CHRISTOPHER T. GRUEN,

Grievant,

v. **Docket No. 95-BOD-281**

BOARD OF DIRECTORS,
CONCORD COLLEGE,

Respondent.

D E C I S I O N

Christopher T. Gruen (Grievant) initiated this grievance on May 16, 1995, pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Concord College (Concord) had improperly terminated his probationary faculty status. Following denial of his grievance at Level I, Grievant appealed to Level II, and a hearing was conducted on May 31, 1995. Thereafter, on June 6, 1995, Concord President Jerry L. Beasley accepted the recommendation of the Level II Hearing Examiner, and denied the grievance. Grievant timely appealed to Level III, where the Board of Directors formally waived participation in accordance with W. Va. Code § 18-29-4(c) on June 21, 1995. Accordingly, Grievant appealed to Level IV on June 27, 1995.

Following a series of continuances, each of which was granted for good cause, and after this matter was reassigned to the undersigned administrative law judge foradministrative reasons, extensive Level IV evidentiary hearings were conducted in Princeton, West Virginia, on February 8 and 9, and April 8, 9, and 10, 1996. (See footnote 1) Both parties filed detailed post-hearing briefs, and this matter became mature for decision upon receipt of those briefs on May 22, 1996.

DISCUSSION

Concord elected not to renew Grievant's probationary contract beyond the 1995-96 academic

year in accordance with authority contained in Series 36 of the Procedural Rule enacted by the State College System of West Virginia Board of Directors (Series 36), 131 C.S.R. 36 (1992). Series 36 establishes "State College System policy and guidelines for institutional policy in matters related to academic freedom, professional responsibility, promotion and tenure." 131 C.S.R. 36 § 1.1 (1992). Particularly relevant to this grievance are the following provisions relating to probationary faculty members:

> 10.1. When a full-time faculty member is appointed on other than a temporary or tenured basis in any of the institutions of higher education in the State College System, the appointment shall be probationary.
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> 10.2. During the probationary period, the terms and conditions of every reappointment shall be stated in writing, with a copy of the agreement furnished the individual concerned within fifteen (15) days following receipt of the board budgetary allocations and guidelines.
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> 10.3. The maximum period of probation shall not exceed seven (7) years. Before completing the sixth (6th) year of a probationary appointment, any nontenured faculty member shall be given written notice of tenure, or offered a one (1) year written terminal contract of employment. During the probationary period, faculty members may be granted tenured appointment before the sixth (6th) year of service, such appointment to be based upon criteria established by the institution and copies provided to the chancellor.
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> 10.4. During the probationary period, contracts shall be issued on a year-to-year basis, and appointments may be terminated at the end of the contract year. During said probationary period, notices of nonreappointment may be issued for any reason that is not arbitrary, capricious, or without factual basis. Any documented information relating to the decision for nonretention or dismissal shall be provided promptly to the faculty member upon request.

Grievant asserts Concord's issuance of a terminal contract for the 1995-96 academic year was an arbitrary and capricious action prohibited under Series 36, § 10.4, as quoted above. Obviously, Concord is bound by the substantive and procedural requirements set forth in Series 36. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993). However, in applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best

Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20- 537 (Mar. 22, 1995). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

In applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. Gomez-Avila v. W. Va. Bd. of Trustees, Docket No.94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); Cohen v. W. Va. Univ., Docket No. BOR1-86-247-2 (July 7, 1987). See Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Kauffman v. Shepherd College, Docket No. BOR1- 86-216-2 (Nov. 5, 1986). This generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3d Cir. 1980). See also Bina v. Providence College, 39 F.3d 21 (1st Cir. 1994), cert. denied, 115 S. Ct. 1406 (1995); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).

With these standards in mind, the factual reasons proffered for offering Grievant a terminal contract are contained in correspondence that was generated through Concord's established process for reaching decisions on such issues. (See footnote 2) On March 23, 1995, Dr. David Bard, Chairman of the Personnel Committee in Concord's Division of Social Sciences, reported on the Committee's evaluation of Grievant for 1994-95 as follows:

> The Social Science Division Personnel Committee meet (sic) on Wed.[,] March 22, 1995, for an evaluation of C.T. Gruen.
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> Both of the Divisional "Teaching Evaluators" made reports based on classroom visits. There was a lengthy general discussion. Dr. Gruen's Student Evaluations were lower than the Division average. The committee was presented with both the positive and negative comments from the written portion of the Student Evaluations. The Teaching Evaluators were not in agreement about the appropriate level of instruction

delivered by Dr. Gruen.

There were concerns expressed by several committee members about Dr. Gruen's teaching techniques, including; reading portions of text material, emphases on informal "chats", class discussion too heavily based on experience without theoritical (sic) or research material, and repetitive ness of material in a number of classes. There were concerns expressed that Dr. Gruen's teaching did not meet the expected standards of the Division. The Peer Review evaluation was rather low, with a large number of "4"s indicated. There were some positive comments about the role that Dr. Gruen plays in student and community activities.

Concerns were expressed about the role that Dr. Gruen played in the recent Social Work accreditation process, specifically in the preparation of reports and course syllabi. There were concerns about the degree that Dr. Gruen received from Sierra University in May of 1994. Concerns were expressed about the appropriateness of the credential, and Dr. Gruen's judgement about the boundaries of the areas of his teaching qualifications.

After considerable discussion and deliberation the Division vote on the issue of continuation of a probationary contract was, one vote - positive, eleven votes - negative.

J Ex 3. (See footnote 3)

On April 11, 1995, John Seago, Chairman of Concord's Division of Social Sciences, who had attended the meeting of the Division Personnel Committee discussed above,forwarded the following "Annual Evaluation of Dr. Chris Gruen" to Dean Turner, Concord's Vice President and Academic Dean.

In accord with the Personnel Committee of the Division of Social Sciences, I am recommending that Dr. Gruen be issued a terminal contract for the 1995-96 academic year. The Personnel Committee's vote was 11 to 1 for termination of Dr. Gruen's teaching contract.

Overall, students enjoyed Dr. Gruen's classes. They felt relaxed and free to participate in class discussions. They enjoyed the guest speakers in their classes and they enjoyed Dr. Gruen sharing his personal experiences with them. At the same time, few to no students commented positively concerning the academic content of his classes. Negative comments concerned the lack of academic content, lack of lecturing and lack of adequate preparation by Dr. Gruen. Nine of fifteen students in one of his classes commented that their textbook was inadequate, boring, and/or out of date.

> It appears that Dr. Gruen relies too heavily on anecdotes in his classes, a continuing concern as noted by the current and past Divisional Personnel Committee reports.
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> Dr. Gruen's student evaluation's mean score for his instructional classes during the Spring and Fall, 1994, were below the Division's and College's averages. Only one of seven classes taught during this time period by Dr. Gruen scored above the Division's and/or College's average.
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> Evaluation means of 9.1 and 8.8 occurred for the field placement classes, which involved field supervision of six students. His average Spring, 1995, peer evaluations were all below that expected of a colleague.
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> Dr. Gruen is a member of the parking committee, advisor to three student groups, and is involved with WVSEU. He has given lectures to and is a member of several off-campus groups.
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> He received a Ph.D. from Sierra University, a Clinical Diplomate certification and licensure as an independent social worker.
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> Sierra University had no recognized regional or national accreditation, according to the American Council of Education. In their experience, degrees from schools of this type are not recognized by accredited schools or by the military. Sierra University closed down on April 7.

R Ex 1. On May 8, 1995, Dean Turner submitted a written recommendation to Concord President Jerry Beasley regarding Grievant's retention beyond his fifth year of teaching. After evaluating Grievant in ten areas, stating both positive and negative comments, Dean Turner recommended that Grievant "be given another terminal contract for the 1995-96 academic year." J Ex 1. (See footnote 4) The record indicates that Dean Turner was making reference to the fact that Grievant had previously been notified that his contract for the 1993-94 academic year would be a terminal contract. Grievant grieved that action under W. Va. Code §§ 18-29-1, et seq., ultimately prevailing before this Grievance Board in an appeal submitted to Level IV by Respondent, which challenged Grievant's declaration of

a default at the lower level under W. Va. Code § 18-29-3(a). Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994). Although testimony regarding the merits of Respondent's decision to issue a terminal contract was presented at the Level IV hearing in that matter, this Board's decision was limited to the procedural default question. See Gruen, supra. Thus, the merits of that nonrenewal decision were never addressed.

President Beasley testified that he considered the current recommendations from Dean Turner, Professor Seago, and Dr. Bard in deciding not to renew Grievant's contract. He also reviewed the package of materials which Grievant submitted in support of retention, as well as the recommendations made on Grievant's retention in prior years. One of Dean Turner's negative comments under "Working Relationships" stated:

> Based on my observations, his negative continuation recommendation by peers, and informal interactions with his colleagues, Dr. Gruen is neither respected nor compatible with the majority of his colleagues in the Division of Social Sciences.

J Ex 1.

President Beasley indicated that this was a factor which weighed heavily in his decision not to renew Grievant's probationary contract. He also testified that he considered writing skills to be essential to any educated person serving as a faculty member. He noted that a "work in progress" which Grievant submitted with his earlier application for retention was below expected standards for a college graduate, let alone a college faculty member. President Beasley further considered the depth and quality of a faculty member's participation in college and community affairs. Finally, he gives considerable weight to the evidence which came forward from teaching colleagues who are "closest to a faculty member." He noted that he had heard more negative comments from faculty regarding Grievant's teaching during his probationary period than he ordinarily heard regarding other probationary faculty members. Further, President Beasley observed that Grievant's colleagues had initially given him a 13-0 positive vote. However, the most recent evaluation process resulted in an 11-1 negative vote. President Beasley noted that Grievant was in a tenure-track probationary position. Accordingly, he considered the criteria set forth in Series 36 for awarding tenure to be equally applicable in reaching a determination on whether to renew Grievant's annual teaching contract. Those factors include:

> excellence in teaching; accessibility to students; professional and scholarly activity and recognition; significant service to the college community; experience in higher education and at the institution; possession of the earned doctorate or the highest earned degree appropriate to the teachingfield granted by a regionally accredited institution, or special competence that is deemed to be equivalent to such academic credentials; publications and research; potential for continued professional growth; and service to the people of the State of West Virginia.

131 C.S.R. 36 § 9.1 (1992).

Dean Turner testified credibly at Level IV that the critical comments regarding Grievant's Ph.D. from Sierra University arose because Grievant failed to note in submitting his personal data to the faculty that Sierra is not an accredited institution. See R Ex 2. Grievant explained that he never represented that Sierra was accredited. However, the weight of the evidence supports Concord's position that degrees from unaccredited institutions are not generally accepted in the academic community. Thus, Grievant's peers might reasonably question his judgment in listing this credential, particularly since his other, legitimate academic credentials were equal to, or better than, anyone else in the Social Work Program.

Grievant began teaching at Concord in 1991. He had previously obtained a Bachelor's in Social Work (B.S.W.) in 1980 and a Master's in Social Work (M.S.W.) in 1982 from California State University at Fresno. He obtained a Doctorate in Education (Ed. D.) from the University of San Francisco in 1990. At the present time, most academic institutions recognize the M.S.W. degree as the terminal degree in the Social Work field for purposes of teaching at the college level. Grievant recounted his extensive field experience in social work, noting that he had been employed in some aspect of the field during nearly all of his academic career, and much of his vocational career, prior to arriving at Concord. Although he had taught English overseas for two years and had served on theadjunct faculty at several institutions, Concord represented his first full-time faculty appointment teaching Social Work.

Grievant presented testimony from former Concord students, James Passerella and Johnny Bragg. These men recently obtained B.S.W. degrees from Concord, taking classes taught by Grievant. Mr. Passerella was employed by the State of West Virginia as a Social Worker. He testified that he never observed Grievant engage in "informal chats" during class time, nor did he believe Grievant relied exclusively on anecdotal experiences. He recalled that Grievant used his personal experiences to illustrate principles which were first discussed in the text. Mr. Passerella took only a

single class taught by Grievant at Concord. He did not pass the state social work licensing examination on his initial attempt and was working under a temporary license.

Mr. Bragg received his B.S.W. from Concord in 1994, graduating with a 4.0 grade point average (GPA). He was recognized for having the highest GPA in the Social Work Program at the time he graduated. Mr. Bragg is currently employed as a counselor by the Department of Veterans Affairs, simultaneously pursuing an M.S.W. at West Virginia University (WVU). He took and passed the West Virginia licensing examination for social work at the first opportunity following graduation.

Mr. Bragg testified that he took at least three classes taught by Grievant, as well as classes taught by Buford Young, Director of the Social Work Program, and Catherine True, another member of Concord's Social Work faculty. He recalled that Grievant normally did not read from the text, except when conducting a review prior to an examination. He likewise remembered that class discussions were not merely "informal chats" in his experience, as Grievant did not permit discussions to wander away from the topic beingdiscussed. Likewise, he was of the opinion that Grievant's discussion of anecdotal life experiences related to the issues raised in the text and helped prepare students to perform hands-on social work. He similarly observed no excessive repetition in the classes he took from Grievant. Mr. Bragg also noted that all of the classes he took at Concord, including those taught by Grievant, were superior to any of the classes he had taken thus far at WVU.

Grievant also presented a package of written comments from former students which he solicited in 1995 in preparation for this hearing. These comments are almost entirely complimentary and positive. See G Ex G. However, this information was gathered in preparation for the Level IV hearing, and was not presented to President Beasley or anyone involved in the evaluation process prior to the time the decision at issue was made. Grievant had the discretion to include such data in his package submitted to the Personnel Committee in support of his retention. It is useless to speculate on whether this information would have had any effect on the retention vote. Although a vast majority of Concord's Social Work graduates who are presently employed in their chosen field value Grievant's teaching, this does not demonstrate that the decision not to renew Grievant's teaching contract was without factual basis. Concord properly relied on the student evaluations which were rendered on Grievant in the normal course of business.

Grievant acknowledged that he emphasizes practical experience in his classes in order to focus on hands-on social work. In his view, this is consistent with statements in Concord's college catalog

that the Social Work program has an "[e]mphasis . . . on preparing for social work practice in rural areas." G Ex F. Grievant further agreed that, as between himself and Mr. Young, the Program Director, "we've got some fundamentaldisagreement about what is appropriate to teach to Social Work students." Nonetheless, Grievant asserted that, in response to student comments in his evaluations and earlier criticism from his mentors, particularly Mr. Young, he changed his teaching practices by including more theory in class discussion, revising his attendance policy, and changing textbooks.

Grievant specifically denied that his classes ever involved "informal chats," noting that Social Work classes inevitably involve considerable discussion. In his view, in every instance, the subjects discussed pertained to Social Work. Grievant also noted that Social Work represents the broadest degree in human services. Thus, Grievant argues that very few discussions could not pertain to Social Work to some degree. Apparently, Mr. Young does not concur with this assessment, suggesting that there are limits on how far afield classroom discussion should be permitted to diverge from the course syllabus.

Grievant took exception to the report submitted by Mr. Young in his capacity as a "Teaching Evaluator." Ms. True also served in this capacity. Although Ms. True and Mr. Young attended two of the same class sessions, their teaching evaluations were in contrast, with Ms. True giving Grievant a generally favorable evaluation and Mr. Young issuing a generally negative evaluation. Cf. J Exs 4 & 9. Grievant introduced a tape recording of one of the class sessions jointly attended by Ms. True and Mr. Young. G Ex I.

After listening to this tape recording (G Ex I), the undersigned was unable to discern any significant misrepresentation of objective facts contained in Mr. Young's teachingevaluation. (See footnote 5) Further, although the undersigned found Grievant's class presentation to be articulate and interesting, such personal opinions are inapposite as Ms. True's evaluation provides the one informed perspective for challenging Mr. Young's subjective critical comments. See J Ex 9. (See footnote 6) As previously noted, these competing evaluations were presented to the Division Personnel Committee and reviewed by Concord's administrators in the evaluation process. The undersigned must necessarily defer to their expertise in such matters as teaching ability, scholarship, and course content. See Kunda, supra.

Concord also noted that numerous students who completed routine end-of-course evaluations in

Grievant's classes made highly critical narrative comments regarding Grievant's teaching, many of which directly contradicted the observations of Mr. Passerella and Mr. Bragg. See J Ex 10; R Ex 4A. One student evaluator complained that after Grievant scheduled a mid-term examination, students prepared for the test, and arrived to take their exam, only to have Grievant delay the exam to a later date because he had forgotten he had scheduled a guest speaker for that class period. Another student evaluator described Grievant as the "poorest excuse for an instructor I've ever seen." Overall, the testimony and documentary evidence indicate that students, as might beexpected, had both positive and negative observations regarding Grievant's teaching performance. Nonetheless, Grievant's student evaluations were correctly stated in the reasons given for nonrenewal and properly relied upon by Concord.

Moreover, such narrative comments from various students provide a rational basis for Concord's concern over Grievant's performance as a classroom teacher, when considered in the context of other negative observations. For example, Dr. Seago testified at Level IV that he had approximately six "A-B" students present him with written complaints regarding Grievant during the 1993-94 academic year. He found this to be an unusual occurrence in regard to any faculty member in the department. Likewise, Mr. Young consistently observed deficiencies in Grievant's classroom teaching during his tenure at Concord.

After reviewing the entire record in this matter, the undersigned administrative law judge finds that there was a difference of opinion between Grievant and his Program Director, Mr. Young, regarding Grievant's approach to teaching Social Work. Mr. Young, whose background is primarily academic, believed that Grievant should rely more upon the text and theoretical matters, with less emphasis on anecdotal material from personal experience. Grievant, whose background included extensive practical experience, resisted Mr. Young's direction on this issue, insisting that students would learn more from discussing hands-on applications of otherwise abstract theories. By March of 1995 when the Social Science Personnel Committee met to consider renewal of Grievant's probationary contract, the Social Work Program Director did not support Grievant's continuation. Indeed, by that point Grievant had lost the support of all but one member of the Social Science Division. The role of this Grievance Board is not to decide which teaching method best prepares students of Social Work for their chosen career. (See footnote 7) That is an academic decision, best left to Concord's discretion. See Broussard-Norcross v. Augustana College Ass'n, 935 F.2d 974 (8th Cir. 1991); Smith v. Univ. of

N.C., 632 F.2d 316 (4th Cir. 1980); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Jan. 8, 1997). The only issues to be decided in this grievance are whether Concord's nonrenewal action was "without factual basis" or was motivated by a prohibited reason. The record clearly demonstrates that Concord followed established procedures in reaching the decision not to renew Grievant's probationary contract for the 1996-97 academic year.

Grievant claims that this action was taken in reprisal or retaliation for the grievance he filed against Concord protesting issuance of a previous terminal contract. Reprisal is defined by W. Va. Code § 18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in protected activity, e.g., filing a grievance;
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> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner, supra. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29,

1989).

Consistent with the foregoing requirements, Grievant made out a prima facie case of retaliation. However, Concord provided convincing evidence that the same result would have been reached, even if Grievant had not filed an earlier grievance. President Beasley testified extensively regarding his reasons for deciding not to renew Grievant's probationary contract. A preponderance of the credible evidence of record establishes that President Beasley based his decision entirely upon matters which were proper under the process established by Concord and the Board of Directors for evaluating probationary faculty. While President Beasley, Dean Turner, Professor Seago and Mr. Young's authority was challenged by the prior grievance, there was no credible evidence that these individualsimproperly influenced the vote of the Social Sciences Division faculty which recommended nonrenewal of Grievant's probationary contract.

Moreover, the nonrenewal decision at issue in this grievance is substantially consistent with the nonrenewal decision that generated the previous grievance. See R Exs 4 & 4A; J Ex 7. The weight of the evidence indicates that Concord decided to terminate Grievant's contract after the 1993-94 academic year, and would have done so but for the default which was determined to have occurred during the grievance process. See Gruen, supra. Accordingly, Concord provided evidence of legitimate, nonretaliatory reasons for its nonrenewal decision, and Grievant has failed to demonstrate that the reasons given were merely a pretext to engage in prohibited retaliation or reprisal. See Conner, supra.

Grievant similarly claims that Concord's decision not to renew his probationary teaching contract beyond the 1995-96 school year was motivated by Grievant's critical comments to the Council on Social Work Education during the process of reaffirming accreditation of Concord's Social Work Program. Concord argues, in part, that Grievant's actions were not protected by any substantial public policy.

As for Concord's claim that Grievant's "whistle-blowing" during the accreditation process was not protected, this issue does not need to be addressed in great detail, given the ultimate conclusion reached on this issue. However, it appears that Grievant's statements to the accreditation team are protected under the general concept of "academic freedom" embraced in Series 36. See § 131-36-2, 131 C.S.R. 36 (1992). Further, given that social workers in West Virginia are eligible for licensing when they have obtained a B.S.W. from an accredited institution, the citizens of West Virginia have a

significant interest in insuring that such accreditation has not been obtained improperly. See W. Va.Code § 30-30-5. Thus, Grievant's participation in the accreditation process, if otherwise truthful and properly motivated, could be considered as an activity that is protected by a substantial public policy. See Connick v. Myers, 461 U.S. 138 (1983); Schalk v. Gallemore, 906 F.2d 491 (10th Cir. 1990) See generally, Page v. Columbia Natural Resources, No. 23469 (W. Va. Sup. Ct. of App. Dec. 6, 1996).

Mr. Young expressed his concerns regarding Grievant's participation in the accreditation process in a written evaluation submitted on March 22, 1995, as follows:

> I do not have a positive opinion about Dr. Gruen's performance working on our recent accreditation material. A sample of my criticisms are:
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> 1. The syllabi he turned in to me on the part he was to complete for accreditation was unacceptable. I returned these to him with comments of areas I would like corrected. He returned them to me with some corrections although they were not yet in acceptable form and told me he was leaving for California the next day and that I could make adjustments as I saw fit. I told him he could take these to California and work on them and mail them back to me. He did not want to do this and I did not press the issue.
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> 2. When asked by the site team what the prerequisites were for Human Behavior I, the first course in our sequence, he told them there was none, and was corrected by Catherine. This was the one area of responsi bility that was to be his.
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> 3. I was disappointed that he requested a meeting with the site team at which time he gave documents that were not made available to me and have not yet been made available to me. This may not be against policy, but for me it is not supportive of our accreditation effort and it is less than I would expect of a colleague.
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> 4. I also have problems with negative comments being made to the site team when he had been invited to meetings to express concerns about the accreditation documents. Again, this may not violate any particular policy, but it does represent behavior I consider inappropriate for a colleague in our department.

R Ex 5. Mr. Young's testimony at Level IV was consistent with the foregoing comments. It does not appear that Mr. Young was so upset about Grievant presenting contradictory information to the

accreditation team that he revised his evaluation to reflect negatively on Grievant. Indeed, Grievant's failure to provide complete and current syllabi, and his lack of familiarity with course prerequisites, represents a significant shortfall in Grievant's participation in the accreditation process on his employer's behalf. Moreover, a preponderance of the evidence indicates that Grievant's primary motive in approaching the accreditation team was to carry forward his professional disputes with Mr. Young to another forum. Grievant's contention that Mr. Young attempted to present false information to the accreditation team is not supported by the record. Mr. Young was advocating Concord's reaccreditation, and presented data that placed the Social Work Program in a favorable posture. As indicated by the evaluation team, the data presented was "misleading." Despite the inaccuracies in Mr. Young's report, a preponderance of the evidence indicates that the accreditation evaluators would have reached the same result, even had Grievant and Ms. True not come forward to reveal their disagreements with Mr. Young's reported data.

In any event, as previously discussed in regard to Grievant's claim of reprisal or retaliation, the weight of the evidence demonstrates that Concord was simply following through on a decision that had been made during the 1993-94 academic year, for reasons wholly unrelated to grievance activity or whistle-blowing, that Grievant did not have such potential for tenure to warrant his continued retention in a tenure-track position on its Social Work faculty. See R Ex 4A. By ridiculing the Concord College Self-Study Report (G Ex E) which Mr. Young had prepared and presented to the Council on Social Work Educationin support of Concord's quest for reaccreditation, Grievant no doubt created additional animosity against his continued presence at Concord, at least on the part of Mr. Young and the college administration. However, this activity was not shown to have been a significant factor in the decision not to renew Grievant's contract beyond the 1995-96 academic year. See Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983). See also Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th Cir. 1990). In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was first employed by Respondent Concord College (Concord) as a probationary tenure track Assistant Professor of Social Work during the 1990-91 school year.

2. Grievant has undergraduate (B.S.W.) and masters degrees (M.S.W.) in Social Work from the

University of California at Fresno. He received his doctorate in Education (Ed.D.) from the University of San Francisco.

3. Mr. Buford Young has served as the Social Work Program Director at Concord for the past twenty years.

4. On October 30 and 31, 1994, a site visit team representing the Division of Standards and Accreditation of the Council on Social Work Education visited Concord College for the purpose of reviewing Concord's Social Work program for re-accreditation. See G Ex B.

5. Grievant and Catherine True, another full-time faculty member in the Social Work Department, requested an interview with the site visit team, reporting certain discrepancies in Concord's Self Study Report prepared by Mr. Young. See G Ex B & E. 6. As a result of "noncompliance with standards," the Council on Social Work Education placed Concord's Social Work program in "conditional accredited status."

7. Sometime after Grievant and Ms. True reported discrepancies to the site visit team considering Concord's reaccreditation in Social Work, Dr. John Seago, Chair of Concord's Division of Social Sciences, reprimanded Ms. True for insubordination in regard to an unrelated matter.

8. During the 1993-94 academic year, approximately six "A-B" students presented Dr. Seago with written complaints regarding Grievant. This was an unusual number of complaints regarding any faculty member in the department.

9. During the 1994-95 academic year, Dr. David Bard served as Chair of the Personnel Committee in Concord's Division of Social Sciences.

10. The Social Science Division Personnel Committee met on March 22, 1995, to consider Grievant's annual evaluation. Following discussion of various matters, the faculty recommended not to continue Grievant's probationary teaching contract by a vote of 11 to 1. See J Ex 3.

11. Prior to the meeting described in Finding of Fact Number 10, above, faculty members in the Division of Social Sciences anonymously completed "Peer Review Questionnaires" evaluating Grievant. The questionnaires solicited responses on a scale of 1 to 5 as follows: (1) Considerably above my expectations for a colleague at Concord; (2) Somewhat above my expectations; (3) About what I would expect for a colleague; (4) Somewhat below my expectations; and (5) Considerably below my expectations for a colleague. Responders were also permitted to mark "Insufficient data to evaluate." See J Ex 2. 12. From those peers who rated the area of "Teaching Effectiveness,"

Grievant received a five on three evaluations, a four on four evaluations, and a three on one evaluation. See J Ex 2.

13. Prior to the meeting described in Finding of Fact Number 10, two faculty members from the Department of Social Work, Mr. Young and Ms. True, observed at least one of Grievant's classes and reported to the Division Personnel Committee on their classroom visits. See J Exs 3 & 4.

14. At the Division Personnel Committee meeting described in Finding of Fact Number 10, Ms. True gave a report which complimented Grievant's classroom teaching while Mr. Young's report was critical of Grievant's performance. Cf. J Exs 4 & 9.

15. Mr. Young reported that Grievant did not provide timely and fully updated course syllabi and reports for inclusion in the Self-Study Report presented by Concord to the Council on Social Work Education in the reaccreditation process.

16. In academic circles, an advanced degree listed in a faculty member's credentials is presumed to be from an accredited institution, unless the person reporting that degree indicates otherwise. Grievant reported a Ph.D. from Sierra University without noting that Sierra is unaccredited.

17. On March 23, 1995, Dr. Bard wrote to Dr. Seago, advising him of the outcome of the Personnel Committee's evaluation of Grievant for nonrenewal. J Ex 3.

18. On April 11, 1995, Dr. Seago wrote to Dr. Dean Turner, Concord's Vice President and Academic Dean, recommending that Grievant be issued a terminal contract for the 1995-96 academic year. R Ex 1. 19. On May 8, 1995, Dean Turner wrote to Concord President Jerry Beasley likewise recommending that Grievant be issued a terminal contract. J Ex 1.

20. In determining not to renew Grievant's probationary contract beyond the 1995- 96 academic year, Concord substantially followed the normal evaluation process applied to probationary faculty members at Concord.

CONCLUSIONS OF LAW

1. In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving each element of his complaint by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. The decision process in non-retention is similar to the decision process in awarding tenure and promotion. The subjective process by which promotion and tenure is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong. Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Fasce, supra; Carpenter v. Bd. of Trustees, Docket No. 93-BOD-220 (Mar. 18, 1994).

3. Grievant failed to establish that Concord's decision not to renew his contract as a probationary faculty member beyond the 1995-96 academic year was without factual basis. See 131 C.S.R. 36 § 10.4 (1992); Kilburn v. Bd. of Directors, 94-BOD-1064 (Dec. 29, 1995); Fasce, supra.

4. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or anylawful attempt to address it." W. Va. Code § 18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in protected activity, e.g., filing a grievance;
>
> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

5. Although Grievant made out a prima facie case of retaliation or reprisal in regard to Concord's decision not to renew his probationary tenure track teaching contract beyond the 1994-95 academic

year, Concord established by a preponderance of the evidence that this decision resulted from continuing concerns regarding Grievant's teaching performance which preceded any protected activity by Grievant. Grievant failed to demonstrate that these reasons were either pretextual or a subterfuge for retaliation. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. It is assumed, without deciding, that Grievant's actions in reporting discrepancies in Concord's Self Study Report to the site team of the Council on Social Work Education which was visiting Concord to consider reaccreditation of the Social Work Programrepresents an activity which is protected by a substantial public policy. See W. Va. Code § 30-30-5; § 131-36-2, 131 C.S.R. 36 (1992); Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). See generally, Page v. Columbia Natural Resources, No. 23469 (W. Va. Sup. Ct. of App. Dec. 6, 1996).

7. A probationary faculty member who claims that his contract was not renewed on the basis of activity which is protected by a substantial public policy must establish by a preponderance of the evidence that the employer's controlling motivation in taking the aggrieved action was based upon the grievant's protected conduct. See Hendricks v. W. Va. Dept. of Tax & Revenue, Docket No. 96-T&R-215 Sept. 24, 1996); Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995).

8. Assuming that Grievant established a prima facie case that Concord declined to renew his teaching contract beyond the 1994-95 academic year in retaliation for activity which is protected by a substantial public policy, Concord demonstrated by a preponderance of the evidence that the nonrenewal of Grievant's probationary teaching contract was based upon job-related factors authorized in Series 36. See 131 C.S.R. 36 (1992); Graley v. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 424 S.E.2d 606 (1992).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 6, 1997

Footnote: 1

In addition, Concord introduced a transcript of a prior related hearing on August 11 and September 29, 1994, as evidence in this grievance.

Footnote: 2

Grievant spent a considerable portion of the Level IV hearing noting perceived flaws in Concord's faculty evaluation process. As indicated by the testimony of Billy Skeen and Dean Turner, this process is constantly evolving and is presently being reviewed by a committee established through Concord's Faculty Senate. As there was no substantial evidence that Concord failed to follow its established procedures, or that these procedures are inherently arbitrary and capricious, this issue need not be further addressed in this decision. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); State ex rel. Tuck v. Cole, 182 W. Va. 178, 386 S.E.2d 835 (1989); Asbury v. Fayette County Bd. of Educ., Docket No. 92-10-166 (July 14, 1992).

Footnote: 3

The Peer Review Questionnaires cited above were admitted as Joint Exhibit 2. The forms indicate that a "4" represents "considerably below my expectations for a colleague." The form also encourages comments on "4" responses. Although there were no comments accompanying any of the "4" ratings given to Grievant, this does not indicate that the ratings were flawed, or that they represent other than the candid responses of Grievant's peers.

Footnote: 4

During the Level IV hearing, Dean Turner noted that certain numbers in his memo of May 8, 1996, (J Ex 1) were in error. See R Ex 3. However, these errors do not significantly affect the conclusions stated by Dean Turner and, having acknowledged the error, his opinion and recommendation did not change.

Footnote: 5

The "informal chat" comment is contained in Dr. Bard's letter of evaluation submitted to Dr. Seago, and does not arise from any comment in Mr. Young's 1995 classroom teaching observation. Nothing in the class recorded in G Ex I approached what the undersigned would consider an "informal chat" unrelated to the subjects under discussion. However, not knowing what the course objective was for that day, the undersigned would be unable to determine if the entire class period was related to the syllabus for that particular course.

Footnote: 6

Neither party called Ms. True to amplify the comments contained in her evaluation submitted on March 10, 1995.

Footnote: 7

Grievant appears to want to vindicate the validity of his approach to teaching Social Work through the grievance procedure. However, even if Grievant's teaching methods were demonstrated to be academically superior to the approach preferred by Mr. Young, this does not mean that the reasons given for nonrenewal of Grievant's contract were "without factual basis."