DR. KATALIN VOLKER,

Grievant,

v. DOCKET NO. 96-BOT-187

BOARD OF DIRECTORS\SHEPHERD COLLEGE,

Respondent.

DECISION

Dr. Katalin Volker, Grievant, filed this grievance against her employer, Board of Directors\Shepherd College, Respondent. She alleges that the:

> Employer's pre-tenure review of Grievant was in violation of its own procedures, was clearly wrong, was arbitrary and capricious and otherwise fits the statutory grounds for appeal. The Level II decision, finding the grievance untimely was clearly wrong.

Specifically, Grievant further alleges:

1. My Pre-Tenure Review (Dec. 15, 1995) has been conducted without impartiality.
2. The manner of my evaluation during the three-year pre-tenure period and at the Pre-tenure Review was not objective and professional.
3. Recent evaluations (1995-December 15) by my Chair were inaccurate.
4. In handling my case proper procedure has not been followed.
5. On several occasions a pattern of discrimination has been practiced.

As relief, Grievant requests that she be given three additional years to prepare for the final tenure review, removal of the pre-tenure review documents from her file, and a new pre- tenure review utilizing procedural fairness.

On May 17, 1996, the Grievance Board received Grievant's appeal. A Level IV hearing was scheduled July 30, 1996, andcontinued for good cause shown by Grievant. This matter was heard on December 13, 1996, January 17 and 28, 1997, and matured for decision on March 31, 1997, with receipt of the parties' reply post-hearing submissions. The following Findings of Fact are derived

from the record.

FINDINGS OF FACT

1. In 1979, Grievant earned a Ph.D. in French Literature with a specialization in 17th Century Literature and French Novels from Case Western Reserve University. Level IV, Jan. 17, 1997, at 3.

2. Grievant began teaching foreign languages part-time at Shepherd College in the fall of 1983, and became employed full-time as a lecturer in the fall of 1990.

3. Grievant entered her current probationary, full-time tenure track position in the fall of 1993. Level IV, Jan. 17, 1997, at 8 and 135.

4. Probationary employees receive contracts on a year to year basis. Level IV, Jan. 17, 1997, at 136.

5. Dr. Sylvia Shurbutt, Chair of the Department of English and Modern Languages (Department) is Grievant's immediate supervisor. Level IV, Dec. 13, 1996, at 20.

6. From the fall of 1993 through the filing of this grievance, Grievant taught “over-load.” Over-load is teaching more than four three-hour courses in one semester. Level IV, Jan. 17, 1997, at 11-12. 7. In 1993, Grievant did not advise the Chair, Dr. Shurbutt, of her Department or the Vice President of Academic Affairs about changing the date of a final examination.

8. On October 31, 1994, Dr. Shurbutt evaluated an elementary French class taught by Grievant. Dr. Shurbutt gave Grievant some “tips” in class presentation organization. Dr. Shurbutt suggested that if Grievant used a written lesson plan each day, she might remain focused and on task. Grievant was informed that students complain about her lack of organization, and her failure to begin and end class on time. Level IV, R. Ex. 9.

9. In 1995, Grievant had misplaced her grade book and could not find it during a grade appeal from one of her students for an elementary Spanish course taken during the 1993 school year. The Grade Appeal Board voted to waive the language requirement for that student. Level IV, R. Exs. 4 and 5.

10. Dr. Hope Maxwell-Snider, Coordinator of Foreign Languages, visited Grievant's intermediate Spanish class on September 11, 1995, and Grievant's elementary French class on September 15, 1995. In written evaluations, she provided Grievant with advice and suggestions on improving class presentation and student learning. Level IV, R. Ex. 7.

11. On January 16, 1996, Grievant received a copy of the Departmental Review, dated December 15, 1995, at a meeting with Dr.Mark Stern, Vice President for Academic Affairs and Dean of Academics. Level II, Tr. 10.

12. On February 14, 1996, Grievant received a copy of the Pre-Tenure Review Committee's (PTRC) review, which is dated February 6, 1996. Level IV, Jan. 17, 1997, at 101.

13. Grievant filed this grievance with Dr. Maxwell-Snider on February 20, 1996, and with Dr. Shurbutt, on February 23, 1996. Level II, at 21-22.

14. During the Spring 1996 semester, Grievant co-taught a course with Dr. Hendricksson, a history professor. Through a written “evaluation,” he informed Grievant of several complaints he received from students. Level IV, R. Ex. 6.

15. During Grievant's three years as a tenure track employee, students have consistently complained about her disorganization, tendency to be late for class, tendency to forget about assignments, and giving assignments not on the syllabus.
Level IV, Jan. 28, 1997, at 57, and R. Exs. 6, 9, and 11.

16. Grievant has not been cooperative with Dr. Maxwell- Snider. Level IV, Jan. 17, 1997, at 78, 225, 226, and Jan. 28, 1997, at 74.

17. Grievant has not published any scholarly works.

18. Grievant became defensive about her teaching style and habits. Level IV, Jan. 28, 1997, at 11 and 12.

DISCUSSION

TIMELINESS ISSUE

The Shepherd College Faculty Handbook (Handbook) provides, in pertinent part:

> Each School shall maintain a standing committee, called the Promotion and Tenure Committee (PT Committee), to consider promotion and tenure applications from faculty within its School. Each PT Committee shall consist of a tenured faculty member from each department within the School, elected for a three-year term by the faculty in the department. Each PT Committee will elect a chair and a vice chair, who will serve as the School's representatives on the Professional Status Committee. The primary purpose of the PRT Committee is to review applications for promotion or tenure and submit its recommendations to the Vice President for Academic Affairs.

A person initially appointed as a professor, associate professor, assistant professor, or

> instructor will undergo a pre-tenure review no later than the third year of employment at Shepherd College, effective Fall, 1991. The School's PT Committee will conduct a review using the same criteria used for a tenure review and will submit, in writing, the results of that review to the faculty member under review. A similar review will be conducted by the faculty member's Department Chair, then each Chair involved submits his or her review recommendations to the PT Committee; the Chair will then provide a written review to the faculty member.

Level II, College Ex. 1, at 30.

Respondent asserted timeliness as a defense. Timeliness is an affirmative defense which the employer must establish by a preponderance of the evidence. Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). As required by W. Va. Code §18-29-3(a), Respondent asserted at Level II that this grievance was untimely. See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. PrestonCounty Bd. of Educ., Docket No. 95-39-413 (May 8, 1996). W. Va. Code § 18-29-4(a)(1) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the
>
> > grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Respondent's timeliness defense fails. The pre-tenure review process is a separate, two system review procedure with the Department Chair (or as in this case, the tenured faculty of the Department) completing its written review before the PT Committee reviews the faculty member's pre-tenure review application. Although there is no procedure in the Handbook for reconciling the two documents (which merely advises the applicant, and does not prompt any action by Respondent's Administration), it would be unfair to Grievant, in this case, to dismiss her grievance without addressing it on the merits since the two procedures are combined in the Handbook, and addressed as a single process - a pre-tenure review. Respondent incorrectly asserts that Grievant is challenging only the Department's review, Grievant's specifically numerated items in her grievance statement, numbers two and four, refer to the entire pre-tenure review process, and not just to the Department Review.

Moreover, the Handbook refers to the pre-tenure review process as a singular process - “A favorable review at this stage ... to receive a review, ...” Emphasis added. Level II, College Ex. 1,p. 30. Therefore, Respondent failed to prove that Grievant did not timely file her grievance, within the

time allowed by statute, once she received the PT Committee's report on February 14, 1996. Level IV, Jan. 17, 1997, at 101.

PROCEDURAL ALLEGATIONS

Grievant asserts that the Department has violated procedural rules in the Handbook. The section of the Handbook cited above provides for the Department Chair to perform the Departmental Review. In this case, the Departmental Review, dated December 15, 1995, was the concerted response by the tenured members of the Department. The undersigned was not informed of any exception to the above provision in the Handbook, and could not find any exception in that part of the Handbook which was admitted as one of Respondent's exhibits. Therefore, although a group response has been the practice of the Department of English and Modern Languages for the past couple of years, (See footnote 1) it has clearly violated the procedural requirements established by Respondent for pre-tenure reviews.

Grievant's counsel asserts that Grievant was harmed by the above procedural violation because all of the tenured faculty members signed the Departmental Review letter, Grievant was virtually left by herself, with no experienced departmental faculty member to talk with about improvements. However, this assertion presumes that the Chair and the tenured faculty members becameadversarial upon signing the pre-tenure review document. That conclusion is not supported by the evidence.

Moreover, the members of her Department are the very people that Grievant needed to talk with to correct any deficiency or alleged deficiency. Grievant's Department would have helped Grievant remedy her deficiencies after the Departmental Review, if she had asked for their help or advice. Level IV, Jan. 17, 1997, at 219 and 220, and Jan. 28, 1997, at 86. However, the Departmental Review document is the issue being grieved in this case, and not what occurred, or might occur, after the document was produced.

Although the Department violated a procedural requirement, Grievant failed to prove by a preponderance of the evidence that her substantive rights were harmed. See Waugh and Livengood v. Monongalia County Bd. of Health, Docket No. 96-MCHD-163 (Dec. 23, 1996). Moreover, this universal opinion should have impressed Grievant with the seriousness of the complaints and deficiencies. Grievant also alleges that the Department and the PT Committee violated the pre-tenure review procedures when she was instructed to provide all of her student evaluations, and not

just the student evaluations she selected. The Handbook, in pertinent part, provides:

> To receive a review, the faculty member must submit a “Pre-tenure Application” in the same manner as a tenure application is provided for here.
>
> * * *
>
> The candidate for promotion or tenure will submit an application to the Department Chair and to the School's PT committee. The application must contain all supporting materials that the candidate wishes to beconsidered by all parties in the review process. Each candidate is encouraged to consult with the department chair during the process of putting supporting documents together.

Emphasis added. Level II, College Ex. 1, at 30 and 31.

Dr. Shurbutt asked Grievant to release more student evaluations because her colleagues in the Department desired to see

more student evaluations. Dr. Shurbutt did not order Grievant to produce more student evaluations. Grievant could have denied the request. See, Level IV, Dec. 13, 1996, at 53-56.

PURPOSE OF THE PRE-TENURE REVIEW

The Handbook, in pertinent part, also provides:

> This pre-tenure review is conducted to give the faculty member an opportunity to improve in those areas that are deemed weak.

Level II, College Ex. 1, at 30.

In this case, the recommendations were to advise Grievant of the expectations of her Department, and to caution her what further recommendations might come in the future should improvements not be achieved. Furthermore, although in some areas, the pre-tenure review documents complimented Grievant on her achievements, no provision was pointed out to the undersigned that these documents should discuss, or praise Grievant for past accomplishments or contributions.

No decision concerning Grievant's employment is made by Respondent at the conclusion of the pre-tenure review process. No decision or action is taken by Respondent following a pre-tenure review. Thus, the pre-tenure review process is only an advisory process concerned with areas that are weak; it is not a performanceevaluation. Feedback was given in the areas of Scholarship and Professional Development, Service to the College, Teaching Ability, and Service to the Department

of English and Modern Languages.

SCHOLARSHIP AND PROFESSIONAL DEVELOPMENT

In the area of Scholarship and Professional Development, the Departmental Review noted that Grievant's work was “somewhat thin,” and that “[s]cholarship is a crucial part of the tenure process in the Department.” To her credit, the Department mentioned that she gave a scholarly presentation in 1992 in Chicago, and regularly attends language conferences. However, Grievant has no publications to her credit.

During the Level IV hearing, Grievant testified that she assisted in the re-editing of an elementary French book, and that her name was mentioned in the textbook. Level IV, Jan. 17, 1997, at 21-22. This was not mentioned in the Departmental Review. The Department's concern in this area is still valid.

During the Level IV hearing, Grievant's counsel established that one of the tenured faculty members of the Department, Dr. Carter, has never published. However, he became a full professor ten or twelve years ago, and previously Chaired the Department. According to Dr. Shurbutt, the “landscape” in Higher Education has changed, and now college teachers are expected to publish. Level IV, Jan. 17, 1997, at 38-39, and 94. Publishing is important to the Department. Moreover, expectations of the past are irrelevant to the pre-tenure review process or Grievant making tenure, and the publishing requirement is not arbitrary or capricious. **SERVICE TO THE COLLEGE**

Under Service to the College, the Departmental Review noted that this was Grievant's “most impressive area of accomplishment.” The Departmental Review noted that Grievant “should be commended and given considerable credit” for her work on the Global Horizons Program, and that she “organized, almost single-handedly, the entire Global Horizons' 'Year of Hungary' program.” Level IV, Gr. Ex. 2, at 2.

Other service areas and programs Grievant participated in were noted by the Department. In this section, the Department did not list a single area Grievant needed to improve.

TEACHING ABILITY

The third area, Teaching Ability, was probably the most controversial area “deemed weak.” The Departmental Review noted an extensive list of student complaints, most of which are also found in previous evaluations of Grievant. Dr. Shurbutt performed Grievant's Faculty Evaluation for the 1993-1994 academic year, on May 10, 1994. Under teaching effectiveness, Dr. Shurbutt advised Grievant

that:

> Her student evaluations reveal some dissatisfaction with organization and approach in the class, and some students feel that she was distracted from the responsibilities this year.

Level IV, R. Ex. 8.

On October 31, 1994, Dr. Shurbutt visited an elementary French class taught by Grievant. She questioned whether Grievant used a written lesson plan each day, and suggested that “[d]oing so is agood idea to keep one focused and on task.” Dr. Shurbutt also wrote:

> [m]y only negative observation about the organization of the lesson was that the video might have been readied before class and that more time might have been planned for the final activity with the student “letters,” an interesting idea. You were very pressed for time at the end of class; thus instructions may have been missed in the hurried conclusion, and class ran just a few minutes over time.
>
> ***
>
> Students appear interested in the class and participation is good; however, students have complained outside of class about lack of organization and Professor Volker's not starting class on time or ending on time. When teachers are careful to begin and end classes on time, it is both a courtesy to students and a recognition that they have other responsibilities and classes they must attend. Failure to begin and end class on time is perhaps the most consistent criticism that students themselves level at Dr. Volker's classes ...

Level IV, R. Ex. 9.

On May 16, 1995, Dr. Anders Henriksson, a faculty member of the History Department who co-taught a course on Hungarian History and Culture with Grievant during the 1995 fall semester, in an “evaluation”, noted several complaints students had about her teaching. Concerns noted were organization of class presentations, skipping from theme to theme with insufficient attention to linkage, a tendency to be unfocused, and assignments outside the syllabus. See, Level IV, R. Ex. 6. Although Dr. Henriksson did not testify at any level of this grievance proceeding, the complaints he heard from students are consistent with prior concerns of Grievant's teaching abilities and effectiveness. Grievant's 1994-1995 Faculty Evaluation, also written by Dr. Shurbutt, and dated May 12, 1995, under teaching effectiveness advises her:

> student evaluations and the complaints of students who come to speak with the chair indicate that students are often disgruntled by Dr. Volker's disorganization, inconsistencies in making assignments and conducting class, and, at times, her lack of

> punctuality. The Department is presently dealing with one student's challenge of 1993 grades where unfortunately Dr. Volker has failed to produce any records which can either prove or disprove the student's complaint; such poor record keeping makes it difficult to handle such student complaints. As the College is attempting to build the language program, many of Dr. Volker's colleagues and some of her students have complained that her attitudes and actions are sometimes an impediment to that goal.

Level IV, R. Ex. 11.

Dr. Roland Bergman, a geography professor, has served on PT Committees before, and Chaired the Committee twice. He testified that student commentary is valuable, if it is taken in perspective. The PT Committees that he served on or chaired did not rely on specific student commentary. Dr. Bergman was “struck by the heavy- handedness” of the Departmental Review, and thought it was “massive over-kill.” He also believed a more general approach was more constructive “[b]ecause students, individual students will have their points of view and there are always going to be a few who might have a very negative view, and that if you're going to rely upon that, we would all fail.” Level IV, Dec. 13, 1996, at 86. While the Departmental Review quotes a few statements from student evaluations, the bulk of the comments contain a laundry list of complaints that are introduced in the Departmental Review with phrases such as “students complain”, “students have complained”,or that this list is “representative of student dissatisfaction”. Grievant was aware of the student complaints since she has access to the student evaluations, and some of the complaints were discussed in Grievant's 1993-1994 and 1994-1995 faculty evaluations. Dr. Shurbutt testified:

> The complaints against [Grievant] have, through the tenure that I have been Chair, been consistent. They have been that there is disorganization and that there is a tendency to be late for class, a tendency to forget about assignments, it has simply been a consistent complaint among students and some colleagues who also have complained about Dr. Volker's work.

Level IV, Jan. 28, 1997, at 57.

Dr. Sally Hresan testified that “[u]sually the chair alludes to the formalized student evaluations in the chair letter.” Level IV, Jan. 17, 1997, at 198. She did not know how “individual student communications face to face or in writing as opposed to the anonymous formal student evaluations” were handled in a Departmental Review.

Dr. Robert Latterell, a retired Shepherd College biology professor, and friend of Grievant, testified during the Level IV hearing, and presented an eleven page document on Grievant's behalf concerning his thoughts of Departmental Review, even though he did not have access or review the student evaluations or any of the other documents reviewed by the Department before writing the

Departmental Review. Level IV, Dec. 13, 1996, at 155. While he took Spanish I and II from Grievant during the 1988-1989 academic year, that was before Grievant entered a tenure track position atShepherd College, and therefore, outside of the scope of pre-tenure review process. The Departmental Review notes:

> [i]n the area of teaching ability, Dr. Volker has demonstrated some consistent patterns over the past three years that have caused concern among her colleagues. That she has been given added responsibilities (both at the college and departmental levels) since being placed in a tenure-track position may have unfortunately magnified these particular problems.

The Department goes on to note an extensive list of student complaints against Grievant. Dr. Latterell also strongly criticized student evaluations, referred to students as “unhappy children,” called other members of Grievant's Department “informers,” etc. In summary, Dr. Latterell's statements were largely conclusory, lacking in foundation, speculative, and were outside of the relevant time period being considered. Moreover, the Grievance Board has upheld the use of student evaluations. See Graf v. Bd. of Trustees/West Virginia University, Docket No. 95- BOT-065 (May 29, 1996); Fasce v. Bd. of Directors/West Virginia Institute of Technology, Docket No. 94-BOD-1072 (Sept. 13, 1995).

Grievant also called one of her current students, Kathy Jo Chambers, during the Level IV hearing. Ms. Chambers testified Grievant issued a class syllabus (which is “very reliable”) in her courses, and appeared well prepared to her.

Previously, Ms. Chambers has taken two French courses from Grievant, and received a grade of “A” in each course. Ms. Chambers was fluent in French before taking courses from Grievant. She took her first French course from Grievant in the Fall of 1995. Currently, Ms. Chambers is taking her third course in French from Grievant on an independent study basis because her schedule would not permit her to take it at the regularly scheduled time. She was scheduled to take her final examination in this course three days after testifying.

Although Ms. Chambers testified that one of her majors was Education, and that Grievant seemed to be following teaching methods described in her education courses, her evaluation of Grievant's teaching cannot be compared to the assessments of tenured faculty of the Department of English and Modern Languages. Moreover, Dr. Charles Carter testified that certain statements from student evaluations were selected and used in the Departmental Review to support the points the Department was making, and that those criticisms were not made by a majority of the student's

evaluated. Level IV, Jan. 17, 1997, at 62.

Mary Ott Reddick, a 1995 Shepherd College graduate with a major in Marketing and a minor in French, took eight three hour courses from Grievant (at least two occurred during the relevant three year time frame that Grievant was a tenure track employee) and received grades ranging from an “A” to an “F”. She thought Grievant was an above average teacher, and she “didn't recognize any disorganization” in Grievant's organization and preparation for class. Level IV, Dec. 13, 1996, at 129.

Mark Snell, Director of the George Tyler Moore Center and a University of Missouri Ph.D. Candidate, took three French courses from Grievant, the first two he audited, to satisfy the foreignlanguage requirement for his Ph.D. This ex-West Point Instructor testified that Grievant was “very concerned about whether her students were learning or not, and a very demanding professor”. Level IV, Dec. 13, 1996, at 137.

Regardless of what others say or write, Grievant admitted, in a rebuttal to Dr. Shurbutt's classroom visitation and evaluation, that there were problems with her Fall 1994 elementary French course, but asserted none of the problems were her fault. She responded:

> I am happy that you can see that I was pressed for time. This kind of course asks an awful lot of material to [sic] be covered. ... SO, IF YOU SEE ME RUSHED. IT IS BECAUSE THERE IS NOT ENOUGH TIME. Perhaps we should think about this in the future! Should we give more time to the students, so that they may feel more confortable [sic] in taking this course. Or is it enough to blame everything on the organization of the teacher? ... Can one tell ahead of time, how well the students are prepared for example? Do I have to add a few extra practice-exercises because some students do not seem to know well [sic] the material? And, if I do so, you should understand, that it is also maybe because the students have not done their homework well - namely - listening to the audio-tape and working out the manual. I am convinced that I am a good language teacher = [sic] I am an excellent teacher - but this course is also one that I need to learn how to structure, it is new methodology with the television. Has Shepherd College helped me to impart this knowledge? No. (See footnote 2)

***

> I have to say that I never had such a difficult year as this one - I had a program to carry through - the Global Horizons - for which most of the time I had help, but it really took me as much [time?] as another job would. I also have a family, and I consider that as important as my job, actually, after all, more important than my job.... At this point, after 12 years (See footnote 3) without a sabbatical, a leave, and lately overworked, working during the night, several times a week, - I feel that it is the wrong tuime [sic] for anyone to tell me that I am not well organized.

Emphasis in original. Level IV, R. Ex. 10.

Statements in the above letter demonstrate Grievant's lack of willingness to take responsibility, and accept constructive criticism. The repetition of the same types of complaints shows that Grievant is unable to correct her teaching deficiencies. In summary, although the Departmental Review was criticized for being harsh, unbalanced, and negative, it is nonetheless the opinion of the tenured members of the Department, and does not violate any policy in the Handbook. Use of student evaluations in the pre-tenure review process is not prohibited by the Handbook. Moreover, while Grievant may have worked hard throughout her employment with Respondent, diligence of effort cannot be a substitute for quality of performance. The pre-tenure review documents, in this area, were not arbitrary or capricious.

SERVICE TO THE DEPARTMENT OF ENGLISH AND MODERN LANGUAGES

Under Service to the Department, the Department noted her long-term involvement with the teaching of languages at Shepherd College, and that all of the faculty members of the Department "support[ed] the premise of placing [Grievant] in a full-time position." Level IV, Gr. Ex. 2, at 3. According to the Departmental Review, "[a]s [Grievant] increased her activities and responsibilities," "her lack of organizational skills became apparent, Grievant appears either unwilling or unable to work collegially in the Department," Grievant has "resisted change" within the Department, Grievant "is consistently tardy in fulfilling her duties, and some of those duties she flatly refused to fulfill (for example, standardization of course syllabi)."

Again, Grievant was aware of the deficiencies prior to the pre-tenure review. For example, Dr. Shurbutt mentioned, in Grievant's 1993-1994 Faculty Evaluation, that:

> Grievant "perhaps [needs] to be a bit more timely in answering departmental memos, requests, and [in] fulfilling other routine duties."

Level IV, R. Ex. 8.

In Grievant's 1994-1995 Faculty Evaluation Dr. Shurbutt wrote:

> Dr. Volker has served on the Recruitment and Mentoring Committee, assuming the duties associated with that committee (ie., Recruitment and adjunct faculty mentoring responsibilities). She has continued to acquire videotapes used in the teaching of languages at Shepherd; she had administered placement tests, and she has tried to organize the language lab and the teaching of languages for the Department. Unfortunately, her lack of organizational skills have made these and other duties problematic at times. In terms of performing even simple or perfunctory duties, such as taking her turn recording Departmental minutes of monthly meetings, her efforts are often confused and tardy. Almost every member of the Department has complained to

> me about the untimeliness and disorder of her work. I have tried to believe that, in part, the problems have been due to the demands of Global Horizons involvements and the illness of Dr. Volker's father this year; however, I am persuaded by the insistence of both colleagues and students that there are more fundamental problems here as well, **all of which Dr. Volker must face candidly and forthrightly if she is toundergo a successful three-year review next fall.** Dr. Volker is often inflexible--in terms of her actions and in terms of listening to her colleagues. She has a limited understanding of issues and specific Departmental and College concerns, usually taking personal particular issues that should be kept on a professional level (a case in point would be the [grade appeal] issue this spring). Her listening skills also need to be sharpened. **In terms of her ability to work with her colleagues collegially and as a member of a team, to perform her duties accurately and in a timely fashion, and to contribute to cordial relations within the Department-- Dr. Volker's actions next year will be crucial.**

Emphasis in original. Level IV, R. Ex. 11.

Grievant also asserted that the members of her Department were not able to evaluate her work because the tenured faculty members do not teach a foreign language. However, as Dr. Sally Hresan, a communications professor and the only dissenting member of the PT Committee, testified "commonalities" and pedagogical issues exist among teachers irrespective of discipline. Level IV, Dec. 13, 1996, at 227.

DISCRIMINATION ALLEGATION

Grievant also alleged that Respondent has engaged in a pattern of discrimination against her. W. Va. Code §18-29-3(m) defines discrimination as:

> "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A prima facie showing of discrimination, under W. Va. Code §18-29-3(m), consists of a grievant establishing:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then respondent may rebut it by articulating a legitimate reason for its action. (See footnote 4) However, a

grievant may still prevail if she can demonstrate the reason proffered by a respondent was pretextual. See W. Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E.2d 490 (W.Va. 1989), Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

In this case, Grievant failed to allege that she was similarly situated to anyone. In the area of receiving tenure without publishing, she is certainly not similarly situated to Dr. Carter who became a full professor ten or twelve years ago. The undersigned fails to see any other possible arguments or similarity, and will not speculate any further as to Grievant's claim in this area. Accordingly, Grievant failed to establish a prima facie case of discrimination.

BUDGETARY ALLEGATION

During the Level IV hearing, Grievant's counsel made a budgetary argument. It was expressed in Grievant's brief as follows:

> The essential and fundamental unfairness of the Department's Pre-Tenure Review suggests other goals are being pursued by the Department. One of those other goals is a budgetary one: hire a “tenure-track” professor, hire another 3 years later, use the first one for six years and reject her application for tenure, then hire a third, reject the second and so on. In this way, Shepherd College can give the appearance of a commitment to having a full professor in foreign languages without ever committing the funds.

Grievant's Brief, at 3.

The above allegation is not supported by the evidence, and is without merit. Dr. Stern and Dr. Shurbutt testified that the Respondent is committed to two permanent faculty positions in the Department. Grievant did not even testify that she believed this was an issue in her pre-tenure review. Moreover, the evidence reveals that Grievant worked for Respondent 10 years before being offered a tenure track position. There is no evidence in the record that Respondent was pressured to offer Grievant a tenure track position, or that she was planning on leaving Respondent's employ if not offered such a position.

In addition to the foregoing narrative and findings of fact, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. Timeliness is an affirmative defense which the employer must establish by a preponderance of the

evidence. Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). 3. As required by W.Va. Code §18-29-3(a), Respondent asserted at Level II that this grievance was untimely. See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

4. Respondent failed to prove that Grievant did not timely file her grievance, within the time allowed by statute, once she received the PT Committee's report on February 14, 1996.

5. The evaluation process in pre-tenure review is similar to the subjective process of promotion and tenure, and, therefore, it 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. See Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997).

6. Although the Chair for the Department of English and Modern Languages violated the pre-tenure review procedural requirement established by Respondent by not authoring the Departmental Review, Grievant failed to prove by a preponderance of the evidence that her substantive rights were harmed. See Waugh and Livengood v. Monongalia County Board of Health, Docket No. 96- MCHD-163 (Dec. 23, 1996).

7. The Chair for the Department of English and Modern Languages did not violate the pre-tenure review procedural requirement by asking Grievant for more student evaluations. 8. A “pre-tenure review is conducted to give the faculty member an opportunity to improve in those areas that are deemed weak”. Level II, College Ex. 1, p. 30.

9. W. Va. Code §18-29-3(m) defines discrimination as:

> "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

10. A prima facie showing of discrimination, under W. Va. Code §18-29-3(m), consists of a grievant establishing:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the

other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then respondent may rebut it by articulating a legitimate reason for its action. However, a grievant may still prevail if she can demonstrate the reason proffered by a respondent was pretextual. See W. Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E.2d 490 (W.Va. 1989), Prince v. Wayne Co. Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

12. Grievant failed to establish a prima facie case of discrimination.

13. Grievant failed to meet her burden of proving that the documents generated by the pre-tenure review process were clearly wrong, or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson 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.

Dated:__7/30/97_____ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

See, Level IV, Jan. 17, 1997, at 216-223, and Jan. 28, 1997, at 78.

Footnote: 2

Respondent was generally supportive, and provided financial aid in terms of purchasing tapes and equipment. See, Level IV, Jan. 28, 1997, at 18.

Footnote: 3

Grievant has been in a "tenure track position" only three years at Shepherd College. The rest of the time Grievant held non- tenure track positions.

Footnote: 4

While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).