

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

April 30, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1605**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**DARLENE M. WEYENBERG,**

**PETITIONER-APPELLANT,**

**v.**

**UNIVERSITY OF WISCONSIN—OSHKOSH,  
JOHN E. KERRIGAN AND VICKI LORD LARSON,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

NETTESHEIM, J. Darlene M. Weyenberg appeals the denial of her request for tenure as an assistant professor of nursing at the University of Wisconsin—Oshkosh (UWO). Weyenberg contends that the chancellor of the university ignored the College of Nursing's (CON) criteria for tenure and improperly applied the university's criteria. Upon judicial review, the

circuit court upheld the chancellor's ruling. Because we conclude that the chancellor properly considered the CON's guidelines in conjunction with the university's criteria, we reject Weyenberg's argument and affirm.

### ***FACTS***

In 1986, Weyenberg was employed as an instructor-rank faculty member in the College of Nursing at the University of Wisconsin—Oshkosh. From 1991 to 1992, Weyenberg took an educational leave from UWO in order to pursue a doctorate in curriculum and instruction at the University of Wisconsin—Madison. Weyenberg returned to her teaching position at UWO in September 1993. On February 10, 1994, Weyenberg was recommended for tenure by the CON faculty tenure review committee. However, all subsequent levels of review—the program director, the dean of CON, the vice chancellor and the chancellor—recommended against tenure. On May 9, 1994, Weyenberg was informed by Chancellor John E. Kerrigan that she would not be granted a tenure position and that her probationary position at UWO would terminate at the conclusion of the 1994-95 academic year.

Pursuant to UWO faculty personnel policies and procedures, Weyenberg requested a summary of the reasons underlying the initial denial of tenure and a reconsideration of her tenure application. Weyenberg's request was forwarded to the program director who made the first nonrenewal recommendation. The program director reviewed Weyenberg's request and again denied tenure. Weyenberg appealed the University's decision to the faculty senate. The faculty senate hearing subcommittee found in favor of Weyenberg, concluding that the University had erroneously failed to apply the CON guidelines for tenure. In its written summary, the subcommittee made the following findings:

I. That the College of Nursing TARPS Committee reviewed the evidence in Darlene Weyenberg's tenure papers and matched it with the tenure criteria of the College for her rank of Instructor .... The [CON] TARPS Committee found that the candidate exceeded expectations for teaching and met expectations for professional growth and service.

....

II. That the review levels above the [CON] (which is the initial level of review) improperly considered the qualifications for tenure of Darlene Weyenberg.

The subcommittee specifically noted that the program director and the dean did not appear to judge Weyenberg by the CON criteria set forth in the 1993 UWO *Faculty and Academic Staff Handbook* (UWO Handbook). Rather, the findings noted that the program director evaluated Weyenberg using criteria inapplicable to the rank of instructor. Because the vice chancellor and chancellor specifically stated that they concurred with the recommendation of the program director and dean, the hearing subcommittee concluded that Weyenberg was improperly evaluated at all levels of the administrative review and that the procedures required by the rules of the board were not followed.

The vice chancellor reviewed the subcommittee's findings and again concluded that Weyenberg should not be granted tenure.<sup>1</sup> In the vice chancellor's memorandum to the chancellor, she observed that the interrelationship between the college and university criteria was of central importance to Weyenberg's case. In doing so, she stated, "When Ms. Weyenberg's qualifications are measured against the college's guidelines at the instructor rank, it appears evident that her

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<sup>1</sup> We note that at the time of Weyenberg's initial tenure review process the vice chancellor was Robert Carruba. On reconsideration, Weyenberg's tenure application was reviewed by Carruba's successor, Vicki Lord Larson.

accomplishments are consistent with those identified factors. However, when these qualifications are now considered in light of the University's criteria, I am not able to make that same statement." The vice chancellor considered the subcommittee's findings, noting her belief that the subcommittee had applied the CON guidelines as a "threshold standard" for tenure at UWO. In rejecting the subcommittee's recommendation, the vice chancellor went on to state that she could not accept "such an automatic relationship between [CON's] statements of minimal guidelines and our University's established criteria for tenure." The vice chancellor additionally reported:

My recommendation against tenure is based on the conclusion that Ms. Weyenberg has not demonstrated scholarly achievement at a level sufficient to ensure continued professional and intellectual growth. I find a silent record with none of the traditional indications of the scholarly life. With no publications and only three professional presentations on her vita (1987, 1988, 1990), I do not see a record of demonstrated scholarly activity that warrants tenure at this University. While she has completed 63 credits toward doctoral studies, this accomplishment is insufficient scholarly achievement to allow me to conclude she will make continued professional and intellectual growth.

Upon receipt of this report, the chancellor conducted a review of Weyenberg's record and, in light of the vice chancellor's recommendation, affirmed his decision to deny Weyenberg's appointment to a tenured faculty position.

In December 1994, Weyenberg requested review of the chancellor's final decision under ch. 227, STATS. Weyenberg argued before the circuit court that the chancellor improperly failed to apply the criteria established by CON in reviewing her application for tenure. The trial court rejected Weyenberg's argument and affirmed the chancellor's decision. Weyenberg appeals.

### ***THE TENURE PROCESS***

The granting of tenure is governed by statute, administrative rule and university policy. In order to give the reader a better understanding of the issue presented in this appeal, we begin with an overview of the tenure process.

The board of regents holds the primary responsibility for governance of the university system and, as such, functions as its administrative agency. *See* § 36.09(1)(a), STATS.; *see also* *Coe v. Board of Regents*, 140 Wis.2d 261, 265, 409 N.W.2d 166, 167 (1987). The board is responsible for approving and granting faculty appointments in the university system. There are two types of appointments in the university system—tenure and probationary. *See* WIS. ADM. CODE § UWS 3.01(1). A tenure appointment, as defined by § 36.13(1)(b), STATS., is “an appointment for an unlimited period granted to a ranked faculty member by the board [of regents of the University of Wisconsin system].” Before receiving tenure, a person holds a teaching position by “probationary appointment.” *See* § 36.13(1)(a). However, a probationary appointment is limited in term. *See* § 36.13(2)(d). Therefore, in order to remain employed at a particular institution, a person must obtain tenure.

The board may grant a tenure appointment only upon the affirmative recommendation of the appropriate chancellor and the appropriate academic department or its functional equivalent. *See* § 36.13(2)(a), STATS. The role of the chancellor in the university system is to serve as the “executive head” of its respective faculties and institutions. *See* § 36.09(3)(a), STATS. “Subject to board policy the chancellors of the institutions ... shall be responsible for ... defining and administering institutional standards for faculty peer evaluation and screening candidates for appointment, promotion and tenure ...” *Id.*

Pursuant to § 36.13(3), STATS., additional rules governing tenure are promulgated under ch. 227, STATS., by the board and its faculties. The administrative rules as they relate to faculty appointments, specifically tenure, are as follows:

WISCONSIN ADM. CODE § UWS 3.01(a) “Tenure appointment” means an appointment for an unlimited period granted to a ranked faculty member by the board upon the affirmative recommendation of the appropriate academic department ... and the chancellor of an institution via the president of the system.

....

UWS 3.03 **Appointments—general.** The faculty of each institution, after consultation with appropriate students and with the approval of the chancellor, shall develop rules relating to faculty appointments ....

....

UWS 3.06 **Renewal of appointments and granting of tenure. (1) (a) General.** Appointments may be granted only upon the affirmative recommendation of the appropriate academic department ... and the chancellor of an institution. When specified by the board, the institutional recommendation shall be transmitted by the president of the system with a recommendation to the board for action ....

(b) Decisions relating to renewal of appointments or recommending of tenure shall be made in accordance with institutional rules and procedures which shall require an evaluation of teaching, research, and professional and public service and contribution to the institution. The relative importance of these functions in the evaluation process shall be decided by departmental, school, college, and institutional faculties in accordance with the mission and needs of the particular institution and its component parts. Written criteria for these decisions shall be developed by the appropriate institutional faculty bodies ....

(c) The faculty and chancellor of each institution, after consultation with appropriate students, shall establish rules

governing the procedures for renewal or probationary appointments and for recommending tenure ....

Pursuant to WIS. ADM. CODE § UWS 3.06(1)(c), the rules governing the tenure process at the UWO were established by the faculty and chancellor of that institution and are set forth in the *UWO Handbook* ch. 5, § 5.04, titled Faculty Personnel Policies and Procedures (Faculty Policy). The policies and procedures set forth in the faculty policy section were approved by the faculty senate, the chancellor and the UW board of regents, and therefore have the status of rules of the regents and may be enforced in the same manner as state statutes.<sup>2</sup> *See* Faculty Policy, ch. UWO 17, § 17.03.

The tenure review process at the UWO is governed in part by the procedure for the renewal/nonrenewal of probationary faculty set forth in ch. UWO 4 of the faculty policy section. *See* Faculty Policy, ch. UWO 5, § 5.01(b). First, a probationary faculty member applying for tenure must receive a favorable tenure recommendation from the department. If the department recommends tenure, the application is then reviewed by the department chairperson, college committee, dean, vice chancellor and chancellor. *See id.* at ch. UWO 4, § 4.01(a). The criteria for recommendations of tenure at UWO are addressed in Faculty Policy, ch. UWO 4, § 4.01(d). That section provides:

Decisions relating to renewal of appointments or recommending of tenure shall require an evaluation of teaching, research, and professional and public service, and

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<sup>2</sup> The faculty policies and procedures contained in ch. 5, § 5.04 of the 1993 University of Wisconsin—Oshkosh *Faculty and Academic Staff Handbook* were originally approved by the faculty senate on November 15, 1983. The rules were approved by then-Chancellor Penson and submitted to the UW system on January 31, 1983. The board of regents approved the rules on March 9, 1984, and the rules became effect on July 1, 1984. The original rules have since been revised and approved by Chancellor Kerrigan and the board of regents. On February 10, 1992, the current rules became effective. *See* Faculty Policy, ch. UWO 17, Historical Notes. To clarify, all references to the *UWO Handbook* refer to the 1993 version.

contribution to the university. The relative importance of each function of the evaluation process shall be decided by department ... and college faculties in consultation with the appropriate committee of the Faculty Senate in accordance with the mission and needs of the University of Wisconsin Oshkosh and its component parts.

Forms for the purpose of renewal of appointments and the granting of tenure shall be prepared ... and shall include provisions for teaching, scholarship, and service criteria ....

In all cases, the reasons for the evaluation must be clearly stated. A written statement of the department/equivalent unit and college criteria shall be made available to all faculty.

In keeping with Faculty Policy, ch. UWO 4, § 4.01(d), each reviewing level recommending tenure is required to provide a statement indicating that: (1) the person recommended will make a significant contribution to the growth and development of the institution; (2) quality performance in teaching and/or in the area of major professional responsibility has been demonstrated; and (3) scholarly achievement and institutional activities are at a level sufficient to ensure continued professional and intellectual growth. See Faculty Policy, ch. UWO 5, § 5.01(b). Additionally, each level of review is “expected to exercise independent judgment.” See Faculty Policy, ch. UWO 4, § 4.01(b)(2).

In order to aid those involved in renewal/nonrenewal and tenure decisions, the UWO *Handbook* provides guidelines which “transmit and interpret the laws and procedures currently in effect in the UW System and [UWO] regarding renewal, nonrenewal and tenure.” See UWO *Handbook*, ch. 7, § 7.01. The general guidelines relating to faculty tenure address the proper procedures to be followed in considering and applying for tenure. See *id.* at § 7.01(II). The guidelines additionally reiterate the tenure criteria set forth in the policy section of the UWO *Handbook*.



In addition to the guidelines set forth by the UWO, CON provides its own set of guidelines for tenure, appointment, reappointment and promotion. *See UWO Handbook*, ch. 7, § 7.05. The CON materials also include forms designed to aid an applicant for renewal in preparing the documents relevant to review. The forms identify each faculty ranking—instructor, assistant professor, associate professor, and professor—and provide examples of activities expected of each ranking in the areas of teaching, professional and scholarly growth, and service. The guidelines and expectations set forth by CON differ substantially from those set forth by the university. However, ch. 7, § 7.05 provides: “The College of Nursing follows University guidelines: see University Faculty Handbook for further information and guidance.”

### ***DISCUSSION***

The issue presented in this appeal is whether the chancellor erred in considering the university criteria in addition to the CON guidelines for tenure in assessing Weyenberg’s qualifications. As outlined above, the board may grant tenure only upon the recommendation of both the chancellor and the faculty. The chancellor in this case denied Weyenberg’s application for tenure because she did not meet the criteria as set forth by the university.

Our scope of review is identical to that given the trial court. *See* § 227.57, STATS.; *see also* *Coe*, 140 Wis.2d at 268, 409 N.W.2d at 163. Whether the chancellor erred in his application of tenure criteria is a question which we review independently of the trial court. *See id.* We observe that an administrative agency’s interpretation of its own regulations is entitled to controlling weight unless inconsistent with the language of the regulation or clearly erroneous. *See Pfeiffer v. Board of Regents*, 110 Wis.2d 146, 154-55, 328 N.W.2d 279, 283 (1983). Because the chancellor is the executive head of his or her institution and

is responsible for administering board policies, we will defer to the chancellor's application of tenure criteria unless it is inconsistent with university rules or clearly erroneous. *See Coe*, 140 Wis.2d at 269, 409 N.W.2d at 169; § 36.09(3), STATS.

Weyenberg contends that the chancellor improperly disregarded the CON guidelines in his decision to deny her application for tenure. Weyenberg argues that the CON guidelines are “written criteria” which the chancellor is required to apply when reviewing tenure and that the chancellor's failure to apply the CON guidelines, as promulgated by the faculty in accordance with WIS. ADM. CODE § UWS 3.06(1)(b), resulted in an erroneous application of university rules. We reject Weyenberg's arguments for two reasons. First, we conclude that the CON guidelines are precisely what they purport to be—guidelines. We reject Weyenberg's invitation to construe the CON guidelines as rules of the university by which the chancellor is bound. Second, based on our review of the record and the applicable law, we conclude that the chancellor's independent application of the UWO criteria is consistent with the language of the university rules governing tenure.

The tenure criteria constituting rules of the university are set forth in the faculty policy section of the UWO *Handbook* and are binding on the chancellor. The criteria indicated in the UWO policies are as follows: (1) the person recommended will make a significant contribution to the growth and development of the institution; (2) quality performance in teaching and/or in the area of major professional responsibility has been demonstrated; and (3) scholarly achievement and institutional activities are at a level sufficient to ensure continued professional and intellectual growth. *See* Faculty Policy, ch. UWO 5, § 5.01(b). Under the third criteria, the chancellor is required to consider whether the tenure

applicant possesses the requisite level of scholarly achievement and institutional activity to ensure continued professional and intellectual growth. In Weyenberg's case, the chancellor concluded that she did not. In doing so, the chancellor acted within the rules of the university and within the scope of his authority.

Weyenberg contends that the CON guidelines change the rules and thus the application of the established UWO criteria. Weyenberg argues that the chancellor was required to evaluate her tenure application under the guidelines set forth by her college. We disagree. Chapter 7, § 7.05 of the *UWO Handbook* sets forth the CON guidelines for tenure. The section begins with the statement: "The College of Nursing follows University guidelines: see University Faculty Handbook for further information and guidance." The information provided in § 7.05 instructs the tenure applicant as to tenure procedure and the submission of data supporting a tenure application. Although the CON guidelines set forth a specific list of descriptors for each faculty rank for which applicants should provide supporting materials, CON also clarifies that "the descriptors designated for each rank are provided to serve as a guideline for preparation of the documents related to reappointment, merit, and tenure." *UWO Handbook*, ch. 7, § 7.05 fig. 7.3 n.1. Indeed, there is nothing in § 7.05 which supports Weyenberg's contention that the CON guidelines take precedence over the university criteria.

Next, Weyenberg argues that in order to maintain the proper statutory balance between the functions of the chancellor and the departmental faculty, the chancellor must be required to use all the written tenure criteria developed by the faculty, including the CON guidelines. While we agree with Weyenberg that the chancellor should consider the CON guidelines in making tenure decisions, we cannot conclude that the chancellor is bound by the provisions therein.

Weyenberg argues that this court's holding in *Coe* requires the chancellor to adhere to the written criteria that govern both his and the faculty's assessment of tenure applications and that therefore the chancellor erred in failing to adhere to the CON guidelines. However, Weyenberg's argument is premised on our acceptance of the CON guidelines as "written criteria" within the rules of the university. We have declined to do so. Therefore, the question becomes whether the chancellor properly applied UWO's written criteria for tenure. We conclude that he did.

Before discussing Weyenberg's application in light of *Coe*, we briefly repeat the rules governing the chancellor's review of Weyenberg's application. First, § 36.09(3)(a), STATS., states that "[s]ubject to ... board policy the chancellors of the institutions ... shall be responsible for ... defining and administering institutional standards for faculty peer evaluation and screening candidates for appointment, promotion and tenure ...." Next, the rules of the board require that "[d]ecisions relating to renewal of appointments or recommending of tenure shall be made in accordance with institutional rules and procedures ...." WIS. ADM. CODE § UWS 3.06(1)(b). Finally, the rules of the institution require that a tenure applicant will make a significant contribution to the growth and development of the institution and that the applicant demonstrates sufficient scholarly achievement. *See* Faculty Policy, ch. UWO 5, § 5.01(b).

In *Coe*, the department voted in favor of the faculty member's tenure application even though the number of tenured faculty members in the department exceeded university limitations. *See Coe*, 140 Wis.2d at 266, 409 N.W.2d at 167. The chancellor then decided to deny the tenure application based on several factors relating to tenure management. *See id.* The court concluded that the chancellor did not err in denying the tenure application on the basis of tenure

density because the written criteria developed by the university under WIS. ADM. CODE § UWS 3.06(1)(b) established tenure density as a relevant criterion. *See Coe*, 140 Wis.2d at 270, 409 N.W.2d at 169.

Here, the written criteria developed by the university under WIS. ADM. CODE § UWS 3.06 govern both the chancellor's and CON's review of Weyenberg's application. These written criteria specifically require that tenure applications be examined for evidence of sufficient professional and scholarly growth at every level of review. Like the chancellor in *Coe*, the chancellor in this case applied a criterion set forth in the university's written criteria. *See Coe*, 140 Wis.2d at 270, 409 N.W.2d at 169. Also as in *Coe*, the chancellor arrived at a different decision than the reviewing department. However, as long as the chancellor applies the rules of the university, we will defer to his or her interpretation if it is consistent with the language of the rules. *See id.* at 271, 409 N.W.2d at 169.

In the chancellor's recommendation decision denying Weyenberg's tenure, he states, "I [have] conducted a complete review of your professional qualifications in light of your college's guidelines and our University's established criteria." Then, specifically noting the vice chancellor's recommendation, the chancellor concluded that Weyenberg had not demonstrated "the characteristics that have earned tenure at this University."

The vice chancellor's recommendation against tenure interprets the scholarly growth criterion as requiring more than the fulfillment of the minimal guidelines set forth by CON. In applying the scholarly growth criterion, the vice chancellor concluded that, in the exercise of her independent judgment, Weyenberg "ha[d] not demonstrated scholarly achievement at a level sufficient to

ensure continued professional and intellectual growth.” The vice chancellor made this assessment only after noting her consideration of the CON guidelines and acknowledging Weyenberg’s fulfillment of those provisions. Nevertheless, the vice chancellor stated that, in light of Weyenberg’s record, she could not “in good conscience ... reach the conclusion required under our established University criteria for tenure.” We conclude that the vice chancellor’s interpretation of the “scholarly growth” criterion as applied to Weyenberg’s tenure application and as noted by the chancellor is consistent with the language of the applicable rules and is in keeping with the court’s holding in *Coe*.

Finally, Weyenberg argues that she was not given notice of the UWO’s written criteria as required under WIS. ADM. CODE § UWS 3.06 and Faculty Policy, ch. UWO 4, § 4.01(d). Weyenberg therefore argues that she was not put on notice that publications and presentations would be considered in reviewing her tenure application. Based on our review of the record, we conclude that UWO provided Weyenberg with all of the required written materials and with sufficient notice that the university criteria would be applied in conjunction with the CON guidelines.

WISCONSIN ADM. CODE § UWS 3.06(1)(b) provides: “Written criteria ... shall be developed by the appropriate institutional faculty bodies ....” Faculty Policy, ch. UWO 4, § 4.01(d) requires that “[f]orms for the purpose of ... the granting of tenure shall be prepared ... and shall include provisions for teaching, scholarship, and service criteria” and that “[a] written statement of the ... college criteria shall be made available to all faculty.” UWO developed written criteria in accordance with § UWS 3.06(1)(b). These criteria are published and available to faculty in the UWO *Handbook*. See Faculty Policy, ch. UWO 5, § 5.01.

Both the UWO and CON provide tenure applicants with forms relating to teaching, scholarship and service criteria. Weyenberg completed these forms as part of her tenure application. The UWO form relating to scholarship and professional growth instructs the applicant to list, among other things, books, articles, performances and papers. The CON guidelines for tenure are also “written” and provided to faculty in the *UWO Handbook*. However, the CON guidelines are not university criteria and are set forth with the statement: “The College of Nursing follows University guidelines: see University Faculty Handbook for further information and guidance.” We conclude that Weyenberg was provided with adequate notice that the UWO written criteria would be considered in addition to the CON guidelines.

### ***CONCLUSION***

An agency's interpretation of its own regulations is entitled to controlling weight unless inconsistent with the language of the regulation or clearly erroneous. See *Pfeiffer*, 110 Wis.2d at 154-55, 328 N.W.2d at 283. This is because the agency knows the specific purposes of the regulations it promulgates and has a certain expertise in the area it is called upon to regulate. See *id.* at 155, 328 N.W.2d at 283. In reviewing a tenure application, the chancellor must consider the broad goals of the university in addition to the immediate needs of the department. Here, the chancellor concluded that Weyenberg met the expectations of the department set forth in the CON guidelines but fell short of the UWO criteria. Because the chancellor's interpretation of the UWO criteria and the CON guidelines is consistent with the language of the UWO rules, we properly defer to his determination that Weyenberg has failed to meet the criteria for a tenured position.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.



