VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 02-1
MARY LEE McISAAC	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 7, 2002, Mary Lee McIsaac ("Grievant") filed an appeal through her attorney, Edwin Hobson, contending that the University of Vermont ("Employer") violated various provisions of the Officers' Handbook of the University, the Vermont Fair Employment Practices Act, the Vermont Parental and Family Leave Act, and standards of good faith and fair dealing in denying tenure to Grievant as Associate Professor of Asian History at the University. Grievant requested as a remedy that the Labor Relations Board grant her a supervised reconsideration of her tenure case under appropriate procedures that include disqualification of those who have acted in bad faith, any lost pay and benefits, and attorney's fees and costs.

Hearings were held before Labor Relations Board Members Richard Park, Chairperson; Edward Zuccaro and Joan Wilson on February 5, 6, 19 and 20, 2003, in the Board hearing room in Montpelier. Attorney Hobson represented Grievant. Attorney Jeffrey Nolan represented the Employer.

Grievant filed a motion on February 5, 2003, the first hearing day, to amend her grievance in respect to her prayer for relief. Grievant requested that the Board grant Grievant: a) reinstatement and tenure, or a supervised reinstatement and reconsideration of her tenure case under appropriate procedures that include disqualification of those who have acted in bad faith or are unable to review the matter without prejudice or bias, or in

the alternative award b) all lost pay and benefits; c) such other relief as this Board may deem just; and d) interest, attorney's fees and costs. On February 14, 2003, the Board issued a Memorandum and Order granting Grievant's motion to amend, and deciding to bifurcate the proceeding by first having a hearing on, and deciding, the merits of the grievance, and then having a subsequent proceeding on the appropriate remedy to be granted if the Board sustains the grievance. 26 VLRB 1.

Grievant and the Employer filed post-hearing briefs on March 10 and 11, 2003, respectively.

FINDINGS OF FACT

1. Grievant was a faculty member in the History Department of the College of Arts and Sciences from the fall of 1994 through the end of the 2000-2001 academic year.

2. The Officers' Handbook ("Officers' Handbook") of the University and the Guidelines for Reappointment, Promotion and Tenure of the History Department ("RPT Guidelines") constitute rules and regulations setting forth the standards governing this tenure case. The Officers' Handbook establishes general criteria, and the RPT Guidelines provide more specific standards. There are three areas examined under these rules and regulations assessing a faculty member's qualifications for tenure: 1) teaching, 2) research, scholarship and creative work (collectively "scholarship"), and 3) service. The Employer determined that Grievant met the standards for teaching and service, but did not meet the standards for scholarship.

3. The Officers' Handbook states in pertinent part at all times relevant as follows:

…

040.2 . . . The University . . . is committed to a policy of equal employment opportunity and to a program of affirmative action in order to fulfill that policy. The University . . . will not unlawfully discriminate against . . . employees in employment matters on the basis of unlawful criteria, such as . . . sex . . .

205.3 The initial appointments of full-time Officers of Instruction with the title of instructor, assistant professor, or associate professor are probationary in nature. The performance of an Officer of Instruction should be reviewed annually during this period. The record of performance and the judgment of potential for future accomplishment form a basis for decisions concerning renewal of the appointment or the eventual decision to grant tenure or not.

…

206. Tenure.

206.1 Tenure represents the commitment of the University to the continued appointment of an Officer of Instruction until retirement for age or prolonged physical or mental disability, subject to dismissal for cause or unavoidable termination on account of financial exigency or elimination of an institutional program as set forth in Section 224.

…

206.3 Officers of Instruction who meet the criteria set forth in Section 223 as appropriate to the conditions described in Sections 207 and 208 may be granted tenure by the President on the authority of the Board of Trustees. Such action shall be taken by the President upon recommendation of the Provost made after considering the recommendations of the appropriate chairperson, Faculty Standards Committee, and dean, and the Faculty Affairs Committee. The procedure to be followed with respect to recommendations for tenure shall be as set forth in Section 231.

…

223. *Criteria in Appointment, Reappointment, Promotion and Tenure Decisions*.

223.1 *General Considerations.* In considering candidates for appointment, reappointment, promotion, and/or tenure, each candidate will be judged with respect to the proposed rank, status, and duties, considering his or her record of performance in teaching, research or other creative work, and service. The following subsections provide a framework of criteria and standards of evaluation within which judgments are made on the present achievements and future potential of the candidate.

In evaluating the candidate's qualifications within these areas, reasonable flexibility shall be exercised, balancing, where the case requires, heavier

assignments and responsibilities in one area against lighter assignments and responsibilities in another. Each candidate is expected to be engaged in a program of work which is sound and productive and which can be expected to continue to develop throughout his or her professional career. *In all instances, excellent intellectual attainment, in accordance with the criteria set forth below, is the crucial qualification for appointment or promotion to a tenured position.* Insistence upon this standard for continuing members of the faculty is necessary for maintenance of quality of the University as an institution dedicated to the discovery, preservation, and transmission of knowledge.

…

223.3 *Research, Scholarship, and Creative Work.* There must be evidence that the candidate is continuously and effectively engaged in scholarly activity of high quality and significance. Account shall be taken of the type and quality of creative activity normally expected in the candidate's field. Documented evidence must be provided of genuine scholarship, productivity and creativity in the form of such things as published research or recognized artistic production, or engineering designs, etc.

Teaching and scholarship go hand in hand. An institution of recognized quality must foster an environment which promotes scholarship and teaching in a mutually supportive relationship.

Publication of research and other creative accomplishment must be evaluated, not merely enumerated.

Elaboration: Work in progress should be assessed whenever possible. When published work in joint authorship (or other product of joint effort) is considered, it is the responsibility of the department to establish as clearly as possible the role of the candidate in the joint effort.

Appraisals of publication or other works in the scholarly and critical literature may provide important testimony.

If the record of the candidate includes journal articles, it is the responsibility of the chairperson to communicate clear information concerning the publication and review standards of the journal and its standing in the discipline.

If the record of the candidate includes publication of a monograph or monographs, it is the responsibility of the chairperson to communicate clear information about the reviewing policies of the press and to report reviews published subsequent to the appearance of the work.

In cases involving tenure or promotion to associate professor or professor, the quality and significance of the work must be evaluated by the

department. In addition, the department must solicit evaluations from acknowledged scholars or practitioners at other institutions.

If the record of the candidate includes presentations, invited and/or subject to peer evaluation, it is the responsibility of the chairperson to communicate clear information concerning the standards involved.

In certain disciplines in which competitive grant and contract support is available, a record of continuing support may be an indication of recognized research competence and productivity.

Textbooks, reports, and similar products connected with teaching or public service should be considered creative work insofar as they present new ideas or incorporate the candidate's scholarly research.

In certain fields such as art, music, literature, and theatre, distinguished production may be evidence of scholarship in much the same way as analytical research is in other disciplines. In evaluating artistic creativity, an attempt should be made to define the candidate's merit in the light of such criteria as originality, scope, and depth of creative expression.

In some instances, professional activities, such as service as editor of a professional journal or service as a major officer of a professional organization, may be considered as recognition of scholarly achievement.

…

231. *Procedure in Matters of Reappointment, Promotion, and Tenure.*

231.1 Although the faculty member bears the responsibility of demonstrating his or her achievement and potential in matters of reappointment, promotion, and/or tenure, administrative officers have a responsibility to contribute to the professional development of the faculty member by communicating to that person their assessments of performance and progress.

In matters of reappointment, promotion, and tenure, chairpersons, deans, or the Provost may either provide a positive or negative recommendation. If the recommendation is negative the faculty member has the option to appeal to the next administrative level.

231.2 *The Standard Consideration Procedure.*

Department chairpersons shall regularly review the performance of faculty members of their departments and may recommend reappointment, promotion or tenure to the dean. Consideration for promotion and/or tenure in cases where such consideration is not otherwise mandated is

required upon request of the individual faculty member. In considering whether to recommend reappointment, promotion, and/or tenure, the chairperson shall request the advice of all tenured and tenure-track faculty members of the department or school. The advice of other faculty members may be requested according to a clear and consistently applied policy developed by the department or school. In making a recommendation, the chairperson shall report the extent of such consultation and the nature of the advice received. The chairperson's recommendation should be separate from the recorded opinion of the faculty.

If a positive recommendation for reappointment, promotion, or tenure is made by the chairperson, it is forwarded to the dean. After considering the recorded opinion of the Faculty Standards Committee of the college or school, the dean, if he or she concurs with the chairperson's recommendation, shall forward it to the Provost with the following exceptions. In the first reappointment of an Instructor, Assistant Professor or Associate Professor . . . the dean will reach and communicate a decision after considering the recorded opinion of the Faculty Standards Committee of the college or school. In all other cases the Provost shall submit the recommendation of the dean and appropriate documentation to the Senate Faculty Affairs Committee for review and after receiving its report, if he or she concurs with the recommendation, shall forward it to the President for consideration.

231.3 *Negative Recommendations and Appeals.*

Whenever a negative decision is rendered at any stage on reappointment, promotion, or tenure, whether in the first instance or on appeal, a written explanation of the reasons will be provided to the faculty member by the appropriate officer.

Following a negative recommendation a faculty member may opt to appeal . . .

231.32 *Appeal; the Dean*

In considering an appeal of a chairperson's negative recommendation, the dean shall seek the advice of the college or school Faculty Standards Committee. The dean may opt to send the case back to the department or school for reconsideration . . .

231.33 *Appeal; the Provost*

A faculty member is entitled to appeal a negative decision by a dean in writing to the Provost . . . stating why he or she believes that the decision should not be accepted. In considering an appeal, the Provost shall seek the advice of the Faculty Affairs Committee.

The Provost may opt to send the case back to the department or school for reconsideration, in which case the Provost shall notify the faculty member and the Dean . . .

231.34 *Appeal; the President*

A faculty member is entitled to appeal a negative decision by the Provost in writing to the President . . . stating why he or she believes that the decision should not be accepted . . .

231.4 When the normal appeal processes to the dean, the Provost, and the President are exhausted, the faculty member may petition the Grievance Committee (Section 270) provided the appeal is based on one or more of the categories outlined in Subsection 270.5.
…

270.4 *Complaints*. Within the framework of this grievance procedure, a complaint is a claim based upon an event or condition which affects the welfare and/or terms and conditions of employment of a faculty member or group of faculty members. When a complaint is accepted by the Grievance Committee as falling within its jurisdiction, it is designated as a "grievance."

270.5 *Jurisdiction of Grievance Committee.* Whatever the nature of the event occasioning a complaint, the Grievance Committee shall have jurisdiction over all and only cases which fall under one or more of the following categories:

> a. Grievances in which faculty members allege a violation of procedural rights. This category includes cases in which appropriate procedures were not followed, and cases in which existing procedures were inadequate or inequitable.
>
> b. Grievances in which faculty members allege that a decision had no rational basis or was the result of an abuse of authority.
>
> c. Grievances in which faculty members allege a violation of fundamental rights. This category includes violation of Constitutional and other extra-University statutory and administrative rights including but not limited to violations of academic freedom and freedom from discrimination on the basis of

race, sex, religion, national origin, age, disability, color, sexual orientation, or Vietnam Veteran status.

…
270.8 *Decisions*

a. The Grievance Committee shall submit its findings and recommendations in writing to the President within 15 days of the hearing….

b. The President shall, within 15 days, notify the Grievance Committee in writing of his/her intention with regard to its findings and recommendations and a schedule for implementation as the case may require.

c. If the President does not agree with the findings, and/or recommendations, or agrees with them but takes no corrective action, the Grievance Committee may request that the President reconsider his/her decision or take corrective action.
. . .
(Grievant's Exhibits 1, 75)

4. The History Department RPT Guidelines, adopted in 1992, provide in pertinent part as follows:

Members of the Department of History take as one of their most important responsibilities the task of carrying out the process of reappointing, promoting and granting tenure to its members. The purpose of these guidelines is to contribute to the fairness and effectiveness of this process by clarifying standards for promotion, reappointment and tenure and making them known to members of the department, members of college and university standards committees and administrators.
…
In all its deliberations, the judgment of the faculty should be guided by its primary mission of achieving excellence in teaching and research. The candidate's ability to discover and communicate knowledge, therefore, should be of primary importance in all decisions relating to retention, promotion and tenure. For the granting of tenure and promotion to associate and full professor, the department's policy is to demand demonstrable achievement of excellence in teaching and research.

…
<u>Research</u>
1. General criteria: Judgments in this area should be based on the quality of research, and not solely on quantity. Although the department

recognizes that historians express scholarship in a number of useful and valuable ways, it affirms the importance of professional publication based on peer review.

2. Indicators of performance include:

a. Judgments of departmental colleagues.

b. Judgments of colleagues and experts in the field outside the department and university
   1) Letters of reference
   2) Reviews of books and articles
   3) Citation of the person's work in the scholarly literature.

c. Published works, including books, textbooks, articles in journals and books, chapters in books and book reviews.

d. Editorial work on scholarly journals, anthologies and conference proceedings.

e. Presentations at professional meetings and conferences.

f. Research grants: Although research grants are not essential to scholarly productivity in History, an individual's success in obtaining grants, thereby increasing the probability of scholarly achievement, may be a consideration.

g. Awards, honors and other recognition of contributions in the area of scholarship.

h. Refereeing scholarly articles and books.

…

3. Standards for specific evaluations:

…

c. Review for Tenure: The candidate's record should clearly demonstrate an ability to carry on successful historical research of high quality. The publication or acceptance of a scholarly book would be impressive evidence of such ability, but this is not a prerequisite for the granting of tenure. A record consisting of published articles in scholarly journals and presentations at conferences and meetings may also provide sufficient indication of scholarly ability. In any case, the candidate must be able to

> show that colleagues in the discipline recognize the importance, quality and value of his or her research. The department will solicit letters of evaluation from outside colleagues about the candidate's research.
>
> …
>
> (Grievant's Exhibit 2)

5. The Faculty Affairs Committee has issued Guidelines for Preparation and Evaluation of Reappointment, Promotion and Tenure Dossiers. It states in part as follows:

> Before undergoing a reappointment, promotion, or tenure ("RPT") action at UVM, it may be useful to understand the general sequence of events involved in such decisions.
>
> A. Creation of Dossiers: The dossier for RPT actions (commonly called "Green Sheets" because of the color of the headings on the stationery) is typically created primarily by the candidate and the candidate's Chair. Often the Chair will appoint an RPT committee charged with assembling the major components of the documentation. Some departments have a standing RPT committee charged with assembling the major components of the documentation.
>
> The candidate's primary responsibilities are:
>
> > 1) to provide a self-evaluation, describing his/her own performance in scholarship, teaching, and service (or whichever combination of those duties is consistent with the candidate's job responsibilities), and
> >
> > 2) to provide a clear and up-to-date *curriculum vitae (c.v.).*
>
> The Chair's duties are more extensive, but also may be broken down into two basic categories:
>
> > 1) The Chair is responsible for the preparation of an evaluative narrative statement containing an objective assessment of the candidate's performance in scholarship, teaching, and service (or whichever combination of those duties is consistent with the candidate's job responsibilities). The Chair must also append thorough objective documentation to substantiate the assessment provided in the Chair's written evaluation.
> >
> > 2) The Chair is required to solicit and present peer reviews of the candidate's work. On a departmental level, the Chair must solicit input from all departmental faculty and provide an explanation of

> the advice received and the process by which it was solicited. When external evaluator letters are required, the Chair must solicit those evaluations of the candidate's achievements from qualified "arm's length" evaluators (usually a balanced list chosen from among a list of names suggested by the candidate and a list suggested by the Chair or relevant departmental committee). The Chair should provide a clear explanation of the professional qualifications of the evaluators and the process by which they were selected.
> …
> (Grievant's Exhibit 3, pages 39, 42)

6. The first review ("First Review") of a University faculty member on a tenure track is in the second year of tenure track employment. It begins with departmental review and then concludes with review by the Dean. The second review ("Second Review") of a tenure track faculty member is during the fourth year of employment. The Second Review begins with departmental review, and proceeds to review by the Dean with the advice of the College Faculty Standards Committee. Further review is then done by the Provost, who receives advice from the Senate Faculty Affairs Committee. The case is then forwarded to the President for final decision. Tenure track faculty ordinarily are reviewed for tenure during their sixth year. The same review process is used for a tenure review as a Second Review.

7. At the end of the sixth year, a tenure track faculty member ordinarily must have tenure, or their employment with the University is ended.

8. Grievant has a B.A. (1984) from UVM, an M.A. (1988) from UVM in History, and a Ph.D. (1994) from Yale University in Chinese History. She joined the History Department at the University of Vermont in 1994 as a tenure-track assistant professor to teach East Asian history, focusing on China and Japan. Grievant taught for one semester at Dartmouth the spring before she came to UVM.

9. Professor Patrick Hutton was Chair of the History Department when Grievant arrived at UVM and, except for one year (1995-1996) when Professor Al Andrea was Chair, was the Chair the entire time before Professor Youngblood took over in the fall of 1999. Professor Hutton spoke with Grievant on many occasions about the requirements for tenure. They had conversations about publication strategies. They discussed Grievant preparing articles that later would be incorporated into a book. Professor Hutton told Grievant that, by the time she was reviewed for tenure, she had to have a book manuscript that could be published. Professor Hutton did not advise Grievant that she needed to have a book accepted for publication because publication of a book is not a prerequisite for tenure under the History Department RPT Guidelines. Grievant followed Professor Hutton's advice, and worked on both a book and articles.

10. The book manuscript worked on by Grievant involved a social and cultural history of workers in the Nationalist Capital of Chongqing during World War II.

11. Modern Chinese history involves special problems. It takes years to learn Chinese. There are problems of travel, time and resources which are greater than a field closer to home, such as United States History or even European history. Most of Grievant's research is in Chinese. Her sources exist in several different libraries and archives, mostly in China, but also at Harvard University. She also uses some English language sources written by journalists, military advisors, and diplomats who were in Chongqing during the war. Doing research in China is complicated. First, a researcher needs to have an introduction requiring reliance on contacts to get letters of introduction to libraries and archives. Once access is gained to libraries and archives, it takes a long time to locate sources because catalogues are not organized and are handwritten.

Archivists do not always provide all materials requested. There are secret catalogues in back rooms that are difficult to gain access to for research. Grievant did oral interviews with people who had lived in Chongqing during the war. Grievant had a research assistant to help her with her research in China (Employer's Exhibit DD).

12. The First Review of Grievant took place during her second year of employment in the spring of 1996 when Professor Andrea was interim Chair of the History Department. The History Department unanimously recommended the reappointment of Grievant. The College Faculty Standards Committee unanimously recommended the reappointment of Grievant, but stated: "The committee is concerned about the apparent lack of scholarly projects as Professor McIsaac's C.V. does not indicate any work in progress." Joan Smith, Dean of the College of Arts and Sciences, approved Grievant's reappointment. In discussing Grievant's scholarship in her written comments on the reappointment, Dean Smith stated:

> Professor McIsaac should indeed continue to use her dissertation to form a substantial body of published work. However, in my view, it would be a mistake to publish her thesis research as both articles and as a book. She should decide which is best and proceed accordingly. The reason for this advice is that I believe in order to win a promotion and a permanent position at the University, faculty must demonstrate that their scholarly work is moving beyond the thesis. If too much time is spent in publishing both articles and a book drawn from the thesis there is little left over to demonstrate future promise which, in my view, is the most important consideration for promotion and tenure. (Grievant's Exhibit 67, pages 945-956)

13. By memorandum dated May 8, 1996, Dean Smith informed Grievant that she had been approved for reappointment, and stated that the "complete set of supporting materials will be returned to your department chairperson" (Grievant's Exhibit 67, pages 957).

14. Although the Dean's First Review comments were written in May 1996, Grievant did not see them until late October 1997, almost a year and a half after they were written. The Dean returned the materials to the History Department in a timely manner, but the History Department did not provide the Dean's comments to Grievant, and she did not know that such comments existed until October 1997. Grievant did not request to review the materials until September 1997. Grievant first learned of the existence of the Dean's First Review comments in September of 1997 in a workshop for those going through the review process. She then went back to the History Department and asked Professor Hutton, who had returned as Chair, if she could have the comments. She received a copy of the Dean's comments in late October 1997.

15. Grievant received a copy of the Dean's comments a few weeks before her Second Review was to begin during her fourth year of employment. By letter of October 28, 1997, to Professor Hutton, Grievant informed Professor Hutton that since the Dean's comments "contain substantial comments and suggestions which differ from those I have received from the department, I am extremely concerned that these comments have only just come into my hands." Grievant further stated: "I have been working on both articles and a book for the past two years. The articles have already been submitted to journals and volume editors, and the book is well underway. In other words, it is too late to follow the Dean's advice" (Grievant's Exhibit 65, page 942-43).

16. Grievant failed to indicate anything she would have done differently had she received the Dean's comments from the First Review in a timely manner.

17. By the fall of 1997, as she had been advised by Professor Hutton, Grievant was working on both articles and a book and giving conference presentations. She was

involved in editorial activities for a newsletter in Chinese urban history that she had founded with some other colleagues in her field. Professor Hutton was supportive of these activities.

18. In the curriculum vitae which Grievant submitted to be considered as part of the Second Review during her fourth year of employment, she listed an article entitled "The City as Nation: Creating a Wartime Capital in Chongqing" as "to be published in *Constructing the Modern in Chinese Cities, 1900-1945*." She also listed an article entitled "Righteous Fraternities and Honorable Men: Sworn Brotherhoods in Wartime Chongqing" as "submitted to *The American Historical Review*". She also listed three submissions she had made to a Chinese Urban History Newsletter that she produced (Grievant's Exhibit 74).

19. The History Department unanimously recommended the second reappointment of Grievant. The College Faculty Standards Committee recommended Grievant's reappointment. The committee concluded that Grievant's record was strong in the areas of teaching and service. In the area of scholarship, the Committee stated:

> In the area of scholarship the Committee found Professor McIsaac's record to be somewhat thin. She has one forthcoming chapter in a conference volume, and has published three reports in a newsletter which she co-founded and edits. She also has a bibliographic publication and has submitted one journal article for consideration. Professor McIsaac is working on a major reframing of her dissertation, with an eye to a book-length publication. And she has given papers at four conferences since last reappointment. The Committee recognizes the value of these projects and wishes to stress the importance of their coming to fruition by the time of consideration for tenure and promotion (Grievant's Exhibit 64, pages 914-927).

20. Dean Smith recommended the reappointment of Grievant. In the area of scholarship, Dean Smith made the following comments:

> McIsaac has taken on a formidable task. She is writing an account of one small, provincial city in China during the second World War. This work requires lengthy travels and strong familiarity with a language that is difficult for even the most serious scholar who is not a native speaker. McIsaac must compile her research records on site and under very difficult conditions. All of this does not absolve her of meeting the Department's and the University's standards for scholarly excellence. What it does do is caution patience.
>
> Professor McIsaac has before her a promising scholarly agenda which has already borne fruit in the form of articles submitted for publication and conference papers. The kind of insights she provides will clearly be significant additions to Chinese history. I am very pleased to note that she has had accepted for publication her paper "The City as Nation: Creating a Wartime Capital in Chongquing (sic)" in a forthcoming volume.
>
> While Professor McIsaac's work is promising indeed and one hopes for the immanent (sic) acceptance of the articles she has under submission, at the time of this second reappointment it is important to point out that she needs to have her research accepted for publication either in the book that is currently underway or in a series of articles if she is to be successful in obtaining promotion and tenure in her next personnel action. I would strongly advise that Professor McIsaac should concentrate on work which will be accepted for publication within the time between this action and the next, for, as the department's guidelines for reappointment, promotion and tenure note, for tenure:
>
>> The candidate's record should clearly demonstrate an ability to carry on successful historical research of high quality. The publication or acceptance of a scholarly book would be impressive evidence of such ability…A record consisting of published articles in scholarly journals and presentations at conferences may also provide sufficient indication of scholarly ability (Grievant's Exhibit 64, page 928).

21. Grievant received these comments from the Dean in January 1998. The Dean's description in her Second Review comments of Chongqing as a "small, provincial city in China during the second World War" is not an accurate description of the city. It was the wartime capital of China (Grievant's Exhibit 64, page 911).

22. In a memorandum dated May 15, 1998, Dean Smith informed Grievant that Provost Geoff Gamble had approved her reappointment. Dean Smith further stated:

> I am including remarks from the Faculty Affairs Committee for your information.

> The Faculty affairs Committee noted: "FAC strongly reiterates the dean's concerns regarding publication rate. For tenure, publication in journals of high quality which are widely read is needed." (Grievant's Exhibit 64, pages 9-10; Employer's Exhibit B)

23. The "City as Nation" article Grievant listed in her curriculum vitae was to be published in an anthology edited by noted scholar Joseph Esherick. The article evolved from a conference paper done by Grievant. Professor Esherick was confident the article would be published and provided assurances to Grievant so Grievant assumed it was going to be published at the time of her Second Review. The "City as Nation" article required additional work after the Second Review. University presses use scholars in the field to review articles and issue "readers' reports". Readers' reports came back in the spring of 1998. The readers had liked Grievant's article, but asked her to make some changes. In addition, the creation of maps for the article was time consuming. There were no maps in English of Chongqing and the press had wanted to include maps. So Grievant had to put together a map of Chongqing and work with a cartographer at the University of Kentucky. It required substantial work because most of the maps were in Chinese. The cartographer at Kentucky did not know Chinese or the different styles of romanizing Chinese. There was much translation required to do the maps. The article was finally accepted for publication by the University of Hawaii Press, as planned. The article was peer-reviewed (Grievant's Exhibit 13, pages 316-334; Employer's Exhibits S,T, U, V, W, X, Y, Z, AA,EE).

24. The American Historical Review article Grievant mentioned in her curriculum vitae had been submitted by her at the time of her fourth year review, but readers' reports had not yet been completed. Grievant submitted the article at the invitation of American Historical Review editors as part of a forum. The article evolved

from a paper presented by Grievant at a 1996 conference. Grievant substantially revised the paper to produce the article. The readers' reports were not completed until the spring of 1998. Readers sent the article back to Grievant for some revisions and resubmission. The American Historical Review accepted the article for publication in the fall of 1998, and it was published in the December 2000 issue of the Review. The American Historical Review is perhaps the premier publication in the history field (Grievant's Exhibits 14, pages 335-49; 64, page 918; Employer's Exhibit DD, CC, FF).

25. Annual reviews of faculty take place in March of each year. These reviews are for work accomplished the previous calendar year. The Chair makes an evaluative score for each of the three areas, and then discusses the evaluation with the Dean.

26. In the March 1998 review, Professor Hutton gave Grievant ratings of 5.0 for teaching, 4.7 for scholarship, and 4.7 for service for her work done during the 1997 calendar year. 5.0 is the highest rating. In his review, Professor Hutton stated: "She also has a book project underway, which she expects to complete this summer" (Grievant's Exhibit 63, page 909; Employer's Exhibit P).

27. Grievant became pregnant in the spring of 1998. Grievant requested a leave from her teaching duties for the spring 1999 semester. Professor Hutton approved of this request, and Dean Smith approved the leave in August of 1998 (Employer's Exhibit D).

28. Grievant's baby was due to be born near the end of the semester in late November 1998, about one week before classes ended. Grievant's plan was to teach three courses through the entire fall 1998 semester. She arranged her syllabi in such a way that she could finish all three classes that semester.

29. Grievant's baby was born two months prematurely on September 27, 1998. The baby was hospitalized for a month, sixteen days of which was spent in intensive care. Grievant stayed with the baby most of the day and night during the first two weeks after the baby's birth. Grievant went back to teaching her three courses two weeks after the baby's birth.

30. In addition to her request for a leave of teaching duties for the spring 1999 semester, Grievant requested a one-year extension of her tenure clock. The University has a policy of allowing women who have babies to receive a one-year extension of their probationary period. Dean Smith recommended the approval of Grievant's request, and the provost approved the request in November 1998. As a result, Grievant was scheduled to be reviewed for tenure during the 2000-2001 academic year, rather than 1999-2000 (Grievant's Exhibits 61, 62; Employer's Exhibit D).

31. Professor Hutton did the annual review of Grievant in March 1999 for the 1998 calendar year. Hutton gave Grievant ratings of 4.9 for teaching, 4.8 for scholarship, and 4.5 for service, for a cumulative total of 4.78. In reference to Grievant's scholarship, Professor Hutton stated:

> Lee also makes good progress with her scholarship. She had two articles accepted for publication this year, one in the prestigious American Historical Review. She submitted a 3rd article that was returned for revision but that she plans to resubmit. She is also working on a book dealing with social relationships in Chongqing, China during World War II. She hopes to complete her draft typescript by the end of the summer 1999. I have read some of her material in draft and believe it is quite promising.

Dean Smith gave Grievant ratings of 4.8 for scholarship, 4.9 for teaching, and 4.0 for service. She noted: "two articles accepted one in AHR! Excellent" (Employer's Exhibit O; Grievant's Exhibit 60, pages 905-906).

32. Grievant did not complete her book manuscript by the end of the summer of 1999. She did not realize the amount of work it takes to complete a book.

33. Professor Denise Youngblood succeeded Professor Hutton as History Department Chair in the fall of 1999. In March 2000, she did the annual review of Grievant. Chair Youngblood gave Grievant ratings of 4.8 for teaching, 4.8 for scholarship and 5.0 for service. In reference to Grievant's scholarship, Youngblood stated:

> Lee works slowly, in part explained by the difficulty of researching her field. (Fieldwork in China is difficult and expensive.) Motherhood has been, not surprisingly, another "impediment" to speedy progress in finishing her book, so the Dean's consideration in granting Lee another year on her tenure clock is much appreciated. Lee is close to finishing her book ms. and expects to submit it to Stanford University Press, a leading publisher in Chinese studies, by the end of May. An article long in press with the University of Hawaii Press has at last appeared, and she had another article accepted for publication (Employer's Exhibit N; Grievant's Exhibit 55, page 896).

34. These evaluation ratings Chair Youngblood gave Grievant were higher than initial ratings she gave her. Grievant became upset at the initial ratings and spoke to Chair Youngblood about the ratings and her salary, which she viewed as too low compared to other department faculty hired the same time as her. Chair Youngblood then changed the ratings she gave Grievant, and recommended to Dean Smith that Grievant receive a compensation adjustment to boost her salary (Employer's Exhibits G and N; Grievant's Exhibits 54, pages 895-96).

35. The practices followed by various academic departments at the University with respect to review of department faculty differ. In some departments, junior faculty (i.e. untenured) vote on whether to recommend candidates for tenure; in other departments, junior faculty do not vote. Tenured faculty vote in every department. In all departments, the department chairperson is ultimately responsible for recommending to

the dean whether tenure should be granted. In most cases, the chairperson's recommendation reflects the view of Department members. In a small percentage of cases, the chairperson's recommendation differs from the majority view. The congruence is highest when faculty voted for tenure. The determination whether a chairperson votes on tenure candidates is left to the department. It is not unusual for a chairperson to vote.

36. In addition to the responsibility of the department chairperson set forth in Findings of Fact Nos. 1 and 3, the chairperson's role in a department tenure review is to help the candidate make the application for tenure as good as possible and prepare the best case for tenure (Grievant's Exhibits 1, page 25-26; and 3, page 42).

37. There is no historical practice in the History Department of department chairs not voting in tenure cases. Professor James Overfield, department chair during the late 1980's and early 1990's, voted in tenure cases. Other department chairs also have voted.

38. During Professor Hutton's tenure as Department Chairperson from 1992-1999 (except for the 1995-96 academic year), the History Department had a committee for tenure and promotion cases to assist the chair in compiling a dossier on the candidate. The practice of having a committee originated in the early 1980's when the review process became more complex and demanding, and the department chairperson sought assistance from colleagues to prepare materials. The use of such committees is not mandated by the University. There were three persons on the subcommittee, each of whom took responsibility for gathering and assembling information on the candidate in one of the three areas in which candidates were evaluated (i.e. teaching, scholarship, service). The committee prepared a report on the candidate, which they presented to

department members. A department meeting was subsequently held in which department members discussed the committee report and the qualifications of the tenure candidate and provided input and advice to the chairperson with respect to his recommendation on tenure. Sometimes the committee made recommendations whether the candidate should be granted tenure; at other times the committee did not make a recommendation. Usually the committee would start the department meeting with a brief summary of the case. The committee did not play the role of mentor to the tenure candidate.

39. During Professor Hutton's tenure as Department Chairperson, his recommendations in tenure cases often reflected the majority view of the department. During department meetings, before and during Professor Hutton's tenure, the department chair typically expressed views concerning the candidate's qualification for tenure.

40. In April 1999, on the recommendation of Professor Overfield, the department unanimously agreed to modify the nature of the committee in tenure reviews. Among the concerns Professor Overfield had with the committee structure was the hesitancy to bring up negative points on a candidate and that department members may be less inclined to thoroughly study the candidate's records themselves, thinking that the committee had already done the work for them. The committee was reduced in size from three to two members. The committee's responsibilities were reduced to fact-finding. The committee was just to gather information and make no recommendation. The committee's evaluative function was dropped in that it no longer provided a report (Grievant's Exhibit 59, page 904; Employer's Exhibit E).

41. In 1994, History Department Assistant Professor Abubaker Saad was reviewed for tenure. Professor Saad was from the Middle East with extensive diplomatic experience. He was a fine teacher with an exceptional service record, but had a weak scholarship record. He had not published anything. The department committee recommended that he be granted tenure. Department members voted 12-4 to recommend him for tenure. Professor Hutton sided with the majority, and recommended that he be granted tenure. The College Faculty Standards Committee split 2-2 on whether he should be granted tenure, and the Dean recommended that he not be granted tenure. Professor Saad was not granted tenure (Grievant's Exhibit 72, pages 1159-1199).

42. Denise Youngblood was appointed Assistant Professor in the History Department in 1988, and received tenure during the 1993-1994 academic year. Professor Youngblood had published a book in 1985 before she became a faculty member at the University. She published another book in 1992, and also published approximately six articles while she was at the University prior to her tenure review.

43. In the spring of 1996, History Department Assistant Professor Willi Coleman was reviewed for tenure. She had been appointed a faculty member that year. She had previously been a faculty member at California Polytechnic State University at San Luis Obispo in California, where she had been a tenured faculty member. The History Department personnel committee, the members of the History Department (by a vote of 9-4) and Interim Chair Al Andrea recommended that she be granted tenure. The Faculty Standards Committee unanimously recommended against tenure. Dean Smith recommended granting of tenure, and the provost approved tenure. At the time of tenure review, Professor Coleman had not published a book. She had published several articles

over a sustained period of time in journals respected by scholars in her field. She had published, or had accepted for publication, five articles, four short articles or encyclopedia entries, and a number of poems. While she was at the California university, Professor Coleman had a heavy teaching load of 12 courses per year, more than twice her load at UVM (Grievant's Exhibit 71, pages 1099-1158).

44. Dona Brown was appointed Assistant Professor in the History Department in the fall of 1994. She was reviewed for tenure during the 1999-2000 academic year. Professor Brown was unanimously recommended for tenure by the History Department and the Faculty Standards Committee, recommended by Dean Smith, and approved by the Provost. Professor Brown had completed most of the work on a book prior to coming to the University. The book was published in 1995. It was peer-reviewed with readers' comments. At the time of her tenure review, she had published two articles while at the University, one of which had been peer-reviewed. A peer-reviewed article is one that has been reviewed and approved by scholars in the field. She also had written encyclopedia articles, a book chapter, and recently had published an anthology which she compiled and edited and for which she wrote an introduction (Employer's Exhibit R).

45. History Department Assistant Professor Melanie Gustafson was reviewed for tenure during the 1999-2000 academic year. She had been teaching at the University since 1990, first in a non-tenure track position and then on a tenure track beginning in the fall of 1994. She had 8-9 years of teaching experience before beginning her probationary period at the University. Professor Gustafson had a book manuscript for which she had a contract with a publisher accepting it for publication when she was reviewed for tenure. She also had two published articles in refereed journals, meaning the articles had been

reviewed and approved by scholars in her field. She also had published one other article and had co-edited an anthology. The readers' reports for Professor Gustafson's book manuscript were included in her tenure dossier. The History Department and the Faculty Standards Committee unanimously recommended that Professor Gustafson be awarded tenure, Dean Smith and the Provost recommended tenure, and she received tenure (Grievant's Exhibit 70, pages 975-1098).

46. At a History Department meeting on February 7, 2000, there was discussion on changing procedures for tenure review which arose from problems with a tenure review of Assistant Professor Thomas Visser during the fall of 1999. No consensus was reached at that meeting on changes. Chair Youngblood prepared a draft of changes in procedures. Her draft did not discuss elimination of the two person tenure review committee of the department. Dean Smith recommended that Chair Youngblood's proposed changes not be implemented at that time. Chair Youngblood did not circulate her draft to Department members. At a February 28, 2000, department meeting, Chair Youngblood indicated that the draft procedures she had prepared would not be implemented for the upcoming academic year (Grievant's Exhibits 11, pages 207-08; 56 and 57, pages 897-900).

47. Grievant had met with the editor at Stanford University Press in March 2000. At that meeting, the editor indicated strong interest in Grievant's book manuscript and told her that she would send it out to readers after she received it. She said that, unless the reader's reports came back saying that Grievant was "an idiot", Stanford would publish her book. Shortly after this meeting, Grievant informed Chair Youngblood that her discussion with the Stanford editor was favorable on publication of her book.

48. Grievant assumed that a two-person department committee would be appointed by Chair Youngblood in the spring of 2000 for her tenure review because the department had taken no action to abolish the committee. Chair Youngblood did not appoint a committee. The History Department did not vote on elimination of the committee. The main responsibility of the two person committee was to solicit letters from outside evaluators on the scholarship of a tenure candidate. This had been mishandled in one case the previous fall, and Chair Youngblood had been blamed for it. She decided to assume responsibility for the outside evaluation process. Grievant made no complaint when a committee was not appointed.

49. Part of the tenure review process at the University is to solicit evaluations of the tenure candidate's scholarship from scholars in the field outside of the University. In soliciting letters from outside evaluators, the intent is to have "arms-length" evaluations from persons whom are neither friends nor enemies of the candidate.

50. In April 2000, Chair Youngblood asked Grievant for a list of names of scholars in her field who might serve as outside evaluators of her scholarship for her tenure review. Grievant submitted the list to Chair Youngblood in early May 2000. Subsequently, on May 11, they had a conversation about the method of compiling and reviewing the list. This conversation took place in a parking lot as they walked to a meeting with Professor Brown. Grievant asked when she and Chair Youngblood would meet together to draw up the final list. Youngblood replied that there would be no such meeting, that Grievant's participation in the process had ended, and that the final list would be drawn up solely by Chair Youngblood. Grievant told Chair Youngblood that the process in some other departments was open, and allowed candidates for tenure to

have conversations with their Chairs to draw up the final list. She had just had conversations with candidates in two other departments who had just had such meetings with their chairs. Chair Youngblood became upset during this conversation. She left the meeting they subsequently attended quickly and did not return.

51. The following day, May 12, Grievant wrote an e-mail to Chair Youngblood stating she was "very sorry" for upsetting her with her questions. A series of e-mails ensued over the next several days in which Grievant and Chair Youngblood discussed the procedures that would be used for soliciting outside evaluators. In her May 12 e-mail response to Grievant's first-e-mail, Chair Youngblood stated that Grievant did "upset" her, and that Grievant had no basis for thinking that Chair Youngblood would treat her unfairly. Chair Youngblood further stated:

> Let me reiterate how your list will be generated: you have given me a list of names, so has Peter Seybolt (who most certainly has your best interest in mind). If a name appears on both your lists, I will definitely contact that person. The rest of the contacts will be drawn equally and randomly from both your lists. You may give me names of people you think should not be contacted, without any explanation, because they may appear on Peter's list (Grievant's Exhibit 11, pages 210-21).

52. Peter Seybolt was a History Department Professor specializing in China, who was a mentor to Grievant. In subsequent e-mail exchanges between Grievant and Chair Youngblood, they discussed changes in the procedures for soliciting outside evaluators recommended by Grievant. Chair Youngblood sent a copy of one of her responses to Dean Smith. In a May 17, 2000, e-mail response, Dean Smith stated: "Denise, I am so damn confused about what this woman wants my head is swimming." Dean Smith sent this response by mistake to Grievant rather than to Chair Youngblood (Grievant's Exhibit 11, pages 212-220).

53. When Grievant first saw Dean Smith's response, she was appalled that the Dean had sent it to her. When she later realized that she was not the intended recipient of the e-mail, she felt better that the Dean was not directly insulting her, but also worried that the Dean had become upset.

54. In a May 11, 2000 e-mail to Dean Smith regarding the Grievant's questions about outside evaluators, Chair Youngblood spoke about possibly resigning, described the two tenure candidates Visser and Grievant as "filled with self-pity," described their concerns as "crap," said that they were turning the evaluation process into a "farce" and described Grievant as hostile. In a May 12, 2000 e-mail to Dean Smith, Chair Youngblood said that Grievant had reduced her to tears, and her job as chair was accentuating her characteristic testiness. The Dean replied that she wanted Chair Youngblood to be among her "girl friends – to hell with the Dean's role" (Grievant's Exhibits 51 and 52, pages 892-93).

55. The dispute over the outside evaluators was ultimately resolved by following the procedures set forth by Youngblood above in Finding of Fact No. 51. Grievant went along with this procedure. Ultimately, all but two persons on both lists submitted by Grievant and Seybolt were contacted (Grievant's Exhibit 22, page 536; Employer's Exhibit I).

56. There is no evidence of any consistent practice used in prior tenure cases in the History Department. Chair Youngblood used the same process used in Grievant's case in the tenure review of Visser's case which occurred during the same period. There are no University or College-wide requirements as to the process by which external

evaluators are chosen beyond the Guidelines of the Faculty Affairs Committee set forth in Finding of Fact No. 5.

57. Prior to the dispute over external evaluators, Grievant and Chair Youngblood had a cordial working relationship. By early June, Grievant and Youngblood had re-established a cordial working relationship.

58. In early June 2000, Grievant finished her book manuscript. She submitted the manuscript to Stanford University Press for publication because she viewed it as the best journal in her field of Chinese history, and she wanted to publish the best book she could. She also submitted the manuscript to Harvard University Press (Grievant's Exhibit 17, pages 364-511).

59. Stanford University Press and Harvard University Press are among the leading university presses. They do not send out every manuscript they receive to reviewers. At Harvard University Press, the Grievant's manuscript was sent out only after a preliminary screening of her book prospectus. Many persons who submit manuscripts to Stanford University Press do not get responses. Stanford sent out Grievant's manuscript to reviewers.

60. Chair Youngblood communicated extensively with Grievant during the spring and summer of 2000 to ensure that the various components of her tenure dossier would be prepared appropriately and submitted in a timely manner (Employer's Exhibits H, J, K and L; Grievant's Exhibits 49, page 890; 50, page 89; 53, page 894).

61. In the curriculum vitae which Grievant submitted to be considered as part of her tenure review, she listed the "City of Nation" article as published by the University of Hawaii Press in 2000; and the American Historical Review article as "forthcoming

December 2000." She listed the two articles as "in refereed journals." She listed "The City in Modern China", which was co-authored with two other persons and was an introduction to a special issue of *Journal of Urban History*, as "forthcoming November 2000" and indicated she was a guest editor for the journal issue. She also listed an encyclopedia entry, a dictionary entry, and an article in a newsletter. These last four works were not peer-reviewed. She listed her book manuscript as a work in progress that was currently under review by Stanford University Press and Harvard University Press (Grievant's Exhibits 15, page 350; 16, page 360; 22, pages 581-82; 36, pages 864-65).

62. In self-evaluation statements, tenure candidates describe their accomplishments in teaching, scholarship and service. In an October 10, 2000 e-mail, Chair Youngblood advised Grievant that she did not think it was necessary for her to write her self-evaluation statement prior to the department meeting to discuss her case. Grievant took Youngblood's advice that preparing a self-evaluation statement for the department was not necessary as an indication that things were going well with the case, and that she could rely upon Chair Youngblood to present her case accurately. Chair Youngblood informed Grievant that a draft of her self-evaluation should be given to Chair Youngblood the last week of October, but that if Grievant wanted to circulate the self-evaluation in time for the department meeting she would have to submit it earlier (Grievant's Exhibits 41, page 882; 48, pages 889).

63. The evidence does not indicate there was a consistent practice of tenure candidates in the History Department submitting self-evaluation statements to department colleagues prior to the department meeting. In the fall of 2000, Professor Thomas Visser

decided to submit a self-evaluation statement to department members as part of his tenure review.

64. No department tenure review committee was appointed in Professor Visser's tenure case.

65. History Department Professor Melanie Gustafson was on sabbatical in Maine during the fall of 2000, and would not be attending the department meeting on Grievant's tenure candidacy. On October 19, 2000, Chair Youngblood sent Professor Gustafson an e-mail that stated, in respect to the Grievant's candidacy:

> I am informing the department of the dean's warnings that her scholarly production was insufficient and that she needs to have a book manuscript ACCEPTED by the time of this tenure review. As you will see from the second reader's report from the Stanford UP, which will arrive with the bulk of materials, this will not happen (Grievant's Exhibit 46, page 887).

66. Chair Youngblood's e-mail was inaccurate in stating that Dean Smith warned that Grievant needed to have a book manuscript accepted by the time of her tenure review. In the Second Review of Grievant, Dean Smith stated: "She needs to have her research accepted for publication either in the book that is currently underway or in a series of articles if she is to be successful in obtaining promotion and tenure in her next personnel action" (Grievant's Exhibit 64, page 910; Employer's Exhibit B).

67. Shortly after the October 19 e-mail, Chair Youngblood sent Professor Gustafson the tenure review materials for Grievant. Professor Gustafson subsequently voted against Grievant for tenure (Grievant's Exhibit 33, page 846-47).

68. Professor Brown did not attend the department meeting on October 30, 2000 relating to the Grievant's tenure application, as she was in Amherst, Massachusetts on a sabbatical. Prior to the meeting, Professor Brown spoke by telephone with Chair

Youngblood. Professor Brown felt that Chair Youngblood had an opinion and that Professor Brown knew what it was. She had a sense that the Chair was lobbying her for a negative vote on Grievant's application. Shortly after this conversation, Professor Brown received a packet of materials on Grievant's tenure candidacy including a curriculum vitae, articles, letters from outside evaluators, the readers' reports for the manuscript, and a summary of teaching evaluations. Professor Brown voted in favor of tenure (Grievant's Exhibit 33, pages 834-35).

69. The first reader's report from Stanford University Press on Grievant's book manuscript was received by Grievant in early September 2000. The reader recommended publication "only if revisions are made." He stated: "I strongly believe that this work is important enough as a contribution to knowledge to justify the amount of work needed to revise it properly." The second reader's report from Stanford was sent to Grievant on September 19, 2000. The second reader concluded that publication of the manuscript was not warranted in its present form, and stated: "With appropriate – and substantial – revision, the ms. might well reach the potential which is only partially achieved here, and I recommend that the author be encouraged to undertake such revision." In sending Grievant the second reader's report, the Executive Editor of Stanford University Press stated in her cover letter with respect to the two readers' reports:

> "Both reports see manuscript as very promising, but "not quite ready for prime time," as the second reader said to me. We are happy to hang in there while you revise, but I don't know if the tenure clock will permit you to take the time needed" (Grievant's Exhibit 22, pages 802-10).

70. The readers' reports from Harvard University Press were sent to Grievant on October 25, 2000. Both readers found merit in the manuscript, but called for extensive

revision of the work. The Executive Editor of the Press informed Grievant: "I think it would be best to offer you a provisional contract on the understanding that this does not constitute acceptance for publication but is simply an expression of interest in the work." This differed from the contract Professor Gustafson had entered into at the time of her tenure review in the fall of 1999 as her book manuscript had been accepted for publication under the contract (Grievant's Exhibits 22, pages 794-801; 70, pages 1091-96).

71. As a result of these communications from the two presses to which she had submitted her book manuscript, Grievant knew by late October that she would not receive a contract for her book accepting it for publication in time for her tenure review.

72. Chair Youngblood recommended to Grievant that she include the readers' reports in her tenure dossier. Grievant agreed and the reports were included. The submission of readers' reports as part of the tenure dossier was not unprecedented as of the time of the Grievant's tenure review, as they were also included in the tenure dossier of Professor Gustafson in 1999 (Grievant's Exhibit 70, pages 1066-81).

73. On October 24, 2000, Chair Youngblood sent an e-mail to Grievant concerning Grievant not having a book contract. Youngblood stated: "We'll need to strategize on how to present this to the dean" (Grievant's Exhibit 44, page 885).

74. The History Department meeting on Grievant's tenure application was held on October 30, 2000. Professor Hutton was unable to attend the meeting because his wife had a stroke the day before the meeting. Professor Seybolt was unable to attend the meeting because he was on a trip to China.

75. During the meeting, there was much discussion on whether Grievant's scholarship record was sufficient to grant her tenure. Opinions were expressed by faculty for and against granting Grievant tenure. Chair Youngblood expressed pessimism about tenure based on Grievant's scholarship record. Chair Youngblood stated "this is not a tenurable case." Chair Youngblood read comments from Professor Hutton in support of tenure. A letter from Professor Seybolt expressing support for Grievant's tenure was circulated during the meeting. At the end of the meeting, Chair Youngblood indicated that her recommendation on Grievant's tenure candidacy would reflect the views of the majority of the Department (Grievant's Exhibit 38, page 874).

76. Grievant was not aware prior to the department meeting that Chair Youngblood was against granting her tenure and would present views against tenure.

77. History department chairpersons historically expressed their views at department meetings concerning whether a faculty member should receive tenure. Prior to Chair Youngblood's stated opposition to Grievant's tenure, no department chairperson previously had spoken against other candidates for tenure. There is no History Department or University rule about whether chairs should state an opinion in department meetings on the merits of a tenure case. There is no College or University rule prohibiting chairs from voting on tenure cases in their department.

78. On October 30, 2000, the day of the department meeting on Grievant's tenure case, Chair Youngblood informed Grievant by e-mail that at the meeting she would see "how many people would find a copy of your (self-evaluation) statement helpful, and let you know." After the meeting, Chair Youngblood told Grievant there were three people who wanted to see her statement. Grievant gave Chair Youngblood a

draft of her self-evaluation statement on or about October 30. The statement was then circulated to department members (Grievant Exhibit 32, pages 856-63).

79. On November 1, 2000, Chair Youngblood informed Grievant that the History Department vote on Grievant's application for tenure was going to be split. Grievant first became aware that Chair Youngblood was opposed to granting Grievant tenure when Chair Youngblood provided her with a draft of her "Green Sheets" on November 4, 2000. She received that draft on Sunday, November 5. If Grievant had known that Chair Youngblood was opposed to granting her tenure, she would not have given her the readers' reports for inclusion in her tenure dossier. She also probably would have sought to have Professor Seybolt put off his trip to China and be at the department meeting.

80. History Department Assistant Professor David Massell, an untenured faculty member, voted in favor of Grievant's tenure application. His initial ballot on Grievant's tenure case contained a negative statement with respect to Grievant not spending enough time in her office. Chair Youngblood sent Professor Massell an e-mail in response asking him if he would like to rewrite the comment, terming it "really unprofessional." Professor Massell resubmitted his ballot, and deleted the negative statement (Grievant's Exhibit 33, page 839; Employer's Exhibit F).

81. History Department Assistant Professor Thomas Visser initially decided to abstain from casting a vote with respect to Grievant's tenure candidacy because his tenure application may influence, and be influenced by, Grievant's application as they were reviewed. He sent Chair Youngblood an e-mail to this effect. Professor Visser was in favor of Grievant being granted tenure; Chair Youngblood was aware of this. In

response to Professor's Visser's e-mail, Chair Youngblood sent Professor Visser an e-mail stating in pertinent part:

> Based on the way you present your analysis, I believe you owe Lee a vote (because you say you find her record adequate in all areas). She did not, after all, abstain from your vote. I hope you will reconsider. Please come talk to me on Monday (Grievant's Exhibit 37, pages 870-73).

82. Professor Visser met with Chair Youngblood the following Monday. Ultimately, Professor Visser decided to vote. He cast a ballot in favor of Grievant's tenure (Grievant's Exhibits 33, page 842; 37, pages 870-73).

83. The History Department voting on Grievant's tenure application was completed by November 3, 2000. The Department vote was eight recommending the granting of tenure, and eight not recommending the granting of tenure. Five of the department's tenured faculty voted in favor of Grievant's application while six voted against it. Three of the department's non-tenured faculty voted in favor of the application while two voted against it (Grievant's Exhibits 11, page 224; 22, page 563).

84. Chair Youngblood drafted "green sheets" for Grievant's tenure application, and signed them on November 8, 2000. The "green sheets" contain the tenure candidate's self-evaluation, a summary of department recommendations, the department recommendations, the Chair's recommendation, and ultimately, recommendations made by committees, dean and provost as the tenure review proceeds. In this November 8 draft "green sheets", Chair Youngblood recommended that Grievant not be granted tenure on the basis that Grievant did not meet the standards for tenure and promotion in the area of scholarship (Grievant's Exhibit 11, pages 224-42).

85. On November 9, 2000, Chair Youngblood sent Grievant an e-mail informing her that she assumed Grievant would want to submit a "statement of

explanation or disagreement" to the Department and Chair recommendations on her tenure case. Chair Youngblood stated in pertinent part:

> …
>
> So, again, your statement is your statement. My suggestion is that its tone be positive. You have the advantage now of knowing what the questions to your record are (and you can fold in some of this…but you should save explicit rebuttals for that section). Most, if not all, of your efforts, in my view, should be devoted to explaining your slow pace of publication and why the quality of the research should outweigh the quantity. It also would be good to explain why you expect this will change/improve in the future.
>
> Everyone agrees that you are a fine teacher. Most agreed that your service record was also adequate. At your last review, the only issue was your lack of publication; explicit requirements were set forth, which you did not meet. The dean and the committees will want to know, as half the department did, why that was so and what will change in the future.
>
> …
>
> I would prefer not to make a rebuttal to your statement because you've got more than enough to deal with. I will only be looking for "errors"-- and I will ask you about them.
>
> An 8/8 split left me with the worst situation a chair can face. I could not abstain. I can live with my decision professionally, but personally, I am very, very sorry (Grievant's Exhibit 25, pages 825-26).

86. Chair Youngblood changed the "green sheets" drafted by her on November 8, 2000. She changed her negative recommendation on Grievant's tenure application to a recommendation for tenure and promotion "with strong reservations" in the final version of the "green sheets" she signed on November 13, 2000. Chair Youngblood changed her recommendation after speaking with Acting Dean Donna Kuizenga. Acting Dean Kuizenga recommended sending the Grievant's case to the Dean's office as a positive recommendation (Grievant's Exhibit 22, pages 548-49).

87. The tenure dossier on Grievant's tenure application sent to Dean Smith for her review included "green sheets" (containing Grievant's self-evaluation, Chair Youngblood's evaluation, department recommendations, Chair Youngblood's recommendation, Grievant's statement of explanation or disagreement, and a summary of

recommendations), History Department faculty evaluation guidelines, Grievant's curriculum vitae, Second Review materials on Grievant, summaries of student evaluations of Grievant, course syllabi of courses taught by Grievant, class observations of Grievant's teaching, letters from students assessing Grievant's teaching, letters from outside professional evaluators assessing Grievant's scholarly work, and the readers' reports from Stanford and Harvard presses (Grievant's Exhibit 22, pages 517-63, 573-822).

88. The outside evaluators who reviewed Grievant's scholarly work were uniformly positive in favorably evaluating her articles, book manuscript, and curriculum vitae (Grievant's Exhibit 22, pages 739-793).

89. In the "green sheets" completed for Grievant's tenure review, Chair Youngblood described Grievant as having received a maternity leave in the spring of 1999. Chair Youngblood described Grievant's teaching as "clearly excellent", and her record of service as "solid". She evaluated Grievant's research and scholarship record as the "weakest area" of her record, concluding that her "record of publication is marginal". Among her observations were the following:

> . . .
>
> McIsaac's commitment to conducting research in Chinese regional history and her use of oral as well as published and archival sources has required a great deal of perseverance, ingenuity, time, and money, not to mention fluency in spoken as well as written Chinese. Her work has borne some results, but this remains the weakest area of her record.
>
> In her second reappointment review, both the Faculty Standards Committee of the College of Arts and Sciences and the Senate Faculty Affairs Committee expressed strong concern about the paucity of peer-reviewed publication. The Dean specifically warned that McIsaac would need a contract for her book, plus additional peer-reviewed publications, in order to receive tenure. Whether the quality of this body of work overrides the small quantity of actual

publications -- thereby qualifying McIsaac for tenure – is the key issue in this review.

McIsaac's publication record (as distinct from her research record) remains essentially the same as it was at her last reappointment review. She has two peer-reviewed articles, both of which appear in slightly different form as chapters in her book ms. The first, "The City as Nation" . . . had been accepted at the time of her last review. The second, "Righteous Fraternities" . . . (forthcoming as part of a "Forum" in the December issue of the American Historical Review), had been submitted at the time of the last review and its acceptance for publication was assumed. These two articles represent McIsaac's work at its best: beautifully written, engaging, well-focused, skillfully researched. (It is worth noting that although participating in an AHR Forum is a sign of distinction, it does not carry quite as much "weight" as having a stand-alone article accepted in this publication, the leading U.S. historical journal.)

In terms of new work that has led to publication, Professor McIsaac is co-editor (with two other scholars) of a special issue of the Journal of Urban History on "The City in Modern China" (forthcoming November 2000) and is a co-author of the introduction. She has also published an encyclopedia article.

. . .

The bulk of her scholarly activity over the last three years has focused on finishing the revision of her 1994 doctoral dissertation ("The Limits of Chinese Nationalism: Workers in Wartime Chongqing, 1937-1945") for publication as a book. In June 2000, McIsaac submitted this ms., titled "Work, Identity, and the Nation in Wartime Chongqing," to Stanford University Press and Harvard University Press, at their invitation. The presses were aware of the simultaneous submission.

Although the readers for both publishers were impressed by the quality of the research and the general conception of the book, they have suggested extensive revisions. As it stands, both Stanford and Harvard remain interested in the book but no contract will be forthcoming until the revisions have been made and the ms. has been sent out for review again. Harvard suggests a "provisional" contract; based on our last conversation, McIsaac has, however, decided to revise the ms. for Stanford. Two of the readers were positive, despite recommending extensive revisions; two were less than positive.

. . .

The external referees the department solicited were, on the other hand, uniformly positive (indeed, extremely enthusiastic!) in their evaluation of the book ms. and her scholarly record.

. . .

My own reading of the book ms. more closely accords with that of the presses' readers than that of the external evaluators: the ms. is definitely interesting, but it lacks a consistent analytical thread and therefore seems more

> like a collection of essays than a monograph. Given that two of the chapters had already been polished and accepted for publication three years ago, it is reasonable to assume that by this time the ms. should have needed only minor revisions.
>
> This record of scholarship is not easy to assess. Professor McIsaac is clearly an engaged scholar who has demonstrated the capability of making important contributions to her field. She is also an impressive researcher, highly skilled at mining the sources. She has not, however, demonstrated the ability to deliver on that promise by translating her research into work that is quickly and consistently accepted for publication.
>
> Based on the record to date, it is evident that McIsaac works very slowly, which does not augur well for speedy revision of the book ms. At the time of her second reappointment, for example, she expected to have her book ms. delivered in August 1998, yet two years later, she still does not have a contract. Regardless of the potential importance of her work, to which the external evaluators warmly attest, it will remain "potential" until she can reach a larger audience through publication.
>
> Professor McIsaac continues to demonstrate scholarly promise, but her record of publication is marginal (Grievant Exhibit 22, pages 532-541).

90. These "green sheets" statements of Chair Youngblood contained some inaccuracies. Inaccuracies include that Grievant never received a "maternity leave", only a teaching release. Chair Youngblood wrote inaccurately that "(t)he Dean specifically warned that McIsaac would need a contract for her book, plus additional peer-reviewed publications, in order to receive tenure." The Dean did not require a book plus articles, but rather a book or a series of articles. Chair Youngblood inaccurately stated that "McIsaac's publication record (as distinct from her research record) remains essentially the same as it was at her last reappointment review". Chair Youngblood indicated that the AHR article "had been submitted at the time of the last review and its acceptance for publication was assumed." The acceptance of the AHR article had not been assumed at the time of the Second Review.

91. Chair Youngblood summarized the History Department's recommendations in the "green sheets". She indicated that all in the department agreed that Grievant was a "very good and effective teacher", and that most department faculty agreed that Grievant's service record reached the standards for tenure and promotion. Chair Youngblood indicated that the department was "sharply split" on whether Grievant's research and scholarship record met the requirements for tenure. Chair Youngblood noted that each member of the department voted in writing, with comments, to support his or her vote, and quoted as follows from the comments they made:

From the 'yes' votes

1. "Her teaching record is outstanding . . . The service record speaks for itself. Lee has conscientiously served on many department, college, and university committees . . . As for research and publication, Lee has already made significant contributions to scholarship on China . . . Her book manuscript . . will certainly be published . . . (The external reviewers') remarks are strongly positive and clearly indicate the unique contributions to the field in Lee's work on China's wartime capital."

2. "Lee has been a warm and helpful colleague . . . I believe Lee is extremely effective in reaching and teaching some of our best and brightest undergraduates through her firm and demanding style . . . I am aware of the shortcomings of Lee's record given that she does not have a book contract in hand . . . (but) with two articles under her belt and the manuscript under revision, it is arguable that Lee has in fact met the standard."

3. "I vote in favor of her tenure and promotion on the basis of conscientious teaching, good service to the College for a probationary faculty member . . . an adequate if not outstanding record as a scholar . . . She thinks professionally and values scholarship and my expectation is that she will acquire a reputation as a fine scholar in her field over the long run."

4. "To my reading, Lee's case in marginal. She has not clearly met the requirements set out for her by the dean at her four-year review. On the other hand, she has not clearly failed to meet them, either. She has published several articles . . . As to her manuscript, after reading and re-reading the readers' reports, I cannot see any reason why it will not 'eventually' be a good book. Of course, 'eventually' is not what we require for tenure, but I would not like to see her denied tenure because she has taken more than the usual time to straighten out her

manuscript. I don't deny that it's a gamble. I have one more concern that moves me to take this view . . . Have we inadvertently set a standard that is nearly impossible to meet for someone who comes into the department straight from graduate school with no teaching experience? It is clear that Lee faced a real struggle learning to teach on the job in the first few years. Two or three years' teaching experience might have made all the difference in the world for her . . . Tenure exists to assure us of a colleague who will be a continuing asset to the department and to the discipline, someone who will remain active and engaged, and who will continue to grow as a scholar. As I see it, Lee shows the signs of being such a colleague; I believe no one doubts her commitment to and engagement with her work, and she has grown a great deal since she has been here."

5. "The question as to whether or not Lee should be promoted and tenured hinges, in my opinion, almost totally on her scholarship. The Faculty Standards Committee and the Dean said as much at the time of her last reappointment. Nothing has been done since then to challenge their conclusion that the teaching and service records were adequate but that the scholarly record was not. Quantitatively measured, Lee's record of scholarly productivity is still not adequate . . . However, the following facts are in my opinion relevant . . . The four reviewers of book manuscript all agree as to the high quality of the research and writing. They further agree that if Lee can resolve the theoretical/analytical problems in the introduction and conclusion the book should be published and that it will constitute a major contribution in the field. The editors of the two presses, two of the most prestigious academic presses in the country, concur and encourage revision . . . (Her) journal article will be published in the American Historical Review, the most prestigious historical journal in the country . . . All seven evaluators of Lee's scholarship conclude that it is of high quality, significant, and worthy of tenure and promotion . . . one of the outside evaluators stated that we should take 'very seriously' Lee's editorship of the Chinese Urban History newsletter, as well as her conference presentations. Our own departmental guidelines concur . . . Do any of the above facts guarantee scholarly productivity in the future? No. Neither does the granting of tenure, however. Do the facts cited above compensate for the paucity of actual publications? Quite frankly I do not know. I do know that with such uncertainty I would rather err on the side of the candidate.

6. "Prof. McIsaac is a very capable scholar and teacher."

7. "When I first reviewed Lee's dossier, I was surprised at the paucity of materials, yet as I read through her work and the letters, I was impressed by the quality of the work and the positive responses she received from colleagues and students . . . The quality of her scholarship is highly praised. Colleagues express deep respect for her written work and her presentations. On the issue of teaching, Lee demonstrates a 'commitment to promoting students' intellectual growth' with innovative teaching techniques and an ability to stimulate a high level of student

intellectualism . . . I would also like to point out the students who praised her for her help and encouragement . . .”

8. “With regards to Lee’s teaching, her record shows her capacity to grow and to develop skills as she gained experience in the classroom. The student letters are especially strong. Her service record shows adequate, though not outstanding, work . . . From her record of published articles and the provisional acceptance of her manuscript, it appears that Lee has demonstrated an ability to carry on high quality successful historical research. The external review letters provide support for this assessment as they place the special challenges that she has faced in conducting research into context.”

From the ‘no’ votes:

1. “The Dean made it quite clear --unambiguously so-- at McIsaac’s second review . . . that a book contract or a series of substantial articles would be needed for a positive decision in the year 2000. . . To be sure, revisions are invited and the rejections are not absolute, but the needed revisions are so extensive and essential as to make publication of the book in the near or even foreseeable future a certain or near certain impossibility. This is, as far as I am concerned, a sufficient and compelling reason to deny tenure . . . That book, although restructured, seems to have not advanced substantially beyond McIsaac’s doctoral dissertation work. The fact there is no demonstrable advancement in scope in her work six years after receiving her Ph.D. does not seem to promise a fruitful career as a scholar. McIsaac has been treated more than fairly. She has received a paid one-semester leave of absence to work on her book and had the time on her tenure clock extended by a year. Notwithstanding, she has not produced . . . Her first five years at UVM witnessed essentially no outreach work. Her few (3) attempts at outreach in the very recent past have been patent attempts at filling in her c.v. in this heretofore neglected area.”

2. “This is a painful decision. McIsaac is definitely a good teacher, which is, of course, essential. Her outreach record is perfunctory until recently, and I have doubts about her willingness to assume a leadership role in the Asian Studies Program after Seybolt’s retirement. Most importantly, I do not see her ever becoming a productive scholar, mainly due to her perfectionism; several people in the department have tried to mentor her to no avail. (It is certainly not due to lack of ability; she possesses a keen intelligence.) Regardless of the leeway offered in the department’s RPT guidelines, a book is the standard for tenure in history. In my opinion the book should at least be in galleys by the time of the tenure review; therefore the Dean’s requirement that all she needed was a contract was more than generous . . . She also seems to have trouble developing a publication strategy; it concerns me that it will be quite some time before she can move on to something that is truly a post-dissertation project . . .”

3. "While the teaching record seems adequate, especially for her stronger students, I do not feel that her record for either scholarship or service are adequate for the granting of tenure in this department."

4. "According to the record, Lee has vastly improved since she began teaching at UVM. Her evaluations are uniformly excellent. This is commendable, especially since her teaching fields are broad and include subject matter of some difficulty for students. . . . Lee has indeed been active in the service category for the last two years, including, for example, in the Asian Studies Program and the Honors Program . . . Overall, I question whether Lee's unwillingness to come onto campus more than two days a week is sufficient to enable her to take over her fair share of department service responsibilities. . . At the last reappointment, attention was drawn to the fact that in order to receive tenure, Lee would need to demonstrate a clear and consistent program of scholarship. As far as I can see, despite relief from teaching and service responsibilities and an extension, Lee has managed to produce only one new piece of scholarship, an entry in an encyclopedia. The other two articles were completed before her last reappointment. Furthermore, she has no book contract. In sum, although her teaching is satisfactory, her work in the other two areas of service and scholarship are not. Lee has been unable to meet the requirements spelled out at the last reappointment even with the extension granted to her."

5. "In spite of serious attempts to do so, Lee has not lived up to department expectations and faith in her clearly evidenced in granting her two extensions . . . A secondary concern is the lack of clear evidence of acceptance of her work for publication. Ultimately my key concern has to do with how this case impacts the other junior faculty."

6. Let me say at the outset that if I had my way, people like Lee McIsaac would be given tenure at UVM. I strongly believe that the university in its arrogance has set unreasonably high and misguided standards for tenure. They are, despite, pronouncements to the contrary, based largely on a person's publication record, and are set at a level more suitable for a Ph.D. granting institution than one mainly in the business of teaching undergraduates . . . In Lee's case we have a young scholar who while working in a difficult field shows promise as a researcher. I think it is true, as she claims, that Stanford will publish her book, though I doubt a contract will be forthcoming in three months as she is predicting. She has proved to be an effective teacher. I also think that if she were to be freed from the intense pressures she has been under for the last few years, she would make her contributions in the area of service . . . The 'laws' of UVM, as they are spelled out in our faculty guidelines and confirmed in statements by the dean and the college standards committee, require a level of scholarly output that Lee has not attained. Part of me wants to give her the benefit of the doubt. She does, after all, work in a very difficult field; she has had personal and family situations that have slowed her scholarly progress. On the other hand she has received an extension for her tenure case and two semesters released from

teaching. She also has known from the start of her career at UVM what was expected of her in terms of scholarly output. For whatever reason she has not met those expectations."

7. "Professor McIsaac has assembled . . . an acceptable record of service to the Department of History, University, and the community at large. Her teaching has emerged as the strongest element of her record . . .she is clearly a respected and talented educator . . . Professor McIsaac's scholarship, however, falls somewhat short of the standard for excellence required for the granting of tenure . . . although it is clear that Prof. McIsaac has continued and expanded her scholarly activity since her last review for reappointment, the quality, quantity, and significance of that activity appears insufficiently demonstrated by the broader evaluative criteria of her field. Progress on her important manuscript . . . has been significant. This progress has not, however, resulted in a firm contract from a publisher . . . The absence of a contract for this book manuscript is not, in and of itself, sufficient cause for denial of tenure. Prof. McIsaac's record of scholarship, however, is not strongly bolstered by the addition of accepted or published peer-reviewed works since her last reappointment review. Finally, Prof. McIsaac's dossier fails to give a strong sense of a clearly formulated scholarly agenda for the future."

8. "In terms of teaching and service, I find her record acceptable. But, in and of themselves, this record is not sufficient to grant tenure. For tenure, and according to our own departmental guidelines, the candidate's record 'should clearly demonstrate an ability to carry on successful historical research of high quality.' It is here that McIsaac's record is thin: she has published two major articles . . . [but] she has not sufficiently demonstrated that she will continue to publish –and I have seen no indication that concrete plans (and I'm not even expecting 'progress') for a second project/continuing research program are in place . . . These deficiencies could be overlooked if she had a manuscript accepted for publication . . . While it is clear that the ms. needs to be 're-thought' and NOT 're-researched,' the bottom line is that the ms. is simply not in published form in time for this review, nor is it likely to be publishable in the near future. While I am convinced that McIsaac's work shows a great deal of promise, by this point in the process -- the tenure review -- this 'promise'should have been translated into a demonstrable and definable end product -- a book accepted for publication or a series of articles that have been accepted for publication in prestigious peer reviewed journals. This is not the case."
(Grievant's Exhibit 22, pages 541-48)

92. Chair Youngblood's summary of the comments of department members was a faithful summary of the views expressed by the faculty members in their ballots. The actual votes, and the sentiments expressed in the ballots, were the result of the

considered, individual judgment of each department member. They were not a product of intimidation, interference or coercion by Chair Youngblood (Grievant's Exhibit 33, pages 834-54).

93. Comments by faculty who voted against tenure contained some inaccuracies. The comment that Grievant's book manuscript had "not advanced substantially beyond McIsaac's doctoral dissertation work" was inaccurate. The book manuscript was a substantial revision of her dissertation work and much lengthier. The comment that Grievant had not had "accepted or published peer review works since her last reappointment review" erroneously excluded the fact that the AHR article had been accepted for publication since the last review. The comment that Grievant had received "two extensions" was inaccurate. Grievant had received one extension – a one year extension on the tenure clock. The faculty member who wrote this comment incorrectly referred to a semester of junior faculty leave received by Grievant as an extension.

94. Chair Youngblood made the following recommendation in the "green sheets":

> This is a troubling case. Professor McIsaac's teaching record is excellent; she maintains the highest standards and is deeply committed to her students. Despite a few quibbles from colleagues about her relative lack of outreach activity, her service record is quite adequate for a junior faculty member. Professor McIsaac'' publication record is, however, quite marginal.
>
> It <u>is</u> hard to earn tenure, as it should be. Lifetime job security is a privilege accorded to no other group in this society. Our standards for scholarly achievement are high but not unreasonably so; tenure denials in this department are extremely rare, and past candidates have met the publication standards in a variety of ways. Furthermore, not only are departmental expectations clear, but these were reinforced by the Dean, the FSC, and the FAC in their comments at McIsaac's second reappointment review.
>
> We hire probationary faculty for their promise of scholarly achievement, but by the time of the tenure review, mere promise of future achievement cannot

> be enough. Achievement must be demonstrated during the probationary period through significant publications. Are two articles in six years, however, good evidence of a high level of achievement, especially when they reappear as two chapters in a book ms. – and those two chapters are the ones the ms.'s reviewers single out as the best? Eight members of this department thought so; eight members did not.
>
> It is extremely difficult not to recommend tenure for a good teacher, especially one who has shown such impressive growth in this area, as has Professor McIsaac. On the other hand, the dissemination of ideas to our peers through scholarly publication is as important to maintaining the principles of a university as is the dissemination of ideas in the classroom. It is here that McIsaac's record comes up short.
>
> But given the evenly split vote in the department and the fact that McIsaac has an active research agenda that received high marks from the outside evaluators, I believe fairness dictates that she should have the benefit of the normal review process, rather than the process of appeal outlined in section 231.6 of the "Officers' Handbook."
>
> Therefore, I recommend her tenure and promotion, with strong reservations (Grievant's Exhibit 22, pages 548-49).

95. Chair Youngblood's recommendation contained two inaccuracies. Her comment that Grievant had "two articles in six years" was inaccurate, when in fact she had published two peer-reviewed articles in five years of employment. Also, in explaining to Grievant her decision to reverse her negative recommendation, the chair cited section 231.6 of the Officer's Handbook, which existed only in an older version of the Officers' Handbook and was then no longer in effect (Grievant's Exhibit 12, page 314).

96. Grievant's rebuttal, or "Statement of Disagreement or Explanation," is part of the Green Sheets and was submitted on November 14, 2000. Grievant's statement articulated in detail her response to what she viewed as inaccuracies, misperceptions, confusion, and misunderstandings by Chair Youngblood and some department members concerning her scholarly record. Among the inaccuracies cited by Grievant was Chair

Youngblood's statement in her "green sheets" evaluation of Grievant's scholarship that "(t)he Dean specifically warned that McIsaac would need a contract for her book, plus additional peer-reviewed publications, in order to receive tenure." (Grievant's Exhibit 22 pages 550-62).

97. After the department review on Grievant's tenure application was completed, the College Faculty Standards Committee reviewed Grievant's case. The Committee voted 3-2 in favor of granting Grievant tenure and promotion to Associate Professor. Their comments included the following statement:

> Those voting in favor believed that the quality of Professor McIsaac's scholarship outweighed concerns about its appearance in print; those voting against found that her scholarly output did not meet the standards for tenure and promotion set out by her Department and the Dean of the College at her last reappointment (Grievant's Exhibit 22, page 564).

98. Grievant's tenure application was then reviewed by Dean Smith. Dean Smith concluded that Grievant's teaching and service records met the standards for tenure and promotion. In addressing Grievant's scholarship, Dean Smith stated as follows:

> It is when we come to scholarship that we find a much less clear record, one that obviously troubles McIsaac's colleagues, her chair, the Faculty Standards Committee, and myself.
>
> Let me begin by drawing attention to a quite unusual pattern, one to which we should pay some attention since I believe it speaks to the conundrum we are facing and strongly reflects the scholarly record before us.
>
> At every single level where McIsaac is evaluated there is no clear, unambiguous recommendation. We look to outside readers of her manuscript currently under review and find a mixed picture to which I will return below. The Department split its vote eight to eight with the Chair of the Department voicing real concern. Indeed, the tenured members of the History Department voted six to five against promotion and tenure while the untenured members voted three to two in favor of granting tenure. Similarly, the Faculty Standards Committee also split, voting three to two in favor of tenure and promotion. What then is the problem? Why is it that at every level of evaluation there is such a mixed reaction? I will return to this question after laying out what I believe the record to be.

Professor McIsaac's *curriculum vitae* describes her scholarly record. First, she has two published articles both appearing this past year . . . Every reviewer as well as her own colleagues ranked these two papers quite highly.

In addition to these scholarly articles, McIsaac has engaged in the kind of activities we expect of someone who is establishing a reputation in his/her field of research. She was a co-author, with two others, of an introduction to a special issue of the *Journal of Urban History*, which she co-edited, has contributed to a newsletter which she co-founded, wrote an entry for a historical dictionary, and has been invited to contribute an encyclopedia entry. Finally, she has a book-length manuscript in progress, *Work, Identity, and Nation in Wartime Chongqing*, to which I will return below.

In addition, she has participated in a number of important conferences. Indeed, this past Fall, she presented a paper at an important conference in the PRC. Virtually every year since she has been at UVM McIsaac has presented papers, and while we have no way of evaluating their content, it is clear that she is beginning to enjoy the kind of respect that comes from highly regarded presentations.

Hers is a record that describes an emerging scholar, but is it a record sufficient to conclude that McIsaac has met the standards of her department? I think not. Let me offer my reasons. While impressive on paper and certainly worth our respect as describing a scholar of promise, the record is insufficient. First, her published pieces constituted the work with which she was credited at her second review. Second, there is no article in a peer review journal that has had the kind of close scrutiny we normally expect. The *AHR* article is a fine one according to her external evaluators but one that was part of a special series and therefore was not subject to the stringent reviews that go along with the more usual submission process. Similarly, the article in the edited collection was not subject to as close a scrutiny as that for which we would normally look.

…

Before considering her book-length manuscript let me summarize the record described above. Lee McIsaac is an active scholar who is beginning to show promise based on the inclusion of one of her articles in an important journal focusing on her area of scholarship, and on her other professional work. We also know from earlier reviews and from what the outside evaluators tell us, that her research is of very high quality. She is beginning to develop a scholarly reputation. She has two published scholarly articles but none since her second reappointment. This is a thin record and not sufficient to say that she will be a productive scholar carrying on a sustained, high-quality scholarly agenda as a permanent member of our faculty. We have promise – indeed strong promise – but not yet clear evidence that that promise will be fulfilled. This is the weight the book-length manuscript has to bear.

Work, Identity, and the Nation in Wartime Chongqing began life as a dissertation McIsaac presented to the faculty at Yale University in satisfaction of the requirements for her doctorate. But this was only the beginning. According to McIsaac, and there is strong evidence to believe this is a very accurate assessment, she has reconceptualized the dissertation, changed its focus, and

included considerable new evidence. I am perfectly satisfied that this is a new piece of work, although growing out of her dissertation – something that is common among younger faculty – but substantially different. I believe we can lay to rest that concern voiced by a senior colleague. What I do need to note, however, is that the two articles credited at the second review, constitute two chapters of the book-length manuscript, and thus also grow from the dissertation.

There is though another question. Is this a manuscript that has passed muster with respect to the normal review processes to which it has been submitted, and will it become a successful, highly regarded publication? While external peer evaluators selected by the Department see much merit in the manuscript, it still has not gained the imprimatur of outside readers for any press, nor has it been accepted for publication. As such, it is simply a work in progress. This is critical since McIsaac was specifically advised by myself and both Faculty Standards and Faculty Affairs that she had to have more work published before she would be seen as meeting the standards of her Department, the College, and the University. This has not happened and there appears to be considerable work to be done before the manuscript is accepted for publication.

…

Professor McIsaac was given the opportunity to respond to the Chair's portion of the Green Sheets. In this response McIsaac reiterates that the readers of her manuscript saw considerable quality in the work. But the point is none recommended publication and all found substantial problems. This is serious, and not inconsequential as McIsaac and some members of the Faculty Standards Committee would make it. . . .

Where then does this leave us? Lee McIsaac is beginning to establish herself as a serious scholar. She shows promise, but promise that has not yet been sufficiently realized. If there were no manuscript, then there could be absolutely no doubt that she had failed to meet the scholarly standards for promotion and tenure. However, the manuscript is only a work in progress. The book is far from completed. The published pieces had already been evaluated and while found sufficient for a positive second review, neither the Faculty Standards Committee, the Faculty Affairs Committee, nor I found it sufficient for a positive tenure review and said so explicitly at the time of that second review. There was a general agreement that she would have to have more published work. She has not met this requirement.

I have concluded that Lee McIsaac does not meet the standards we have established for tenure and promotion as these are articulated both in formal documents at the departmental and university level and as they were clearly spelled out in her previous reappointment. I am therefore recommending against tenure and reappointment. McIsaac is a good teacher and advisor. She has performed fine service. Nevertheless, her scholarly record simply does not meet the standards we expect (Grievant's Exhibit 22, pages 565-71).

99. In a footnote to her comments, Dean Smith responded to the conclusion reached by a majority of the Faculty Standards Committee as follows:

> The Faculty Standards Committee in its remarks this year contrasts quality and publication. I strongly disagree with this line of argument. Publication is a strong *measure* of high quality. To use some jargon, publication in highly regarded venues operationalizes what we mean by high quality. There are three reasons why publication *per se* is important. The first is that our job as scholars is to make our research available to other scholars as well as the community. Second, it is only by subjecting that research to external reviewers that we can be sure what does finally appear is of the highest quality. Finally, in the absence of the requirement to publish, we risk arbitrariness that would seriously undermine the tenure system itself (Grievant's Exhibit 22, page 569).

100. In another footnote to her comments, Dean Smith responded to Grievant's statements in her rebuttal concerning extension of her tenure clock:

> In her rebuttal to the Chair's write-up in the Green Sheets, McIsaac mentions that the Chair raised the issue of the extension of the tenure time clock. It was entirely appropriate for her chair to mention this, since it explains what is otherwise unusual timing of the tenure review. In addition, McIsaac worries that the extension was used by some of her colleagues as a reason to ask for more than what is otherwise normally required. I agree this would have been inappropriate but do not believe that her colleagues were making this argument. McIsaac should not be asked to do more because her tenure clock was stopped – what is the point of stopping the clock if that were the case – but neither can she be held to a lesser standard on the same grounds for which additional time had been offered and accepted. We have been very careful in the College of Arts and Sciences to make accommodations for the extra burden of maternity, but once that accommodation is made, maternity cannot be used as a reason for doing less. McIsaac is not making this argument, but some clarity is demanded here (Grievant's Exhibit 22, page 571).

101. Dean Smith did not consider Grievant's book manuscript as scholarship; she considered it as work in progress. When she received the "green sheets" from the History Department, she did not conduct an independent investigation of that information, and has not done so in any other tenure review case. In reviewing Grievant for tenure, Dean Smith did not consider the timelag in Grievant seeing the Dean's comments in Grievant's First Review.

102. The Faculty Affairs Committee met on March 12, 2001, and recommended by a vote of 8-2 that Grievant not be promoted or tenured. The Committee stated in a March 13, 2001, memorandum explaining the decision:

> The candidate's teaching was considered strong and service was considered good to excellent. The primary issue is whether the candidate is engaged in a sound program of work that is both productive and which can be expected to continue to develop throughout the candidate's professional career. Those voting in favor felt that the record of scholarship is sufficient to award tenure, citing in particular the extremely positive external review letters. Those voting against felt the candidate's current record of scholarship insufficient for a positive tenure recommendation. Those voting against noted in particular that the candidate's book manuscript does not reach the standards of completed scholarship, and, when taken together with other published work of the candidate, does not establish a scholarly record adequate for tenure (Grievant's Exhibit 22, page 572).

103. Robert Low, Acting Provost for Faculty Personnel, next reviewed Grievant for tenure and promotion. By letter dated March 27, 2001, Provost Low informed Grievant in pertinent part as follows:

> The Guidelines from the Department and within the Handbook are quite clear with regard to expectations in scholarship. What is required is the internal and external view that sustained, high quality scholarship based on work done at UVM has been demonstrated. It is my view as I have reviewed the record that, unfortunately, these criteria have not been met in this case. Thus, I reluctantly conclude that the Dean's decision not to promote is the correct one, based on achievements in scholarship. I note that a strong majority of the Faculty Affairs Committee agrees (Grievant's Exhibit 11, page 296).

104. In a summary of Provost Low's detailed review accompanying the March 27 letter, Provost Low explained the method by which he considered his review:

> As is my habit with every faculty action, I undertook my review by examining the materials submitted in the following order:
>
> 1. The Guidelines for promotion and tenure issued by the History Department.
> 2. The CV.
> 3. The documentation provided by Dr. McIsaac regarding her teaching.

4. The evaluation of teaching provided by peers and students.
5. Dr. McIsaac's description of her scholarship.
6. The evaluation of her scholarship as described by external letters from individuals in her discipline.
7. The decision of the faculty of her department.
8. The decision of her Chair.
9. The decision of the Faculty Standards Committee of the College.
10. The decision of the Dean.
11. Prior communications that came from her review at last appointment that might pertain to this case.
12. The "Candidate's Statement of Explanation or Disagreement".
13. The appeal letter of appeal addressed to Provost Martin and dated 02/09/01.
14. The decision of the Faculty Affairs Committee.

> After each component was reviewed, I came to a tentative conclusion regarding the merits of the record. At each level, I assessed whether the view I held to that point should be modified. I took pains to avoid discussion of the case with anyone until after I had come to my own conclusion (Grievant's Exhibit 11, page 297).

105. In the summary, Provost Low indicated that Grievant had met the tenure and promotion requirements with respect to teaching and service. In addressing Grievant's scholarship, Provost Low stated in pertinent part:

> My review solely of Dr. McIsaac's CV caused me to be concerned about the extent of her scholarly contributions. To be sure, there are signs in her CV that she is becoming known within her discipline, in terms of national and international presentations and like contributions (e.g. being asked to write an introduction to a special issue). However, the number and distribution in time of her scholarly contributions raised significant questions in my mind regarding productivity. . .
>
> The outside letters uniformly indicate that the level of scholarship represented in Dr. McIsaac's CV is of high quality. The focus of their review was the book manuscript that had been submitted for publication. . .
>
> I next read the publishers reviews that were submitted of her book manuscript. On the balance, they suggest promise, though to differing degrees they suggest that work still need(sic) to be done.
>
> It was at this point that I first began to examine the outcome from internal review. I shall concentrate here on the record of scholarship, since performance in teaching and service has not justifiably been questioned. The faculty vote was 8 in

favor and 8 against promotion. The Chair's final decision, a reversal, was to recommend promotion. At the same time, several of the concerns I initially held appeared here as well. These included mention that Dr. McIsaac had been warned of the need to improve the extent of her scholarship at last reappointment; the query as to whether two published articles, however good, are enough for promotion, especially as their substance appears as two chapters in the submitted book manuscript; the need to demonstrate achievement during the probationary period; and the statement that the record "comes up short." On the subject of research and scholarship, the Faculty Standards Committee, which voted 3/2 in favor of promotion, indicated that Dr. McIsaac "shows promise" of being an important scholar on China, though noted the book manuscript had yet to be accepted. Those in favor of promotion felt that the quality of the contribution of the book as they judged it outweighed the importance of it presently being accepted or in print. Those against promotion noted that the scholarly output did not meet the standards for tenure and promotion set out by the Department and the Dean of the College at her last reappointment.

Comments from the Dean confirmed that teaching performance and service certainly have met the criteria for promotion. With regard to scholarship, the Dean's concerns reflected my own with regard to the extent of scholarship and the demonstration of sustained productivity. The Dean noted that the published articles had been part of Dr. McIsaac's record at last promotion and that they were parts of a series and a collection or an introduction to a special issue, as opposed to free-standing articles in the more traditional sense. The Dean further suggested the belief that material in these publications stemmed from dissertation research prior to when Dr. McIsaac came to UVM. Finally, the Dean discussed prior concerns expressed at the time of the last promotion and the expectations that were laid out. In the end the Dean's decision weighted clear, direct evidence against promise.

I next reviewed the "Candidate's Statement of Explanation or Disagreement". Noteworthy were her comments about maternity leave and how its length and nature had been misinterpreted by certain faculty in her Department. This issue was no factor whatever in my conclusion. In any case, it is clear that the extension was justified. Furthermore, I reject any argument that the extension was merely to provide her more time before coming up for promotion. That there was lack of clarity in the minds of certain faculty regarding the nature of the extension, insofar as true, is disquieting: it is essential that every party to such a review have the essential facts straight.

The Candidate's Statement cites and discusses departmental guidelines with regard to scholarship and promotion. It is clear from those guidelines that Books(sic) are not essential and that a series of articles in scholarly journals and presentations can be sufficient. The issue in my mind from the initial point of my review was that neither had been sufficient in a fashion consistent with departmental and institutional guidelines.

. . .

Next was discussed the issue as to whether recent work simply was refinement / modification of Dr. McIsaac's dissertation. To me, what she has done recently is an entirely reasonable extension of what she began with her thesis (e.g. going beyond "local identities"), not an uncommon occurrence in many fields. It is also a logical party of focus, especially as one is establishing a career. That her recent work might be "too close" to her thesis is a lesser concern to me.

A further issue that was raised was the level of actual accomplishment since her fourth year review. Indeed, this is a very important issue in terms of Department and University guidelines. As an important specific case, the Am. Hist. Rev. in fact was submitted but not accepted: its acceptance (10/98) and publication do, indeed, represent an important accomplishment. At the same time, the accomplishment was based on work prior to 1994. Considering submitted but not yet accepted contributions always is somewhat dangerous at any review, but the more so when promotion with tenure is under consideration.

I next reviewed the letter (from Grievant) to Provost Martin, dated 02/09/01 . . . I completed my review of these issues unconvinced that my conclusions, as explained above, should be changed. Included with this letter, as well, were comments from 4th year review. There is uniformity in describing what needed to be accomplished. I have to agree reluctantly that the required accomplishments were not forthcoming.

It is at this point that I reviewed the recommendation of the Faculty Affairs Committee. Voting 2/8 against promotion. The consistency of the views expressed by the FAC with my own and those of others involved with the review left my initial impression unaltered.

The Guidelines from the Department and within the Handbook are quite clear with regard to expectations in scholarship. What is required is the internal and external view that sustained, high quality scholarship based on work done at UVM has been demonstrated. It is my view as I have reviewed the record that, unfortunately, these criteria have not been met in this case. Thus, I reluctantly conclude that the Dean's decision not to promote is the correct one, based on achievements in scholarship. I note that a strong majority of the Faculty Affairs Committee agrees (Grievant's Exhibit 11, pages 298-301).

106. In the view of Provost Low, it is essential for faculty to receive First and Second Reviews in a timely manner. He attempted to ensure that any errors made at other steps of the review process did not contaminate his review. He was concerned that Grievant had less experience than others whom had been reviewed, but still held Grievant

to the standards set forth in the Officers' Handbook and the RPT Guidelines. He took into account the language and geography difficulties Grievant had due to her field of study.

107. Grievant appealed the negative decision in her tenure and promotion case to Acting President Martin (Grievant's Exhibit 11, pages 302-308).

108. By letter dated May 31, 2001, Acting President Martin informed Grievant that she was sustaining the denial of promotion and tenure. She stated in pertinent part:

> . . .
>
> In sum, I agree in general with the analyses of Dean Smith and Acting Provost Low that while your excellent teaching and significant service contributions meets the standards for promotion and tenure, your record of scholarship unfortunately does not. Having compared the written decisions with the record, it appears to me that Dr. Smith and Dr. Low each conducted an independent assessment based on an essentially accurate understanding of the record presented, and each came to a reasoned conclusion, based on sound academic judgment, that your published scholarship was not sufficient. While I understand that you do not agree with the substance of their respective judgments, I cannot agree with your assertions that their decisions were prejudiced by any misunderstanding of the record or material procedural errors.
>
> . . .
>
> I must note my disagreement with your general assertion that the conclusions of the Dean and Acting Provost were prejudiced by "inaccuracies and misunderstandings" on their part that began at the departmental level. The written decisions demonstrate clearly that Drs. Smith and Low each made an independent assessment of the extent and quality of your scholarly production, and that each carefully noted their disagreement with, and rejection of, certain concerns expressed at the departmental level. For example, Dr. Low clearly described the process by which he reviewed the record, noting explicitly that he made an initial, independent assessment of the extent of your scholarly production, and reviewed the external reviews and publishers' reviews, before turning to the internal review. Further, Dr. Low explicitly rejected the suggestion of one of your departmental colleagues that your tenure clock might have been extended inappropriately. Dr. Smith's decision similarly reflects an accurate understanding of the record, a rejection of inappropriate assumptions or misunderstandings generated at the department level, and an accurate recollection of her advice at your fourth-year review. Further, it must be remembered that your Chair ultimately made a positive recommendation, albeit with strong reservations. Rather than prejudicing your case, the Chair's decision in this regard afforded you the benefit of a fuller review by the Dean, committee members, the Provost, and

> the President. Therefore, because the written decisions demonstrate that Dr. Smith and Dr. Low each performed an independent assessment of your scholarship in accordance with applicable standards, and the department made a positive recommendation, I do not believe that any material prejudice is shown by your arguments about procedures at the departmental level or the Chair's participation therein (Grievant's Exhibit 11, pages 312-313).

109. Grievant filed a grievance with the Faculty Grievance Committee over the decision to deny her tenure and promotion. The Faculty Grievance Committee consists of five faculty members appointed by the Faculty Senate, and two administrators appointed by the Provost. Grievant made nine complaints in the grievance. After an October 30, 2001, hearing, the Faculty Grievance Committee unanimously sustained five of the nine complaints. The Committee unanimously recommended, in view of procedural violations that occurred in the case, that Grievant's tenure case be reconsidered, beginning at the History Department level (Grievant's Exhibits 1, page 28; 9, pages 87-94; 11, pages 176-196).

110. Interim President Edwin Colodny rejected the Grievance Committee's recommendation that Grievant's tenure case be reconsidered. The Grievance Committee requested reconsideration of Interim President Colodny's decision. He rejected the request for reconsideration (Grievant's Exhibits 6,7,8, pages 75-86).

111. Dean Smith recommended against tenure for one candidate while she was interim Dean in 1995-1996. Since 1996, Grievant's case is the only case in which Dean Smith has recommended against tenure. Since 1996, she has approved every tenure applicant who was approved by the department, or 38 candidates, except for Grievant (Grievant's Exhibit 69, pages 967-974).

112. The vast majority of faculty members who have been reviewed for tenure at the University have received tenure. The University seeks to recruit faculty who are

"tenurable". There is a sorting out process after faculty are hired where, if they have problems during their probationary period developing a record that meets tenure requirements, many of them do not apply for tenure.

113. During the period from academic years 1992-1993 through 2000-2001, one of five faculty members who received an extension of their tenure clock for maternity reasons was granted tenure. Three of the four faculty who have not been granted tenure did not apply for tenure. The fourth faculty member is Grievant (Grievant's Exhibit 68, pages 963-966).

OPINION

Grievant alleges that there were a series of procedural and substantive defects in the Employer's review of her application for tenure that violated her rights under rules of the Employer. Specifically, Grievant alleges: 1) the Employer failed to follow its written procedures, 2) the Employer based the tenure review on discriminatory application of the rules in violation of Grievant's procedural and substantive rights, 3) the denial of tenure constitutes an abuse of authority, lacks a rational basis, and is discriminatory based on sex, and 4) various actions of Chair Youngblood violated the covenant of good faith and fair dealing and the basic rights of a tenure applicant to a fair review.

At the outset, we discuss our jurisdiction to decide this case. The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance, Boynton v. Snelling, 147 Vt. 564, 565 (1987), which statutory definition provides:

> "Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed

> dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 V.S.A. Section 902(14).

Since there is no applicable collective bargaining agreement here, Grievant must allege and prove the discriminatory application of a rule or regulation. Discrimination in this instance means unequal treatment of individuals in the same circumstances under the applicable rule. Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988). Failure of an employer to follow a binding rule is sufficient to result in an actionable grievance. Id. In re Grievance of Gobin, 158 Vt. 432, 434 (1992). Employer regulations governing procedures, or guidelines mandating procedures, for management constitute binding rules or regulations. Grievance of Gobin, 158 Vt. at 435.

Accordingly, we consider allegations made by Grievant in this case only to the extent that she alleges there was a violation of a rule or regulation. We are not addressing claims made by Grievant that involve purported deficiencies in the review process if such claims do not cite rules and regulations that allegedly were violated.

We also do not consider alleged violations of provisions of the University's Officers' Handbook, and other alleged violations subsequently raised by Grievant in her post-hearing brief, which Grievant did not raise in the grievance filed with the Board. In the post-hearing brief filed by Grievant, Grievant contended among other things that the Employer violated Sections 223.1 and 231.2. Grievant further alleged that the Employer applied the tenure criteria in an arbitrary manner. Grievant did not make these allegations in the grievance filed with the Board and it is untimely to raise them now. Grievance of

UE Local 267 and Bruley, 22 VLRB 167, 181-82 (1999). Grievance of Sklar, 19 VLRB 183, 206-208 (1996). *Affirmed*, Sup. Ct. Dock. No. 96-315 (June 24, 1997). Grievance of Brabant, 18 VLRB 410, 424-25. Grievance of McCort, 16 VLRB 70, 109 (1993). Section 18.3 of the Board *Rules of Practice* requires that a grievance filed with the Board contain a concise statement of the nature of the grievance and specific references to the pertinent rule or regulation alleged to have been violated. The grievance filed here contained no references to the alleged violations set forth above and, thus, Grievant raised these issues in an untimely manner and she waived her right to grieve them. Brabant, 18 VLRB at 425. McCort, 16 VLRB at 109.

In the grievance filed with the Board, Grievant has alleged violations of other sections of the Officers' Handbook. The provisions of the Officers' Handbook are rules and regulations that must be followed by the University. Grievance of Gobin, 14 VLRB 40, 45-46 (1991).

Grievant alleges that the Chair of the History Department, Professor Denise Youngblood, failed to follow appropriate procedures when Grievant was reviewed for tenure. Defined reappointment and tenure procedures, as they are set forth in a binding rule or regulation or the collective bargaining agreement, must be scrupulously observed by an employer. Nzomo v. Vermont State Colleges, 136 Vt. 97, 99- 103 (1978). Grievance of Burrill, 1 VLRB 386, 396 (1978). Grievant contends that Chair Youngblood applied procedures in her case that were without precedent in the History Department. Specifically, Grievant complains of Chair Youngblood not appointing a department committee to assist in the tenure review process and further complains of the procedure by which Chair Youngblood solicited outside scholars to evaluate Grievant's scholarship.

In order to prevail on these claims, Grievant must point to binding rules or regulations constituting defined tenure procedures that Chair Youngblood violated through her actions. She has not presented evidence on any such rules and regulations.

Prior to the 1980's, the History Department did not have a committee assisting in the tenure review process. The practice of having a committee originated in the early 1980's when the review process became more complex and demanding, and the department chairperson sought assistance from colleagues to prepare materials. During most of the 1990's, there were three department faculty members on the committee, each of whom took responsibility for gathering and assembling information on the tenure candidate in one of three areas in which candidates were evaluated (i.e., teaching, scholarship, service). Sometimes the committee made recommendations whether the candidate should be granted tenure; at other times the committee did not make a recommendation. In the spring of 1999, the department members unanimously agreed to reduce the committee in size from three to two members, and to reduce its responsibilities to gathering information without making a recommendation on the granting of tenure. The following year, Chair Youngblood did not appoint a committee for Grievant's tenure review even though department members did not vote on elimination of the committee. The committee had mishandled one case the previous fall, and Chair Youngblood had been blamed for it. She decided to take responsibility for the tasks previously performed by the committee.

Chair Youngblood's failure to appoint a committee did not violate any rule or regulation. The use of such committees is not mandated on a university-wide or college-wide basis. The History Department had no rule or regulation on the appointment of such

a committee. Rather, the department had varying practices concerning such committees over the years. Under these circumstances, we conclude that Grievant does not have a valid grievance in this regard.

Similarly, Chair Youngblood did not violate any rules or regulations by the procedure she used to appoint outside evaluators in Grievant's tenure case. There are no University or College-wide requirements as to the process by which external evaluators are chosen, beyond the Guidelines of the Faculty Affairs Committee for Preparation and Evaluation of RPT Dossiers, which state:

> When external evaluator letters are required, the Chair must solicit those evaluations of the candidate's achievements from qualified "arm's length" evaluators (usually a balanced list chosen from among a list of names suggested by the candidate and a list suggested by the Chair or relevant departmental committee). The Chair should provide a clear explanation of the professional qualifications of the evaluators and the process by which they were selected.

Chair Youngblood acted in conformity with these guidelines with respect to Grievant's tenure review. She solicited evaluators from qualified "arm's length" evaluators chosen from lists prepared by Grievant and Grievant's mentor, History Department Professor Peter Seybolt. She clearly explained to Grievant by a May 12 e-mail the process by which the evaluators were to be selected. Thus, Chair Youngblood did not violate any rules and regulations by the process she used for selecting outside evaluators. Moreover, even assuming there were such violations, there was no prejudicial harm to Grievant since all of the evaluators provided positive evaluations of her scholarly work.

Grievant alleges that Chair Youngblood abused her authority in violation of Section 270.5 of the Officers' Handbook by presenting a case against tenure of Grievant while purporting otherwise to Grievant. Grievant contends that Chair Youngblood had an

obligation to ensure that Grievant's application for tenure was clearly, accurately, objectively and fairly presented to members of the History Department, and that she failed egregiously in fulfilling these obligations. Section 270.5 of the Officers' Handbook provides in pertinent part that the "Grievance Committee shall have jurisdiction over all and only cases which fall under one or more of the following categories . . . Grievances in which faculty members allege that a decision . . . was the result of an abuse of authority".

The Employer contends that Section 270.5 is a jurisdictional provision that pertains to a non-mandatory, advisory body. The Employer maintains that, while Section 270 does promise in general that a certain procedure will be made available to faculty members, section 270.5 cannot be read reasonably as being a binding rule mandating that every decision made by the University must be adequate, equitable or rational, nor does it provide that every University decision should be reviewed by the Board for compliance with such standards.

We do not believe it is necessary for us to decide whether the standards set forth in Section 270.5 are to be applied by the Board, as well as the Faculty Grievance Committee, in deciding grievances. Even assuming that we do have jurisdiction to apply such standards, we conclude that Chair Youngblood's actions do not rise to the level of constituting an abuse of authority. Some of Youngblood's actions were short of best practices, and can be questioned. She advised Grievant that she did not think it was necessary for her to write her self-evaluation statement prior to the department meeting. Given the way the department meeting proceeded, particularly that Chair Youngblood spoke against the adequacy of Grievant's scholarship meeting the requirements for tenure, it would have been better for Chair Youngblood to advise Grievant to submit a

self-evaluation statement which would have presented her case for tenure in a way that was not otherwise done. Nonetheless, this advice by Chair Youngblood did not constitute an abuse of authority. The evidence does not indicate there was a consistent practice of tenure candidates in the History Department submitting self-evaluation statements to department members prior to the department meeting on tenure review cases. Given this, it would be overreaching for us to conclude that Chair Youngblood abused her authority in not advising Grievant to submit a self-evaluation statement.

Chair Youngblood's further action of contacting a professor on sabbatical, and informing her erroneously that Dean Smith had warned Grievant that she needed to have a book manuscript accepted for publication by the time of her tenure review, demonstrated an inappropriate disregard of the actual standards Grievant was required to meet. The Dean did not require a book plus articles, but rather a book or a series of articles. Similarly, Chair Youngblood contacted another professor on sabbatical, and gave her a sense that she was lobbying for a negative vote on Grievant's application. It would have been better for Youngblood to withhold her views on Grievant's candidacy until later in the process, after department members had a chance to review the materials on Grievant's tenure application.

Nonetheless, Chair Youngblood did not violate any rules or regulations through these actions and her actions were not sufficiently detrimental to Grievant's tenure review to constitute an abuse of authority. The evidence does not indicate that the one professor who received the erroneous information from Chair Youngblood, and who voted against Grievant for tenure, relied on such information. The other faculty member contacted by

Chair Youngblood voted that Grievant be granted tenure, and thus there was no prejudice to Grievant demonstrated by Chair Youngblood's action.

Further, other actions of Chair Youngblood do not constitute an abuse of authority. Her comments at the department meeting speaking against Grievant's tenure application violated no rule or regulation, and was not contrary to past practices in the department of department chairpersons expressing their views regarding the merits of tenure applications at department meetings. Chair Youngblood's actions and expressed views on the merits of Grievant's tenure application did not result in an improper interference, intimidation or coercion of department members. The votes and comments of department members on Grievant's tenure application were the result of the considered individual judgment of each department member.

Chair Youngblood's action of not informing Grievant of her opposition to Grievant's tenure application until six days after the department meeting again was not the best practice, but did not constitute an abuse of authority. There were no rules or regulations mandating Chair Youngblood to inform Grievant of her views at an earlier time. Moreover, the evidence indicates that, except for her handling of Grievant's self-evaluation statement, Chair Youngblood generally fulfilled her obligation to help Grievant make the application for tenure as good as possible and prepare the best case for tenure. She communicated extensively with Grievant to ensure that various components of her tenure dossier would be prepared appropriately and submitted in a timely manner, and she provided sound advice to Grievant on how to present her tenure case in subsequent reviews beyond the department level.

Although Grievant is critical of Chair Youngblood for recommending that she include readers' reports of her book manuscript in the tenure dossier, this did not constitute an abuse of authority on the part of Chair Youngblood. Since Grievant's manuscript had not been accepted for publication, such readers' reports provided expert opinions on the quality of Grievant's manuscript that allowed those reviewing Grievant's tenure dossier to make a more informed assessment of Grievant's scholarship.

Grievant alleges that the conduct of Chair Youngblood in undertaking to prepare the case for tenure and secretly opposing it violated even rudimentary standards of good faith and fair dealing. As a result, Grievant argues that she was effectively denied the peer review guaranteed by university tenure procedures. In the event that Chair Youngblood was going to present a recommendation against tenure to the History Department, Grievant contends that Chair Youngblood had a duty of good faith and fair dealing either to so advise Grievant, or at a minimum to advise her that is was necessary for Grievant to present her tenure case herself.

Grievant's claim of violation of the common law doctrine of the implied covenant of good faith and fair dealing is not appropriately before the Board. As indicated at the outset of this opinion, our adjudicatory jurisdiction in this matter is limited to an alleged discriminatory application of a rule or regulation. This claim of Grievant is not supported by citation to a rule or regulation. *See* Grievance of Sklar, 19 VLRB at 208 (grievant's claims of abuse of authority, abuse of discretion, fraudulent misrepresentation and breach of contract not appropriately before the Board where none of these theories are supported by citation to a rule or regulation).

Further, Grievant's contention that she was denied the peer review guaranteed by university tenure procedures is not supported by the evidence. The evidence indicates that History Department members were provided the pertinent materials to properly review Grievant for tenure. They had the opportunity at the department meeting on Grievant's tenure application to engage in academic debate and provide their input on Grievant's qualification. Then, they cast an independent vote and made comments on the merits of Grievant's tenure candidacy. This provided Grievant with the peer review guaranteed by tenure procedures.

Grievant alleges that, in reviewing Grievant's tenure application, Chair Youngblood and a considerable number of members of the Department failed to apply the written University and History Department RPT Guidelines to Grievant's scholarship. Instead, Grievant contends that the standards applied by Chair Youngblood were a mistaken reading of comments by Dean Smith.

Grievant's allegation in this regard is a reference to the fact that, in her "green sheets" comments evaluating Grievant's scholarship, Chair Youngblood stated inaccurately that "(t)he Dean specifically warned that McIsaac would need a contract for her book, plus additional peer-reviewed publications, in order to receive tenure." Chair Youngblood was referring to a comment made by Dean Smith in her fourth year review of Grievant for reappointment. In that comment, the Dean did not require a book plus articles, but rather a book or a series of articles.

However, the evidence does not indicate that this misstatement by Chair Youngblood had any effect on other reviewers of Grievant for tenure. Department members were not affected by this error by Chair Youngblood in the "green sheets", as

they cast their ballots and commented on Grievant's tenure application before Chair Youngblood made this "green sheets" statement. Dean Smith was not misled by Chair Youngblood's misstatement as she knew what she said in her fourth year review of Grievant. Also, there is no indication in written analyses of Grievant's tenure case by the Dean, Faculty Standards Committee, Faculty Affairs Committee, Acting Provost or Acting President that they relied in any way on this misstatement by Chair Youngblood. Moreover, Grievant pointed out Chair Youngblood's error in her "Statement of Explanation or Disagreement" contained in the "green sheets". The Dean, Acting Provost, Acting President and the committees all would have reviewed Grievant's correction on this issue when they were reviewing Grievant for tenure. Accordingly, Chair Youngblood's misstatement was not prejudicial to Grievant in the ultimate determination that she not be granted tenure.

Grievant next alleges that Chair Youngblood and certain members of the History Department discriminated against Grievant on the basis of her sex by applying stricter standards to Grievant's tenure application due to her one-semester release from teaching responsibilities and the one-year extension on her tenure clock for maternity reasons. In so doing, Grievant alleges that they violated the Vermont Fair Employment Practices Act, the Vermont Parental and Family Leave Act and Sections 40.1, 40.2 and 270.5(c) of the Officer' Handbook.

The Board has such adjudicatory jurisdiction as is conferred on it by statute, and it has held that the Board does not have jurisdiction over Family and Medical Leave Act claims. Grievance of UE Local 267 and Bruley, 22 VLRB 182. Grievance of Woolaver, 21 VLRB 219 (1998). Grievance of VSCSF and Laflin, 16 VLRB 276, 280-81 (1993).

The Board also has held that it does not have jurisdiction over alleged violations of the Vermont Fair Employment Practices Act. Appeal of Bartley-Cruz, 19 VLRB 225, 231-32 (1996). Grievance of B.M, et al, 15 VLRB 503 (1992). Accordingly, we dismiss Grievant's Fair Employment Practices Act and Family and Medical Leave Act claims.

This leaves for consideration Grievant's allegation that the Officers' Handbook was violated. Section 040.2 of the Officers' Handbook provides that the "University . . . will not unlawfully discriminate against . . . employees in employment matters on the basis of unlawful criteria, such as . . . sex". It is not clear whether Grievant is pursuing this allegation on a "pretext" theory or a "mixed motive" theory. We will analyze Grievant's claim under both theories.

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination. Grievance of Butler, 17 VLRB at 312. The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision. Id. In pretext cases, the analysis used is that which is set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Id.

The employee carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. Burdine. If the employee succeeds in proving the *prima facie* case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action taken against the employee. Id. Should the employer carry this burden, the employee must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Id. The ultimate

burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. Id.

Thus, we must first determine whether Grievant has established a *prima facie* case of discrimination based on sex. The burden of establishing a *prima facie* case of disparate treatment is not onerous. Burdine, 450 U.S. at 253. Grievance of Lowell, 15 VLRB 291, 330 (1992). The employee must prove, by a preponderance of the evidence, that he or she was subject to an adverse employment action under circumstances which give rise to an inference of discrimination. Id. The Burdine court stated:

> As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 450 U.S. at 254.

In a tenure review case, a *prima facie* case of discrimination is shown by demonstrating that the employee belongs to a protected class; that the employee was qualified for the position; and that the employee was not granted tenure in circumstances permitting an inference of discrimination. Grievance of Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB 261, 300 (1995).

Grievant has met the protected class prong of this test since she is a woman. In the second prong of the test, a prima facie case that a faculty member is qualified for tenure is made out by a showing that some significant portion of department faculty, evaluators of the faculty member's performance and other scholars in the field hold a favorable view on the question. Id. A candidate for tenure does not make out the elements needed for a

prima facie case, however, merely by showing qualifications for continuation as an untenured faculty member; this is because advancement to tenure entails what is close to a life-long commitment by a college or university. Id. It must be noted, though, that the evidence necessary to be introduced by the tenure candidate in the *prima facie* case does not have to rise to the level mandating a determination that he or she is qualified for tenure. The qualifications of a tenure candidate must be at least sufficient to place him or her in a group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion. Id.

We conclude that Grievant has met the second prong of a *prima facie* case. One-half of her department colleagues, some members of tenure review committees in her case, and a significant number of outside evaluators of her scholarship, held a favorable view on her qualifications. This is sufficient to place Grievant in a group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion. In keeping in mind that Grievant does not have an onerous burden to prove her *prima facie* case, we conclude that Grievant has met her burden with respect to qualifications for tenure.

In analyzing the third prong of the test to meet a prima facie case, whether Grievant was denied tenure and promotion in circumstances permitting an inference of discrimination, we consider comments made by History Department members and Chair Youngblood in reviewing Grievant for tenure. One department member voting against Grievant for tenure stated that Grievant "had the time on her tenure clock extended by a year" to support a conclusion that Grievant "has not produced" sufficient scholarship for tenure. A second department member who voted against Grievant for tenure indicated

that “despite . . . an extension”, Grievant’s scholarship was not satisfactory. A third department member who voted against Grievant for tenure concluded that Grievant “has not lived up to department expectations and faith in her clearly evidenced in granting her two extensions”. A fourth department member voting against Grievant for tenure stated that Grievant “has received an extension for her tenure case” to support a conclusion that Grievant had not met expectations with respect to scholarly output.

These comments by four faculty members who voted against Grievant’s tenure application indicate that they inappropriately relied on an extension of Grievant’s tenure clock for maternity reasons to partially justify not recommending Grievant for tenure. It is clear by reviewing the comments made by Dean Smith and Acting Provost Low in their tenure review of Grievant that it was not appropriate to rely on the extension of Grievant’s tenure clock as a basis to support a conclusion that she had not met scholarship requirements. Provost Low stated: “That there was a lack of clarity in the minds of certain faculty regarding the nature of the extension, insofar as true, is disquieting”.

This is because the extension of a tenure clock for maternity reasons means that no advances in scholarship are expected of a faculty member during the time of extension, and such extension should not be used against a faculty member to support a negative conclusion regarding scholarly output. The fact that four members of the History Department did use Grievant’s extension for maternity reasons against her to support their conclusions on Grievant’s scholarship is sufficient to raise an inference of discrimination against her in the department based on her sex.

We do not conclude that "green sheet" statements made by Chair Youngblood to the effect that Grievant had been employed for "six years", or mentioning that Grievant had a one-year extension of her tenure clock without noting that it was a maternal extension that relieved Grievant from scholarship, raise an inference of discrimination against Grievant based on her sex. When Chair Youngblood's "green sheets" comments are read as a whole, it is evident that she did not use Grievant's extension for maternity reasons against her to support her conclusion on Grievant's record of scholarship, and there is no inference of discrimination against Grievant based on her sex. However, because we have concluded that comments made by four members of the History Department on their ballots voting against Grievant for tenure is sufficient to raise an inference of discrimination against her in the department based on her sex, we conclude that Grievant has established a *prima facie* case of sex discrimination.

Grievant having established a *prima facie* case, the burden shifts to the Employer to articulate a legitimate non-discriminatory reason for the denial of tenure and promotion. Burdine, 450 U.S. at 253-55. Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB at 302. The Employer needs not persuade the Board that the proffered reasons constituted the true motivation for the action. It is sufficient if the Employer's evidence raises a genuine issue of fact as to whether the Employer discriminated against the employee. Id.

To accomplish this, the Employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions. Id. The explanation provided must be legally sufficient to justify a judgment for the Employer. Id. The Employer must produce admissible evidence which would allow us rationally to conclude that the Employer's

action had not been motivated by discriminatory animus. Burdine, 450 U.S. at 257. Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB at 302. The determination whether the Employer has met the burden of production involves no credibility assessment. St Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993). Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB at 302. If the Employer fails to meet its burden of production, then Grievant prevails on her claim of discrimination as a matter of law. Id. Grievance of Day, 16 VLRB 312, 344 (1993).

The Employer has met this burden. The Employer articulates as a reason supporting tenure denial that Grievant met the required criteria to be awarded tenure in only two of the three performance areas of teaching, scholarship and service. The Employer contends that Grievant met the required standards in teaching and service, but not in scholarship. Suffice it to say that the evidence presented by the Employer of Grievant's deficiencies in the area of scholarship is sufficient to allow us rationally to conclude that the action denying tenure and promotion to Grievant did not result from discrimination against Grievant based on her gender.

The Employer having sustained its burden of production, Grievant must prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 253. Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB at 303. In determining whether the Employer's explanation was pretextual, we consider the evidence, and inferences properly drawn therefrom, previously introduced by Grievant to establish a prima facie case. Burdine, 450 U.S. at

255, n. 10. Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB at 302. Disbelief of the reasons put forward by the employer may, together with the elements of the prima facie case, suffice to show intentional discrimination. Hicks, 113 S.Ct. at 2749. Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO (Re: Yu Chuen Wei), 18 VLRB at 302-03.

We conclude that Grievant has not met her burden of proof. We are persuaded by the written comments of Dean Smith, Acting Provost Low and Acting President Martin in their respective reviews of Grievant for tenure, and the testimony of Dean Smith and Provost Low, that any deficiencies at the department level with respect to the extension of Grievant's tenure clock due to maternity reasons did not play a factor in the conclusions reached by Dean Smith, Acting Provost Low and Acting President Martin that Grievant's record of scholarship did not meet the qualifications for tenure and promotion.

We next analyze Grievant's discrimination claim on a "mixed motive" theory. In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 – 249 (1989). Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB at 294 -95. Once an employee shows that a prohibited factor, such as sex, played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role. Id.

We conclude that Grievant has not demonstrated that discrimination based on sex was a motivating factor in the decision to deny her tenure and promotion. As indicated

above, the extension of Grievant's tenure clock due to maternity reasons did not play a factor in the conclusions reached by Dean Smith, Acting Provost Low and Acting President Martin that Grievant's record of scholarship did not meet the qualifications for tenure and promotion. Accordingly, Grievant is unable to prevail on her discrimination claim on either a "pretext" theory or a "mixed motive" theory.

Grievant further alleges in the grievance filed with the Board that Chair Youngblood failed to communicate clear information concerning publication and review standards of the journals and conference volume in which Grievant had published her scholarly article in violation of Section 223.3 of the Officers' Handbook. Grievant contended that Chair Youngblood suggested that the publications were not adequately peer-reviewed. Grievant failed to establish this claim. The evidence indicates that, in her "green sheets" comments evaluating Grievant' scholarship record, Chair Youngblood accurately indicated that Grievant had two peer-reviewed articles. Given this evidence, and because there is no evidence that Chair Youngblood otherwise communicated inaccurate information regarding Grievant's peer-reviewed articles to History Department members, we cannot conclude that Chair Youngblood inappropriately suggested that publications were not adequately peer-reviewed.

Grievant alleges that her right to peer review of her scholarly achievements by known and acknowledged scholars in her field was violated because anonymous readers' reports of her book manuscript were inappropriately used to evaluate Grievant's scholarship. Grievant contends this is so because such reports are anonymous and thus the stature of the readers is unknown, and because the purpose of the reports is not for tenure review but to improve the manuscript for publication.

Grievant has failed to established that there was any violation of a rule or regulation as a result of the inclusion of the readers' reports in the tenure review process. Section 223.3 of the Officers' Handbook provides that the "department must solicit evaluations from acknowledged scholars or practitioners at other institutions" on the quality and significance of a tenure candidate's scholarly work. The History Department did this in Grievant's case by obtaining the views of seven acknowledged scholars from other colleges and universities to evaluate Grievant's scholarly work, including her book manuscript. Thus, Grievant cannot prevail on her claim that she was denied peer review of her scholarly achievement.

Further, Section 223.3 also provides that scholarly "work in progress should be assessed whenever possible". Since Grievant's book manuscript had not been accepted for publication, readers' reports of her book manuscript provided expert opinions on the quality of Grievant's manuscript, in addition to those provided by the seven outside evaluators, that allowed reviewers of Grievant for tenure to make a more informed assessment of Grievant's scholarship.

Grievant also has alleged that there was no rational basis for Youngblood's statement in her "green sheets" comments that Grievant's publication record "remains essentially the same as it was at her last reappointment review" and for the statement by one department member in his ballot on Grievant's tenure application that Grievant's book manuscript had not advanced substantially beyond the completion of her dissertation in 1994. Grievant contends that these statements violated Section 270.5 of the Officers' Handbook, which provides in pertinent part that the "Grievance Committee shall have jurisdiction over all and only cases which fall under one or more of the

following categories . . . Grievances in which faculty members allege that a decision had no rational basis".

Even assuming that we have jurisdiction to apply the standards set forth in Section 270.5, and even given our conclusion that the statements cited by Grievant were inaccurate as alleged by her, we do not find that they resulted in no rational basis for the "decision" on whether Grievant was qualified for tenure. The comments made by the one department member and Chair Youngblood were at the beginning of a comprehensive and protracted tenure review process. Subsequently, Dean Smith, Acting Provost Low and Acting President Martin reviewed comments made at the department level, and through their own comments rejected any conclusions that Grievant's book manuscript had not advanced substantially since 1994 and that Grievant's publication record had remained essentially the same since her last reappointment review. These higher-level decision-makers thus did not rely on the misstatements made at the department level, thereby defeating Grievant's claim of any violation of a rule or regulation.

Grievant's final allegations are that Chair Youngblood's issuance of a nominally positive recommendation in her tenure case deprived Grievant of the proper review of an adverse decision and the possible remedy of the Dean sending the matter back to the Department for review, and that there was no rational basis for the Employer's ignoring of the actual negative report of Chair Youngblood. Grievant's allegation concerning Youngblood's issuance of a nominally positive recommendation fails for lack of citation to a rule and regulation that was violated by Chair Youngblood's action. Grievant's latter allegation fails because the evidence does not indicate that subsequent reviewers of Chair Youngblood ignored the nature of her recommendation. They viewed Chair

Youngblood's report for what it was – a reflection of a split department on a difficult tenure case. Moreover, the evidence does not demonstrate that any harm resulted to Grievant as a result of the nature of Chair Youngblood's recommendation.

In sum, we conclude that Grievant has not demonstrated the violation of any rules or regulations in this grievance, and thus we dismiss her grievance. This is not to say that we do not have compassion for Grievant. She is a good teacher who attempted to meet the requirements for tenure. However, we do not see where Grievant has demonstrated violations of rules and regulations. We note that Grievant was reviewed for tenure and promotion at six different levels within the University. At each level, she was either rejected for tenure or received what can be characterized at best as equivocal support. This reflects the difficult nature of this case as well as the rational basis for the ultimate denial of tenure and promotion to Grievant. We recognize that there were deficiencies at the department level, but conclude that these deficiencies did not change the ultimate decision in this case.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Mary Lee McIsaac is dismissed.

Dated this ____ day of April, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

_____
Edward R. Zuccaro

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Joan B. Wilson