J. and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**POTTERFIELD, J.**

David Meltzer appeals from the district court's ruling on judicial review upholding Iowa State University's decision to deny him a promotion to associate professor with tenure. He contends the decision to deny him tenure was unreasonable, arbitrary, capricious, and an abuse of discretion; and that the process violated his procedural rights. Meltzer asserts he has satisfied all contractual obligations, thus requiring promotion to the tenured position. Finally, he contends the district court erred in not allowing him to present additional evidence.

**I. Background Facts and Proceedings.**

David Meltzer was hired as Assistant Professor, Department of Physics and Astronomy ("Department") at Iowa State University ("University") on a tenure-track appointment in 1998. The letter offering Meltzer his position noted the expectation of "teaching excellence and the development of a nationally recognized program in physics education based on solid research and publication in leading journals for the field."

Because physics education is an emerging discipline in the field of physics and astronomy, I will express some of our expectations in detail. You are expected to carry on an active research program in physics education or science education leading to national recognition for excellence in the field. Appropriate activities include (but are not limited to): 1) publication of physics education or science education papers in refereed journals; 2) publication of physics curriculum material such as textbooks, workbooks, laboratory manuals, study guides and curricular material using appropriate media; 3) presentation of invited talks at professional meetings, workshops, and other universities; 4) development of in-service teacher training; 5) securing external funding for physics education research; 6) serving on review panels for funding agencies; 7) serving on editorial boards of professional journals; 8) serving as reviewer for journals

and textbooks; 9) supervising Ph.D. students in science education;  
10) participating in AAPT activities.

The offer letter also mentioned and attached a copy of the Department's promotion and tenure document, the "Blue Document."

The Blue Document notes that evaluations for promotion "shall be those broadly specified in the Faculty Handbook, based upon the areas of research, teaching, and service," with research and teaching having "overriding importance." For promotion to associate professor, "excellence sufficient to lead to a national or international reputation is required and would ordinarily be shown by the publication of approximately fifteen papers of good quality in refereed journals." However, the Blue Document states: "It should be emphasized . . . that subjective judgment is involved in all of these cases; promotion with fewer papers than indicated above, or non-promotion with more, could occur based upon the Committee's evaluation of the research involved."

In all cases of promotion, the ultimate criterion which is expected to be applied in deciding the departmental recommendation is the question "will this promotion significantly enhance the ability of the Department and Iowa State University to meet the responsibilities implied by their respective missions?" All of the above guidelines for consideration are designed to answer this question in each individual case. No individual is considered to have proprietary right to promotion. No individual earns a promotion without having earned a "yes" to this question.

The Faculty Handbook notes that a faculty member is ordinarily reviewed for tenure in the sixth year. An applicant for associate professor with tenure is to have a "solid academic reputation," show "promise for further development and productivity," and demonstrate "excellence in scholarship that establishes the individual as a significant contributor to the field or profession, with potential for

national distinction, effectiveness in areas of position responsibilities, and satisfactory institutional service.” The Faculty Handbook notes that a “key tool” in the promotion and tenure review process is the position responsibility statement (“PRS”).

Meltzer’s PRS states:

- 1) You will carry out a research and scholarship program that is nationally competitive and recognized. This includes creation of the conceptual framework for the research, raising funding to support the work, and reporting the results in major journals;
- 2) you will perform classroom and laboratory teaching at a level consistent with Department norms established by peer and student evaluations; and
- 3) you will contribute to the outreach and service aspects of department activity.

Under the Blue Document, a two-thirds vote of those eligible is required for recommendation of promotion. Meltzer sought early promotion in his fifth year and was denied. In Meltzer’s sixth year—academic year 2003-04—he was considered for promotion to associate professor with tenure. Twenty-nine faculty members voted on Meltzer’s promotion: twelve voted for and seventeen voted against. A Department promotion and tenure committee recommended denial. The Department chair agreed with the committee’s recommendation.

Pursuant to University procedures, Meltzer appealed and was unsuccessful at the following levels: the College of Liberal Arts and Sciences’ Tenure and Promotion Committee and its Dean; the University Provost; and the University President.

The President noted,

A grant of lifetime tenure is a privilege, not a right. The decision is weighty for both the candidate and the institution. It requires careful consideration together with application of judgment and

discretion. It requires a holistic review of the candidate's record. In the primary area of emphasis, it is not a determination of the minimum necessary to be competent. University standards require a showing of "excellence in scholarship," together with "an assessment that the candidate has made contributions of appropriate magnitude and quality and has a high likelihood of sustained contributions to the field, or profession and to the University." *Faculty Handbook*, § 5.2.3.2. Our policies do not tie the grant of tenure to a defined set of results. Nowhere do our policies indicate that favorable evaluations, external reviews, funding levels or a defined number of scholarly works will assure success.

The President acknowledged that Meltzer's was a "difficult case" because Meltzer had "achieved a great deal." The President reviewed Meltzer's claims (1) that improper procedures were followed; (2) that the decision was arbitrary and capricious, as well as a newly raised claim; and (3) that a significant factor—invited presentations—was ignored. The President found no grounds to overturn the decision to deny tenure. The Regents concurred.

Meltzer then requested that an independent faculty senate committee review the denial of his application for promotion. An Ad Hoc Investigation Committee ("AIC") of three was appointed to investigate. The AIC concluded that Meltzer's "appointment letter outlines not only the department's expectations of him but also provides a framework for his promotion and tenure evaluation." It also expressed concern with his "extremely generic" PRS and found it "extremely unfortunate that these two documents were not consistent with each other." The AIC expressed the opinion that use of colloquia without explicitly identifying their use in the Blue Document was "arbitrary and capricious." It was the opinion of the AIC that external review letters, which were unanimously in favor of Meltzer's promotion, were discounted and concluded that "discounting of the external

letters was an arbitrary decision” and violated the Faculty Handbook. The AIC concluded, however, that Meltzer’s claim that the effectiveness of his teaching activities was based on additional expectations not found in the Handbook, did not harm Meltzer. It also rejected his claim that his record of invited lectures was ignored. As a result of its findings, the AIC recommended that the decision to deny tenure be reversed. It also recommended that the Department revisit how it structures its PRS for their faculty.

Responses were received from the Department committee chair and others noting, among other things, that the appointment letter included the Department’s promotion and tenure document. The faculty senate committee voted on the AIC’s recommendations: seven of twelve committee members voted to reverse the denial of tenure. The Department chair disagreed with this committee’s recommendation and affirmed his original decision to deny tenure.

Meltzer appealed a second time to the President and, finally, again to the Regents. Meltzer then sought judicial review in the district court.

The district court addressed the claims made by Meltzer and reviewed the appeal process, noting the reasons provided at the various levels of appeal for the denial of tenure. The court found that Meltzer had waived his claims with respect to Iowa Code section 17A.19(10) (2005) subsections (a) (unconstitutional), (b) (beyond the authority delegated to agency), (e) (improperly constituted body of decision makers), (f) (decision not supported by substantial evidence), (l) (irrational, illogical, or wholly unjustifiable interpretation of law), and (m) (irrational, illogical, or wholly unjustifiable application of fact to law).

The court found Meltzer had preserved his claim that the denial of tenure was arbitrary and capricious. Iowa Code § 17A.19(10)(n). The district court wrote:

University decision-makers were concerned about the lack of impact of Meltzer's scholarship: low number of publications, low number of citations to his publications, lack of evidence that his curriculum had been adopted, and a poorly received colloquium. Meltzer claims: a) that he had satisfied the criteria *or* b) the criteria should not have been considered *or* c) the University ignored other relevant criteria. The University did not act in an arbitrary and capricious manner . . . .

The court concluded that the "University considered the relevant facts and adequate evidence demonstrates that Meltzer did not satisfy the high standard required for promotion to Associate Professor with tenure."

With regard to Meltzer's claims of procedural violations, the district court found that the offer letter did not set forth the promotion and tenure criteria. The criteria were found in the Department's policy and the Faculty Handbook. In a well-written and reasoned decision, the court enumerated Meltzer's various claims and concluded he had failed to show that the University violated any rule or procedure. The court noted that even if there were such a violation, Meltzer had failed to prove any resulting prejudice. The district court affirmed the decision to deny Meltzer promotion with tenure.

Meltzer now appeals.

## **II. Scope and Standard of Review.**

Tenure entitles a faculty member to continuous, lifetime appointment with an academic department. The decision whether to grant tenure and the criteria used to guide that decision are within the statutory mandate of the agency and

are peculiarly within its discretion and area of expertise. *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992). Thus, we begin our analysis being mindful of the discretion owed to the agency here:

We are mindful of the singular nature of academic decision-making, and we lack the expertise to evaluate tenure decisions or to pass on the merits of a candidate's scholarship. We have said that "[w]hile Title VII unquestionably applies to tenure decisions, judicial review of such decisions is limited to whether the tenure decision was based on a prohibited factor." *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 976 (8th Cir.1991). The Supreme Court has made it clear that "[w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, [513,] 88 L. Ed. 2d 523, [532] (1985) (footnote omitted); see also *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90, 98 S. Ct. 948, [958,] 55 L. Ed. 2d 124, [135] (1978).

*Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 879 (8th Cir. 2005).

The exclusive remedy for judicial review of a decision concerning tenure is under Iowa Code section 17A.19(1). *Genetzky*, 480 N.W.2d at 861. The district court is to apply the statutory standards of sections 17A.19(10) and (11). Under section 17A.19(10)(n), agency action can be reversed or modified if it was "[o]therwise unreasonable, arbitrary, capricious or an abuse of discretion."

A decision is "arbitrary" or "capricious" when it is made without regard to the law or underlying facts. *Norland v. Iowa Dep't of Job Serv.*, 412 N.W.2d 904, 912 (Iowa 1987). A decision is "unreasonable" if it is against reason and evidence "as to which there is no room for difference of opinion among reasonable minds." *Id.*



### III. Arbitrary and Capricious Claims.

We have thoroughly reviewed the record related to Meltzer's application for promotion. We note that the closeness of the question has been acknowledged throughout this process. Had the Department vote been in favor of promotion and the promotion nonetheless denied, we would be more inclined to find the denial arbitrary and capricious. That, however, is not the case. Meltzer did not get a majority vote for promotion within the Department, let alone the required two-thirds. The faculty senate committee voted seven in favor of promotion and five against. The importance of various aspects of "scholarship" has been debated and discussed at every level of decision making. Meltzer was offered ample opportunity to present his position that his scholarship achieved the level of "excellence" required. It is precisely for the reason that reasonable minds can differ on such questions, that the court is to give deference to the decision makers. As one court has stated,

The subjective decision process by which promotion and tenure are awarded or denied must be left to the professional judgment of those presumed to possess a special competency in making the evaluations, unless shown to be arbitrary and capricious or clearly wrong.

.....

Juries and judges lack the credentials and the knowledge to determine whether a group of scholars should be required to accept into their midst for life a member of the academic community.

*Karle v. Bd. of Trustees/Marshall Univ.*, 575 S.E.2d 267, 271 (W. Va. 2002)

(internal citations and quotations omitted).

We disagree with Meltzer's characterization that the record is infected with "falsified data." While Meltzer can reasonably disagree with the conclusions

reached by the University, the record does not indicate the decision to deny promotion was unreasonable, arbitrary and capricious, or an abuse of discretion.

#### **IV. Procedural Irregularities.**

Meltzer contends that the Department failed to: “tie its tenure review to the Appointment Letter”; “tie the tenure review to the standards of the PRS”; provide him with written notice that the colloquium would be used as a criterion; properly evaluate the effectiveness of his teaching; and give due consideration to external peer reviewers and his record of invited talks. He asserts he was prejudicially barred from correcting misstatements in his dossier.

We first note that Meltzer took every opportunity to provide additional information to the numerous decision-makers throughout the review process. At every level of review, Meltzer received a substantive response to his additional information.

Meltzer’s appointment letter set forth expectations of the Department, but did not provide the basis for promotion. The Department’s “Blue Document” and the faculty handbook governed the promotion process. That promotion process is admittedly subjective in many respects. The importance of various factors in determining “excellence in scholarship” is beyond the province of the court. Our role is to ensure that the process was procedurally fair. We, like the district court, find no procedural errors that prejudiced Meltzer’s application for promotion.

#### **V. Failure of District Court to Take Additional Evidence.**

In reviews of “other agency action,” the taking of additional evidence is within the discretion of a district court. *Sindlinger v. Iowa State Bd. of Regents*, 503 N.W.2d 287, 390 (Iowa 1993). Pursuant to Iowa Code section 17A.19(7),

the court “may hear and consider such evidence it deems appropriate.” However additional evidence “is for the limited purpose of highlighting what actually occurred at the agency level in order to facilitate the court’s search for errors of law or unreasonable, arbitrary, or capricious action.” *Sindlinger*, 503 N.W.2d at 390.

Here, the district court concluded that the record was “adequate to make clear the claims and agency conclusions and the bases serving as the foundation of each.” The court found that Meltzer’s proffered evidence was “either redundant of that which is already in the record or evidence that goes beyond ‘highlighting’ and is wholly new evidence.” We agree. The district court did not abuse its discretion in refusing to hear additional evidence.

#### **VI. Conclusion.**

We acknowledge that tenure decisions are weighty and carry high stakes for an applicant. Having invested six years with the University, Meltzer was disappointed by the denial of his promotion to associate professor with tenure. While that decision was not reached on a unanimous vote, the grounds upon which it was based were not unreasonable, arbitrary, capricious, or an abuse of discretion. Nor was the process affected by prejudicial procedural violations. Meltzer asserts he has satisfied all contractual obligations, thus requiring promotion to the tenured position. However, tenure is not a matter of right. The decision is within the discretion of the agency and we find no abuse of that discretion. Finally, the district court did not err in not allowing Meltzer to present additional evidence. We therefore affirm.

**AFFIRMED.**