RICHARD L. GIBSON,

Grievant,

v. **Docket No. 97-BOT-368**

BOARD OF DIRECTORS/SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Grievant, Dr. Richard L. Gibson, employed as an Associate Professor of Physical Education at Shepherd College (Respondent), filed a level one grievance on June 19, 1997, in which he alleged "arbitrary and capricious placement in category 2 for purposes of merit pay: relief sought is placement in category 3 for purposes of merit pay." Following denials at levels one and two, Grievant elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(c), and advanced his complaint to level four on August 13, 1997. Following an unsuccessful mediation session, a level four hearing was conducted on January 30, 1998. Grievant appeared pro se, and Respondent was represented by K. Alan Perdue, Esq., College Counsel. The matter became mature for decision with Grievant's post-hearing submission on February 25, 1998.

The essential facts of this matter are not in dispute and may be set forth as formal findings of fact.

Findings of Fact

1. In Spring 1997, Respondent completed the 1996-97 academic year faculty evaluations for purposes of implementing a merit pay plan.

2. The Faculty Merit Pay Evaluation Form completed by the Division Chair, rated the faculty in the areas of teaching (50% of the total points), scholarly/artistic/performance endeavors, (20% of the total points), and professional service, (30% of the total points). 3. Four merit categories were established using the percentages awarded in the three categories:

Merit Category	Points
3	90-100
2	80-89
1	70-79

0 0-69

4. The amount of the merit raises increased with the categories, i.e., those ranked in Merit Category 3 received the maximum merit increase.

5. Dr. Robert Cleminson, Chair of the Division of Education and Professional Studies, awarded Grievant 44 points in teaching, 15 points in scholarly/artistic/performance endeavors, and 25 points in professional service, for a total of 84 points, placing Grievant in Merit Category 2.

6. Grievant's rating was based on an annual report which he completed, setting forth his teaching, research, and service activities, and input from his Department Chair.

7. Grievant had been placed in Merit Category 3 for the 1995-96 academic year.

8. Grievant was initially awarded 91 points by his Department Chair, placing him in Merit Category 3 for the 1996-97 academic year. However, the Department Chair had erroneously completed the form since that part of the process was the responsibility of the Division Chair.

Discussion

Grievant argues that his rating in teaching and professional service did not accurately reflect the level of his work, and that the evaluation process was arbitrary and capricious based upon a failure of Respondent to define what was required for an “excellent” rating, and because it compared him with other faculty in the department and division. Grievant objects to consideration of factors which were evaluated numerically, and contests the factors which were given a numerical rating. He adamantly argues that the evaluation should be strictly measured against stated criteria, and opposes any comparison with other faculty. He opines that his work warrants an “excellent” rating and characterizes Respondent's failure to define “excellence”, the subsequent placement of him in merit category 2, and the use of a quota for category 3, as arbitrary and capricious. Respondent denies that its actions were arbitrary and capricious because all faculty were subject to the same process and procedure.

Because this matter is not disciplinary in nature, Grievant bears the burden of proving each of the elements of the complaint by a preponderance of the evidence. Procedural rules of the W. Va. Educ. & State Employees Grievance bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No.96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

In the present case, Grievant only alleges that Respondent's action was arbitrary and capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Trimboli, et al. v. Dept. of Health and Human Resources and Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the employer. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982).

A review of the evidence submitted at levels two and four establishes that while theassignment of percentages to the evaluation categories was to some extent subjective, it was based upon information, some of which was provided by the faculty member, relating to his teaching, scholarly, and service activities. Most information considered, including student evaluations, number of advisees, etc., was numerical. However, the evaluators also considered the individual's level of performance. For example, presenting a paper at a national convention or meeting was accorded more weight than bringing a guest speaker to class.

Grievant raises many objections to the processing of his evaluation. He disagreed with the decision to base student evaluations on one question involving the overall teaching ability of the instructor. He also disagreed with the determination that his ranking of fourteenth out of twenty- three instructors was less than “very good”, based upon his numerical designation of 4.05. Grievant also disagrees with the credit given to his work on a very important committee, and with a fund raising phone-a-thon.

Grievant is by all accounts a good employee who makes a substantial contribution to Shepherd College. It is also evident that he wishes to function at the “excellent” level, and is seeking guidance as to what he must do to attain that rating. However, at this time it is difficult, if not impossible, to advise Grievant as to what specific actions would guarantee him a rating of “excellent,” because Respondent makes that determination based upon a comparison of faculty; therefore, the degree of excellence is subject to change from year to year.

While Grievant's complaints illustrate that the evaluative procedure is not perfect, the evidence

does not support a finding that Respondent did not rely on criteria intended to be considered, reached a decision contrary to the evidence, or reached a decision so implausible that it cannot be ascribed to a difference of opinion. In fact, this grievance is simply a difference ofopinion. Grievant believes that he has worked hard, and that his efforts should be rewarded with classification in Merit Category 3. Respondent finds that Grievant's efforts, while substantial, are more precisely slotted in Merit Category 2. Based upon all the available evidence, the undersigned may not simply substitute her judgment for Respondent's.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. In a nondisciplinary grievance, grievant bears the burden of proving each of the elements of the complaint by a preponderance of the evidence. Procedural rules of the W. Va. Educ. & State Employees Grievance bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No.96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. An action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Trimboli, et al. v. Dept. of Health and Human Resources and Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

3. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the employer. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982); Trimboli, supra. 4. Grievant has failed to prove that Respondent acted arbitrarily or capriciously when its evaluation of his teaching, scholarly, and service activities placed him in Merit Category 2.

Accordingly, the 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.

Date: April 29, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE