DALLAS BROZIK,

Grievant,

v. **DOCKET NO. 98-BOT-142**

BOARD OF TRUSTEES/
MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievant Dallas Brozik against the Board of Trustees/Marshall University, Respondent ("Marshall"), on or about April 9, 1998, when he was denied promotion to the rank of full professor for the third time. As relief he seeks promotion to the rank of full professor effective the Fall term of 1996 (the school year following the first denial of his promotion), backpay and interest, and legal expenses. (See footnote 1) Grievant sought a review of his first and second denials of promotion in this grievance. The undersigned ruled at the hearing that those matters were not grieved in a timely fashion, and would not be addressed.

A candidate for promotion to full professor at Marshall must prepare a promotion application outlining his accomplishments since his last promotion. In order to obtain promotion to the rank of full professor, a candidate must demonstrate effectiveness in all major areas of responsibility. The major areas of responsibility are teaching and advising, scholarly and creative activity, service to the university, and service to the community. The candidate must also demonstrate excellence in two or more of the major areas of responsibility, and one of those areas must be either teaching and advising or scholarly and creative activities.

The application is first reviewed by the promotion and tenure committee of the department or division in which the applicant teaches, in this case, the Division of Finance and Economics. The committee makes a recommendation on the application, and the application and recommendation are forwarded to the chair of the department or division, in this case Roger Adkins, the Chair of the Division of Finance and Economics. The chair is to review the application and make a

recommendation on the application. The application and recommendation are then forwarded to the promotion and tenure committee of the college within which the applicant's department or division is housed, in this case, the Lewis College of Business. The committee's recommendation is forwarded to the dean of the college, in this case, Dean Calvin Kent. The dean is to review the application and make a recommendation on it, which is next sent to Sarah Denman, Vice-President of Academic Affairs. She also reviews the application and makes a recommendation to the President of Marshall University, Dr. J. Wade Gilley, who makes the final decision whether to grant promotion.

The ultimate issue in this case is whether Grievant has demonstrated his teaching and advising, scholarly and creative activities, or service are excellent. In reaching these issues, the questions to be addressed are what weight may student evaluations and complaints be given; does the College of Business' policy require classroom visits and evaluations by Dr. Adkins; can Dean Kent decide that publication in refereed journals (See footnote 2) is not sufficient, but require a faculty member to publish an unspecified number of articles in the "better" refereed journals in order to achieve a rating of excellent; and can "collegiality" be a factor, and if so, the controlling factor, in rating a faculty member's service?

The following findings of fact have been properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant was first employed by Marshall in 1987 as an Assistant Professor. He was promoted to Associate Professor in 1990. He teaches finance, and is in the Division of Finance and Economics, within the Lewis College of Business ("COB").

2. The COB became accredited by the American Association of Collegiate Schools of Business ("AACSB") in April 1997. Only about 20% of the business schools in the country are accredited by the AACSB.

3. The Marshall Greenbook is the official Faculty Handbook. The Greenbook requirements for promotion to the rank of full Professor are: a terminal degree in an appropriate teaching field; four years experience as an Associate Professor; demonstrated effective performance in the four major areas of responsibility; and demonstrated excellence in two or more of the major areas of responsibility, with one of those two areas being either teaching and advising or scholarly and

creative activities. The other two major areas of responsibility are service to Marshall and professional service to the community.

4. The COB has not developed any quantitative standards for excellence.

5. Grievant first applied for promotion to full Professor in 1995. The Division Committee recommended promotion at that time, by a vote of two to one. Dr. Dayal Singh voted against promotion for personal reasons, and wrote a minority report and added it to the application. The COB Promotion and Tenure Committee voted to remove this report from the application as an improper addition. (See footnote 3) The Chairman of the Division, Roger Adkins, recommended against Grievant's promotion, stating that Grievant's effectiveness in teaching was questionable, and that even if it were excellent, he "would not support his bid for full professor due to his deficiencies in the area of collegiality." (See footnote 4) The COB Promotion and Tenure Committee did not recommend promotion. The Dean of the COB, Calvin Kent, recommended against promotion, the Academic Affairs Vice-President, Sarah Denman, recommended against promotion, and President J. Wade Gilley denied Grievant's application for promotion. Grievant appealed the decision to the Institutional Hearing Committee.

6. The Institutional Hearing Committee stated in its findings, on April 21, 1997, that inclusion of Dr. Singh's minority report in Grievant's application was a violation of proper procedure, and that Dr. Singh did not properly review the application file. It further found that Dr. Singh should not have been on the Promotion and Tenure Committee, and someone else should have been appointed in his place, even if that person were from outside the Division.

7. The Institutional Hearing Committee also found that Dr. Adkins' introduction of "`collegiality' as a criterion for promotion, including his use of the Tennessee collegiality scale, was a violation of the Greenbook criteria for promotion." The Committee recommended that President Gilley reverse his decision to deny promotion. The Committee stated, "[g]iven the lack of specific objective standards for promotion in the COB and the biases against Brozik it is the IHC's opinion that it will be very difficult for Brozik to receive a fair evaluation." President Gilley did not adopt the recommendation of the Committee. Grievant did not appeal this decision.

8. Grievant again applied for promotion in 1996. The Division Committee unanimously recommended promotion. Dr. Adkins recommended against promotion. The COB Promotion and Tenure Committee recommended against promotion by a vote of three to two. Dean Kent and Vice-

President Denman recommended against promotion, and President Gilley denied the application for promotion. Grievant did not appeal this denial.

9. Grievant applied for promotion a third time in November 1997. (See footnote 5) The Division Promotion and Tenure Committee made no recommendation, as the vote was one for promotion, one against promotion, and the third member, Dr. Singh, abstained. Dr. Adkins, recommended against Grievant's promotion, stating simply, "I have concluded [from your application] that your overall performance does not merit promotion. In my opinion, you have not successfully addressed concerns raised in the past when you sought this rank. I encourage you to discuss this decision with me and to initiate a plan for improvement which would address problem areas." The COB Promotion and Tenure Committee recommended against promotion, by a vote of three to two, stating simply that the application did not support a rating of excellence in either teaching or scholarly and creative activities. Dean Kent recommended against promotion, noting that Grievant had not demonstrated excellence in teaching or scholarly activities. Vice-President Denman recommended against promotion, and President Gilley denied the application for promotion.

10. Grievant met with Dr. Adkins regarding his reasons for not recommending promotion in this third time. Dr. Adkins told Grievant he would have to get along better with certain unnamed individuals in order to attain the rank of full professor.

11. Dr. Adkins testified at the Level II hearing that he did not recommend promotion the third time, because of Grievant's "failure to perform in an adequate manner in terms of collegiality and that also the issues I raised earlier with respect to teaching."

12. In evaluating Grievant's most recent application for promotion, Dean Kent rated Grievant as Effective in teaching and advising, Good to Effective in research and scholarly activities, and Excellent in service. He reviewed Grievant's application for promotion, in particular, the annual evaluations, ratings by students on student evaluations, teaching materials, comments from students and others, the intellectual contributions, and the materials presented which document service.

13. Vice-President Denman and her staff review the application to assure procedure has been followed. They look for the transmittal sheet, make sure everyone in the chain of review has signed off, make sure the faculty member has been notified of any negative recommendation, and make sure they have the complete application. She then personally reviews the application to find proof that the preceding review levels were wrong. If nothing convinces her of this, she concurs in the

recommendation of the Dean. She believed the Greenbook was followed in Grievant's latest application, and found nothing to convince her the Dean's recommendation was wrong.

14. Grievant holds a Bachelor's Degree in Mathematics and Physics, and a Masters of Business Administration. He obtained a doctorate from the University of South Carolina in Business Administration (Finance) in 1984. He holds a terminal degree in an appropriate teaching field.

15. Grievant has more than four years of experience as an Associate Professor.

16. Grievant served as Chairman of the Department of Finance and Business Law one and a half years, from January 1993 to May 1994, when the COB was reorganized, and Finance was merged with Economics into the Division of Finance and Economics.

17. Dr. Adkins was appointed Chairman of the new Division by Dean Kent.

18. Dean Kent has a doctorate in Economics. He served as a staff economist for the United States Senate Finance Committee, as Chief Economist for the South Dakota Legislative Research Council, and as an Assistant Secretary of the United States Department of Energy and Administrator of the Energy Information Administration, upon appointment by the President and confirmation by the Senate in 1990. He has been Dean since 1993.

19. Each professor is rated annually in an "Annual Report" (hereinafter referred to as an "evaluation"). That form provides for ratings in the four major areas of responsibility, and an overall rating. The rating choices are "outstanding," "good," "satisfactory," "needs improvement," and "unacceptable."

20. On his 1992-93 evaluation, prepared by Dean Kent, Grievant was told that Dean Kent was seriously concerned about his teaching style, because, although students had commented to him that Grievant was one of the best teachers they had, they felt Grievant was insensitive and uncaring, and they felt belittled in class, which discouraged them from participating. Dean Kent praised Grievant's contributions to Marshall, however, and stated, "[y]our research efforts are among the best in the College. They clearly meet and exceed AACSB expectations. You have become a role model in this area for your faculty to follow. I am convinced that these efforts will continue because you are capable of first class scholarship." Grievant responded to this evaluation of his teaching style in writing, stating he could not accept the comments on his teaching style, that his style was necessary and justified, and he did not intend to change.

21. On his evaluation for 1993-94, Dr. Adkins rated Grievant's teaching and advising as "good,"

noting this rating was conservative due to limited information, and noting student ratings for one course were very low. Grievant's scholarly/creative activity, service to Marshall and service to the community were all rated as "outstanding." The overall rating was "good."

22. On his 1994-95 evaluation, Dr. Adkins rated Grievant's teaching and advising as "good," and noted mixed results from student comments, with weak to poor scores from graduate students, and good scores in two finance course. Scholarly/creative activity was rated as "good," and service to the community was rated as "excellent." Grievant's service to Marshall was rated as "needs improvement," although he noted Grievant's committee work "is impressive both in quantity and importance of assignments. My only area of criticism deals with a very critical area of service." He characterized Grievant as unprofessional, stating he had "no problem with you being critical of my actions and/or Division policies. On the other hand, the criticism should be constructive and given in a calm manner. You can make your point without raising your voice, without belligerent gestures and without inappropriate language. I firmly believe anyone promoted to a senior rank or given tenure must contribute to the building of a team approach within the academic unit." The overall rating was "effective."

23. In his endorsement of the 1994-95 evaluation, Dean Kent stated Grievant's teaching was uneven, with "[p]oor results in graduate classes, average results in principles classes, good results in upper level. Must develop teaching style for broader base of students." Dean Kent also stated, "[c]ontinued problem with highly disruptive and antagonistic behavior." He noted, "[i]ntellectual contributions exceed AACSB minimum standards but do not include major publications in better journals."

24. Dr. Adkins rated Grievant's service to Marshall as "Needs Improvement," on his 1995-96 evaluation (See footnote 6), even though he noted that Grievant's "involvement on various Committees is commendable and exceeds what is expected of a faculty member." However, Dr. Adkins further stated, "I include collegiality under service since it is not currently a separate item. . . . In addition to myself, there are two other members of the division that you no longer speak to unless an [sic] question or issue pertains to the division or college. . . . Last year I did not support your bid for promotion to full professor in large part because I deemed your performance in the area of collegiality as not being satisfactory." He rated Grievant's teaching and advising as "good," noting he had good student evaluations in the spring, but a low rating in one course. He suggested Grievant "rethink" his

style of instruction with graduate students. He rated Grievant's scholarly/creative activity as "good," and his service to the community as "good," for an overall rating of "effective."

25. Dean Kent stated on his comments to the evaluation that he continued to receive student complaints about Grievant's attitude and approach in class, which "are demeaning to them," and that there was a problem with grading graduate exams which had not been resolved. He stated Grievant should concentrate less on less selective conferences and try to become published in "quality refereed journals." He stated he agreed with Dr. Adkins' rating regarding service.

26. On his 1996-97 evaluation, Dr. Adkins rated Grievant's scholarly/creative activity as "good," his service to Marshall as "excellent," and his service to the community as "good." He rated Grievant's teaching and advising as "good," stating, "[y]our student evaluations were above average in the first term and average in the second term. Senior exit evaluations are complimentary on your teaching effectiveness. The survey of finance graduates undertaken this summer were impressive in their collective praise of your teaching. Based on the above, you would merit a rating of excellent in this section; however, your performance is diminished by a continuing concern regarding your attitude toward students in the classroom. Past annual reviews have discussed this issue. This problem emerged again during the year under review. In particular, it is documented in Dean Kent's memo of 9-19-97 on "Student comment" which the three of us discussed on that same date. It is particularly troubling that the comments come from five female students one of whom indicated she was dropping finance as a major. . . . Consider visiting the classes of outstanding faculty across the University or discuss with them their teaching philosophy. I am certain that other viable approaches to teaching will present themselves." Grievant's overall rating was "needs improvement." Dr. Adkins did not explain how he arrived at this rating, which is two to three steps lower than the rating on any individual area. (See footnote 7)

27. As a member of the Reynolds/Pickens-Queen Teacher of the Year Selection Committee for five years, Grievant has observed the classroom instruction of the best teachers at Marshall, and has brought their instruction techniques to his classroom.

28. Dean Kent stated in his endorsement of the evaluation, "[n]either teaching nor scholarly activity are excellent. Teaching continues to receive mixed student reviews. There are many favorable student comments. Overall student ratings about average, but students continue to comment on obnoxious and condescending behavior which creates a negative classroom

environment for some. Intellectual contributions are about average for the LCOB. Needs to concentrate on publication in peer reviewed, nationally circulated journals in field. Your refusal to appropriately respond to evaluations and comments from your students and supervisors is a problem which you need to confront."

29. Dr. Adkins believes Grievant has not engaged in teamwork activity, has done a number of things to obstruct the work of the Division, and has not shown the leadership which he would he expect from someone seeking to be a full professor.

30. Grievant spoke infrequently to a new professor, Lisa Schwartz, during a school year, and made what, according to Dr. Adkins, she perceived to be an offensive remark to her during a discussion among colleagues. (See footnote 8)

31. Grievant has worked with faculty members in the Division in producing research and in teaching classes. He has assisted Associate Professor of Economics Dr. Alina Zapalska, and she characterized Grievant as always being professional. Grievant had approached her to work on projects together, and they had jointly worked on several papers, and in developing new teaching methods. She found Grievant very easy to work with. Grievant's Level IV Exhibit 1.

32. Neither the Greenbook nor the Guidelines for the Evaluation of Faculty Applications for Promotion and Tenure indicate that collegiality is a consideration in promotion.

33. On November 25, 1996, the Marshall Faculty Senate Executive Committee adopted a resolution that, "[t]he addition of `collegiality' as a criterion for promotion (Section 6) may be immeasurable and introduces subjectivity and personal bias into faculty evaluation. This term should be eliminated." When the Faculty Senate sends a recommendation to President Gilley, the practice has been that, unless he rejects it, it becomes part of Marshall's operating considerations. Dr. Gilley signed the resolution, and did not indicate he objected to it.

34. Grievant chaired the University Equipment Committee for five years, which is responsible for reviewing and recommending the purchase of all major equipment on campus. He was a member of the Reynolds/Pickens-Queen Teacher of the Year Selection Committee for five years, and was chair two years. He has been a member of the University Graduate Academic Appeals Board. He served five years on the Faculty Senate, was Vice-President three years, and Secretary one year. As an officer he was a member of the Executive Committee. He served on the North Central Association Self-Study Steering Committee, and was chair of the Subcommittee for Instructional Equipment. He

chaired a university-wide committee to determine an equitable method to allocate faculty salaries, at the request of President Gilley. He researched funding for Marshall, and concluded Marshall was not receiving its share of state funding, and worked with Senator Thais Blatnik to rectify this problem. He has served on seven COB committees, including his leadership of a group of faculty which produced "the white paper," a plan to achieve the goal of obtaining accreditation from the AACSB for the COB. He served as the COB's Captain for the United Way, and he has served on the Promotion and Tenure Committee.

35. Grievant is a member of the Board of Directors and Vice President of the Huntington Community Players, and a member of the Finance Committee of the Huntington YWCA. He prepared and presented a seminar for minority businessmen and women, assisted the Red Cross in designing their Recognition Meeting program and photographing the proceedings, and was President of a citizens group to try to save the 6th Street bridge.

36. Dr. Adkins does not regularly observe classroom instruction of any faculty member. He evaluates teaching by looking at student evaluations, senior exit interviews, (See footnote 9) and review of course notebooks for each course, which includes exams and student work.

37. Dean Kent evaluates teaching and advising by looking at the professor's evaluations, student evaluations, teaching portfolios, student comments, senior exit interviews, comments by alumni, and complaints to his office. In evaluating teaching and advising on annual evaluations, Dean Kent considers what is submitted by the professor, which includes class notebooks, class syllabi, coverage of material, how they test, assignments, and student comments Dean Kent has received.

38. Dean Kent believes Grievant's teaching is not excellent because some students are intimidated by him, and many have indicated they are dropping his class or are not majoring in finance. In one semester, more than half the students dropped out of one of Grievant's courses, and complaints were made. The usual attrition rate is 10 to 20%. He has received complaints from students every year about Grievant's teaching style, and that they feel belittled. Some students comment to him that Grievant is an excellent instructor. He believes Grievant is an effective teacher, but could not be considered excellent due to the atmosphere he creates for certain students.

39. Grievant teaches upper level and graduate finance courses.

40. Grievant has had teaching overloads two semesters, due to his teaching of courses to nontraditional students in Williamson and the off-campus Saturday MBA Program. He has supervised

internships and independent study projects, mentored three Yeager scholars in the development of their senior projects, and worked with two graduate students on their theses.

41. Dr. Adkins has observed Grievant's classroom instruction twice, on March 29, 1995, and on December 4, 1996. He prepared a written evaluation of Grievant's performance after the second observation, giving him the highest rating on the form, excellent, in four of eight categories, and the second highest rating, very good, in the remaining four categories. The form also provided for ratings of adequate, needs improvement, and unsatisfactory. He noted, "[t]he lecture was lively and well-paced. You exhibited solid skills in a lecture environment. . . . Your organization of the material, command of the material, and lecture skills made this a very effective lecture."

42. Grievant's instruction was observed by Dr. Don Holdron, a full Professor at Marshall, on November 20, 1996. He gave Grievant the highest possible rating on the "Classroom Observation Report," a "5" in 9 of 12 listed categories, and a "4" in 3 categories, for an overall rating of "4.75."

43. Grievant's instruction was observed on April 10, 1995, by Dr. Robert P. Alexander. He rated Grievant above average ("4") in four out of six categories, and marked two categories N/A. The highest possible rating was exceptionally high, positive ("5").

44. Compilations of student evaluations reflect that Grievant received better student evaluations than most of the COB faculty during the 1996 fall semester and the 1995 spring semester, was at the Division average for the spring semesters of 1994 and 1996, and received worse student evaluations than most of the COB faculty during the 1996 and 1997 spring semesters, and the 1994 fall semester.

45. The student evaluation form was developed by the COB for the purpose of providing feedback to faculty members, and was not developed to be used as a faculty evaluation form. It was not designed for each question to be given the same weight, as is done when the ratings are compiled. Students are asked to anonymously evaluate each class in the COB. The evaluations are used by the COB to evaluate how the students perceive the quality of the education received from the professor, classroom performance, and what problems exist with performance.

46. In the past, administrators were not privy to student comments on evaluations, but received only a numerical ranking of each professor.

47. Dean Kent believes student evaluations of Grievant show his performance is inconsistent, and is at or below average for the COB, even though he had two semesters where his performance

was well above average. Dean Kent agreed that the inconsistencies could also be read to support that the student evaluations are not reliable or there is some other factor at work which is not reflected in the comparisons of Grievant to other faculty.

48. In the Fall of 1994, three students complained to Dr. Adkins regarding Grievant's attitude toward them. Several years later, Dr. Adkins was informed that 12 or fewer of over 30 students in an intensive five week, Saturday, pre-MBA course for non-business major professionals, including a number of doctors, had visited a business professor's house, and at least some of them voiced complaints about Grievant's assignment of homework and Grievant's "belittling and belligerent attitude toward them." The doctors in the course had refused to complete any homework assignments during the period. In the 1996-97 year, five female students complained to Dean Kent.

49. One of Grievant's courses is Advanced Financial Analysis and Planning. In that course he requires students to prepare and present case studies as they would in a business environment, to a boss with no sense of humor. The students are questioned at length and in depth concerning their analysis, and any errors are highlighted.

50. Grievant has been developing a teaching method he calls "The Market Game," where students develop market structures. He has shared this method with other faculty.

51. In September 1996, Dr. Adkins and Dean Kent submitted a "summary of innovative teaching: `The Market Game: Interactive Learning Through Market Simulation,' for consideration for the 1996 SBAA Innovative Teaching Award at the Southern Business Administration Association." They noted the Market Game had been valuable in classes. This summary was prepared by Grievant and Dr. Zapalska, based upon their experiences in using this methodology in the classroom.

52. Grievant included in his application several letters from former students indicating how his classroom instruction had assisted them in their careers.

53. Dr. Adkins believes excellence in research would require either a publication of refereed journal articles or a very large quantity of other work.

54. Dr. Adkins was not familiar enough with Grievant's research to testify at the Level II hearing as to whether it was excellent "without a doubt," but it was his "impression" that it was not quite excellent.

55. Dr. Adkins did not adequately evaluate Grievant's scholarly and creative activity.

56. In evaluating research, Dean Kent looks for a pattern of continual improvement, and quality

and quantity of intellectual contributions. He believed Grievant's scholarly and creative activity was not excellent because the majority of Grievant's publications are in what he referred to as "second and third tier journals," in professional publications, or in non-selective conference proceedings or presentations. He stated Grievant would have to have four to six publications in better national refereed and circulated finance journals to achieve excellence, and he believed Grievant knew which ones these were, although he did not know how many of these there were.

57. Publication of a paper in a journal not listed in Cabell's Directory is not given much consideration. Most of Grievant's publications were in journals listed in Cabell's.

58. Grievant exceeded AACSB standards in quantity of publications.

59. Since his last promotion in 1990, Grievant has had three publications in refereed journals. He has made 14 professional meeting presentations; and co- authored a chapter in a book.

60. The faculty has rejected the idea of setting a specific number of publications to achieve excellence.

61. Dr. Adkins noted on Grievant's 1994-95 evaluation, regarding scholarly research, "[t]he evaluation of excellent generally requires a minimum of three to four contributions."

62. Dean Kent wrote a note to Grievant in 1995, in which he stated, "you more than meet the AACSB requirements in the area of intellectual contributions. You are making a strong contribution to our accreditation effort in that area!"

63. Dr. Craig Hollingshead, formerly an Associate Professor at Marshall, has served on the COB Promotion and Tenure Committee for six years, and was chairman five years. He is leaving Marshall because he has become disillusioned and dissatisfied with Marshall, and was denied promotion.

64. Dr. Hollingshead stated Grievant has a nice publication record. He is aware there is a feeling that some journals are better than others, but pointed out that the faculty handbook guidelines talk only about refereed versus non-refereed journals, and material that is available for public inspection, and these are the guidelines which the Promotion and Tenure Committee is to use. He stated Cabell's provides information on journals, but it does not rate them. He stated some universities have created a list of "A" journals, and "B" journals, which is usually done by faculty consensus. He did not indicate that Marshall had taken this step.

65. Dr. Hollingshead has reviewed many applications for promotion. As he had not yet

achieved the rank of full Professor, he was not allowed to vote on Grievant's application for promotion. He did, however, review the application, and found Grievant to have exceeded the standards set in the faculty handbook. He stated that someone who did not support Grievant's promotion was either using a completely different yardstick from the one commonly used, or there was some other reason.

66. Because of personal animosity between Dr. Adkins and Grievant, Dr. Adkins did not fairly evaluate Grievant's application for promotion. The sole reason Dr. Adkins recommended denial of Grievant's application for promotion was Grievant's lack of collegiality.

67. There were suggestions made during the COB Promotion and Tenure Committee deliberations that Grievant had done certain things, and that students were in revolt. This information was not in the application before the Committee, and was not documented. No one on the Committee argued that Grievant did not have enough publications or that his service was less than excellent.

68. As Chairman of the COB Promotion and Tenure Committee, Dr. Hollingshead insists that each member observe the classroom instruction of the applicants. This duty is divided among the members so that, although each member is observing an applicant, each member does not observe each applicant. For this reason, Dr. Hollingshead observed Grievant's classroom instruction three times. He stated Grievant has a lively classroom presentation; he knows the material and expects students to know the material; he generates volunteer comments, which he stated is difficult to do; he questions the students closely and tries to help them understand the points which are being made; and he has good, relevant, fun, unusual examples. He stated Grievant can be abrasive, but he did not observe this in the classroom. He stated Grievant pushed the students, but was not offensive. He stated he has seen no evidence that Grievant's teaching is less than outstanding.

69. Dr. Suzanne Desai, a full Professor in the Division of Marketing and Management, was recently promoted. She had not reviewed Grievant's application, but she was aware of Grievant's student evaluations, research, and service, and could compare his work to her own. She stated his committee work clearly exceeded her own, that the quantity and quality of his research exceeded hers, and that they were about equal in teaching. She concluded that it was difficult to see how she could be promoted, and not Grievant.

Discussion

The review of an institution of higher learning's promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors, Docket No. 93-BOD-400 (Apr. 11, 1995). "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement 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). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra.

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgement for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

"[P]romotion is reviewed from the last promotion. Further, promotion is a continuing process, and the standards for advancement to the higher levels are more stringent [than the standards for tenure]." Baker v. Bd. of Trustees, Docket No. 97- BOT-359 (Apr. 30, 1998). The undersigned "is limited to considering the record before the decision-maker at the time of the decision. An applicant is responsible for informing the decision-maker of her qualifications for promotion. If she does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a promotion grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it." Id (citations omitted). See also, Castiglia v. Bd. of Trustees, Docket No. 97-BOT-360 (May 27, 1998).

"In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service. Rather, in accordance with the West Virginia Board of Trustee's Policy Bulletin 36, a promotion is based upon excellence in teaching, service to the institution and/or community, ongoing professional development and other relevant factors." Baker, supra; Hart v. Bd. of Directors, Docket No. 95-BOD- 198 (Mar. 6, 1996). However, "[p]romotion and tenure are paramount professional and

economic goals of a teacher. Grievant has a valuable property interest in this expectation of tenure. State ex. rel. McLendon v. Morton, 162 W. Va. 431, 249 S.E.2d 919 (1978)." Finver v. Bd. of Trustees, Docket No. 97-BOT-271 (Oct. 15, 1997).

Marshall's Greenbook provides the guidelines for promotion. It states:

> The specific areas in which faculty are evaluated for promotion include the following:
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> 1. **Teaching and advising:** command of disciplinary knowledge and methodology; effectiveness of classroom performance; advising load and effectiveness of academic advising; effectiveness in assessing student learning; rapport with students; contributions to curricular development; instructional development of faculty colleagues, etc.
>
> 2. **Scholarly and creative activities:** number, quality and importance of publications and creative productions; memberships and contributions to professional societies; professional growth and development; scholarly presentations and creative performances; contributions to the professional development and achievement of colleagues, etc.
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> 3. **Service to the university:** contributions within the department/division, within the college, or university-wide; contributions to official student organizations or other university-related organizations; other work in behalf of the student body, faculty, staff or administration of the university.
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> 4. **Service to the community:** service on a compensated or pro bono basis to governments, to educational, business or civic organizations, or to the public. (Such service could include applied research, consultation, technical assistance, special forms of instruction, clinical work and performance). Involvement as an official representative of Marshall University, or units thereof, in activities of governments and of educational, business or civic organizations.
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> For purposes of promotion, as well as other personnel decisions, all relevant faculty activities should be subject to objective qualitative evaluations. Whenever possible, evaluations should be based on multiple sources of evidence.
>
> Teaching is subject to evaluations by students and peers. The latter may visit a class or classes, or examine and evaluate course materials such as syllabi, textbooks and examinations. For a scholarly publication or presentation, critical appraisals from scholars in the same field might be solicited. For public service qualitative assessment should be solicited from those associated with the service activity or affected by the service outside the university. Colleges are encouraged to refine and clarify these guidelines and to develop specific performance standards for application to their faculty. All college policies and guidelines relating to the promotion process, including the determination of appropriateness of the degree to the teaching field, which is to be made by the dean of the college, must meet or exceed the policies as specified in this chapter and shall be reviewed and approved for consistency with university and Board of Trustees policies by the Faculty Personnel Committee and the Vice President for Academic Affairs or, where appropriate, the Vice President for Health Sciences. Level

IV Joint Exhibit C.

The College of Business has adopted guidelines for evaluation of faculty applications for promotion, but has not developed specific performance standards. However, the Institutional Hearing Committee, in reviewing Grievant's appeal of the 1995 denial, found that these "guidelines have not been approved by the proper agents/agencies (eg Faculty Personnel Committee) within the University as stated in p. 13 of the Greenbook." Level II, Grievant's Exhibit 8. Neither party addressed this. Respondent apparently conceded that the COB Guidelines were not properly approved, as the testimony with regard to the requirements for promotion to full professor did not indicate that the COB's Guidelines, which place a weight of 65% on teaching and advising, were or should be applied to Grievant.

Grievant's evaluation in each of the four major areas of responsibility will be addressed separately, as well as the flaws in the evaluation process.

A. Teaching and Advising.

Dean Kent rated Grievant's teaching and advising as effective. Grievant has demonstrated he is a dedicated teacher. He has demonstrated he has received excellent peer reviews, and excellent reviews from many of his students and former students. He has worked to develop new effective teaching methods, and has been willing to put in extra time to assist other instructors with their classes, and take on Saturday instruction for persons wishing to pursue an MBA.

However, Grievant's teaching style has also generated negative student comment. Dean Kent and Dr. Adkins have repeatedly made Grievant aware of this, and that he needs to make some changes. Grievant, however, has chosen to ignore the comments of Dr. Adkins and Dean Kent regarding what they perceive as his teaching deficiencies, and stated clearly that he has no intention of changing. Their opinions regarding Grievant's teaching are obviously going to be discounted by Grievant when Dr. Adkins, and to some extent Dean Kent, use the evaluation largely as a means by which to beat Grievant over the head regarding their perceptions of his lack of "collegiality." The evaluations are clearly suspect when Grievant receives ratings in each area of "good" or higher, and then receives an overall rating lower than "good." This simply is not possible, and demonstrates a lack of fairness and respect by Dr. Adkins. Dean Kent should not allow this type of conduct.

The question, however, is whether it is arbitrary and capricious to require Grievant to correct his perceived problem with some students in order for him to achieve a rating of excellent.

Grievant pointed out that Dean Kent has never visited his classroom, and Dr. Adkins has visited only twice, arguing they could not properly evaluate his teaching based upon this lack of personal observation. The COB Faculty Handbook states, "[a]ll College of Business faculty are evaluated on an annual basis. Evaluations consist of classroom visitation by the Department Head, the University Annual Report of Faculty Member form and College of Business Student Evaluation form." Dean Kent testified that this provision had never been interpreted to mean that it is necessary for the Division head to visit every classroom every year, and this has never been done. Level II Transcript, page 138. He stated the usual practice is that the Division head will visit the classroom if the professor invites him. Level II Transcript, pages 136, 139. He further stated, "in the College of Business what classroom visitations have been done have been entirely for developmental purposes in which the people who have visited the classroom have filled out the forms, they have gone back to the faculty member in confidence. They have not even gone to the division head, they certainly have not gone to the dean, because they have been viewed as developmental tools, not as tools for promotion and tenure. And that is how I think they should be used." Level II Transcript, pages 146-147. The provision cited above does not require classroom visitation.

The guidelines for the evaluation of faculty applications for promotion in the COB state, "Division Heads are responsible for observing the classroom performance of the candidate." This indicates that it is expected that the Division head will observe the applicant's classroom performance in rendering an evaluation. However, as noted above, these guidelines have apparently not been approved as is required, and are not binding.

This Grievance Board has previously held that student complaints and poor student evaluations may support a finding that teaching and advising does not meet the standard of effectiveness, even where classroom observations by peers have resulted in good evaluations. Shackleford v. W. Va. Bd. of Directors, Docket No. 96- BOD-414 (Oct. 9, 1997); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT- 524 (Mar. 14, 1995).

The undersigned concludes that Grievant has not demonstrated Dean Kent's and Dr. Adkins' reliance on student complaints and evaluations to rate the quality of his instruction is arbitrary and capricious, clearly wrong, or a violation of any policy. Although the student evaluations are somewhat suspect, they do provide a means of comparison of faculty. In addition, Dean Kent has personally received student complaints, and has been made aware of the particulars of other student

complaints. From this, Dean Kent and Dr. Adkins have been able to reach the conclusion that Grievant has a serious problem with some students, and they have repeatedly told Grievant this was a serious matter which would have to be addressed. Grievant did not appreciate this constructive criticism, decided his method of instruction was beyond reproach, and made a conscious choice to disregard this criticism. Grievant did demonstrate his teaching and advising are at least effective.

B. Scholarly and Creative Activities.

Dean Kent stated he did not believe Grievant's scholarly and creative activity "has yet achieved excellence. I do not see a significant number of publications [in] better refereed journals . . .. I do not think that he had achieved that on the basis of the quality of his publications, and I did read all of the publications that he had in there. The majority of his conference work was what I feel are less selective conferences, because I am familiar with most of them, where it's not difficult to get papers on to be presented. Some of his journals are not as highly rated as other journals are, although some of them are peer reviewed and refereed journals." Level II Transcript, page 133. He stated that in order to achieve excellence in this area, Grievant would need to publish more in nationally circulated refereed journals. When asked whether he could state how many more publications would be necessary, Dean Kent responded at the Level II hearing, "[n]o, because there is no number required. . . . It is a judgmental factor, as I have indicated." Level II Transcript, page 142. At the Level IV hearing, however, he came up with a number of four to six publications in "better" journals. Dr. Adkins had indicated to Grievant that he would need at least three to four publications, and had never indicated he needed to be published in anything other than refereed journals.

Dean Kent's belief that Grievant must publish in higher quality refereed journals in order to achieve excellence, is not the standard adopted at Marshall and applied to other faculty. Dean Kent is holding Grievant to a higher standard than other faculty, which is arbitrary and capricious. While it is commendable that Dean Kent would try to push Grievant to excel in the area as he believes Grievant can (and as Grievant apparently requires of his students), Grievant cannot be held to a different standard than other faculty. Grievant has proven he has met the standard of excellence at Marshall for publications.

C. Service to Marshall.

Grievant has proven that his service to Marshall is excellent. Dean Kent testified his service has been excellent, and it is clear that it is. Dr. Adkins' ratings of Grievant's service on his annual

evaluations are that it is excellent, except for Grievant's lack of "collegiality."

Grievant has proven that it is arbitrary and capricious to include collegiality as a factor in evaluating an application for promotion. There is no evidence that it has ever been applied to another application. The overwhelming evidence is that it is not a proper factor for consideration in evaluating an application for promotion, or in the annual evaluation of faculty, and that it has been specifically rejected as a consideration.

D. Service to the Community.

Grievant demonstrated he has provided various types of service to the local community, including contribution of his zeal, and leadership and computer skills. Respondent did not dispute that Grievant's service to the community met the standards for promotion, and it will be considered to be at least effective.

E. Flaws in the Process.

Grievant has also demonstrated that at several steps in the review process, he was not fairly evaluated.

At the Division Promotion and Tenure Committee level, Grievant demonstrated that Dr. Singh is biased against him. It is unclear why he has been allowed to continue to serve on this Committee when he has demonstrated an inability in the past to fairly evaluate an applicant. Even though Dr. Singh abstained from voting, his presence on the committee meant that the Committee had only two voting members when it is supposed to have three.

It is clear that Dr. Adkins did not fairly evaluate Grievant's service or scholarly and creative activities. The relationship between Dr. Adkins and Grievant seems irreparable, unless both of them are willing to make changes in their attitudes toward one another. It is unfortunate that Dean Kent has allowed the downward spiral in this relationship to continue.

In addition to the substantial evidence of Dr. Adkins' lack of fairness recited above, Dr. Zapalska testified regarding her own experiences with Dr. Adkins. She related three incidents. Once, Dr. Adkins accused her of not holding class, without any knowledge of what she was doing with her class, and approached her in a very rude manner, shaking his finger in her face. On another occasion Dr. Adkins brought her to his office and put her in a chair in front of him and talked about her lack of responsibility as a teacher, and how bad her performance was, although he was never able to tell her what she was doing wrong. She stated he had made her afraid and diminished, he did

not act professionally, and he did not use fair tactics. Finally, she related that Dr. Adkins had made a comment to her regarding whether she would be able to get to her classes from her home in Lexington in an ice storm, apparently without any knowledge that she also rented an apartment in Huntington, and was consistently at work very early in the morning before Dr. Adkins arrived, regardless of the weather, and stayed late into the evening. She concluded that Dr. Adkins' judgements are not fair and are not based on fact.

Dr. Adkins' attitude toward Grievant and evaluation of his abilities have been relayed to others in the COB, and may have influenced their opinions regarding whether Grievant should have been promoted. Dr. Zapalska testified that there was a lot of conflict between the Economics and Finance sections of the Division. She stated Dr. Adkins had caused conflict in the Division by accusing Grievant of being non-collegial, and that her experience with Grievant had been just the opposite.

Dr. Hollingshead concluded that the COB Promotion and Tenure Committee had deviated from the standards set forth in the faculty handbook, and did not recommend Grievant for promotion because they were punishing him for disagreeing with administrative decisions within his Division and within the COB, and for personal disagreements. No evidence was offered to rebut his testimony. No other COB Promotion and Tenure Committee members were called to testify. Respondent suggested that Dr. Hollingshead's testimony should be discounted because of his dissatisfaction with Marshall, and because he was confused about the year when Dr. Singh had inserted his minority report in the application. While Dr. Hollingshead may have a different perception of events due to his personal experience with Marshall, there was no indication that he was lying, and his conclusion was supported by factual information he provided. Respondent offered no reason to believe that Dr. Hollingshead was confused about anything other than which year the Dr. Singh incident occurred.

The undersigned concludes that the evaluation process was significantly flawed. Even if Grievant had not clearly demonstrated excellence in service to Marshall and scholarly and creative activities and effectiveness in the other two areas, the undersigned would find the entire review process so flawed that a new evaluation would be appropriate.

As to Grievant's request for attorney fees, the undersigned has no authority to award them. Chafin v. Boone County Health Department, Docket No. 95-BCHD-362 (June 21, 1996). See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86- 062 (June 16, 1986).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement 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). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison v. W. Va. Bd. of Directors, Docket No. 93-BOD- 400 (Apr. 11, 1995).

2. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgement for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

3. The undersigned "is limited to considering the record before the decision- maker at the time of the decision. An applicant is responsible for informing the decision-maker of her qualifications for promotion. If she does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a promotion grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it." Baker v. Bd. of Trustees, Docket No. 97-BOT-359 (Apr. 30, 1998)(citations omitted). See also, Castiglia v. Bd. of Trustees, Docket No. 97-BOT-360 (May 27, 1998).

4. "[P]romotion is reviewed from the last promotion. Further, promotion is a continuing process, and the standards for advancement to the higher levels are more stringent [than the standards for tenure]." Baker, supra.

5. In order to obtain promotion to the rank of full professor at Marshall, a candidate must demonstrate effectiveness in all major areas of responsibility. The major areas of responsibility are teaching and advising, scholarly and creative activity, service to the university, and service to the community. The candidate must also demonstrate excellence in two or more of the major areas of

responsibility, and one of those areas must be either teaching and advising or scholarly and creative activities.

6. The standard of excellence in scholarly and creative activities at Marshall's College of Business is publication in refereed journals. Dean Kent is holding Grievant to a higher standard than other faculty by requiring him to publish in better refereed journals, which is arbitrary and capricious.

7. Grievant has proven he has met the standard of excellence at Marshall for scholarly and creative activity.

8. Grievant has proven that it is arbitrary and capricious and clearly wrong to include collegiality as a factor in evaluating an application for promotion.

9. Grievant has proven his service to Marshall is excellent, and his service to the community and teaching and advising are at least effective.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to promote Grievant to the rank of full professor, effective on the same date as it would have become effective had President Gilley granted Grievant's application for promotion which was submitted in November 1997, and to pay him any backpay to which he is entitled, plus interest.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: November 30, 1998

Footnote: 1

The grievance was denied at Level I on April 13, 1998, and Grievant appealed to Level II. A Level II hearing was held on April 21, 1998, and a decision denying the grievance at Level II was issued by Marshall President J. Wade Gilley on April 27, 1998. Level III was waived by Grievant, and he appealed to Level IV on April 30, 1998. Two days of hearing were

held at Level IV, on August 18 and October 2, 1998. Grievant was represented by Jane Moran, Esquire, and Respondent was represented by Gregory G. Skinner, Esquire. This case became mature for decision on November 4, 1998, upon receipt of the parties' post-hearing written arguments.

Shortly thereafter Grievant's counsel submitted a portion of the record which she had had transcribed. Respondent objected to this, indicating this was not an official transcript, although no errors were noted, and suggesting that the purpose was to somehow prejudice Respondent's case by presenting only that testimony which wasfavorable to the Grievant. One would not expect Grievant to try to help Respondent make its case. The parties can rest assured that the undersigned has reviewed the entire record in reaching a decision in favor of Grievant in this matter, and the portion of the record which has been transcribed on Grievant's behalf is not considered the official record.

Footnote: 2 A refereed journal has a group of experts in their field review each paper submitted for publication and determine whether it has merit and should be published.

Footnote: 3 Dr. Singh had in the past served as Chairman of the Department of Finance and Business Law. He was removed from this position and replaced by Grievant. Dr. Singh then filed a lawsuit in federal court challenging his removal, and naming Grievant as one of the defendants.

Footnote: 4 A definition of collegiality is not found in Webster's New Universal Unabridged Dictionary, Deluxe Second Edition, 1983, however, collegial is defined as, "relating to a college; belonging to a college; having the nature of a college." Collegiality is defined in the American Heritage Dictionary, Second College Edition, as, "shared authority among colleagues." It is apparently this definition to which Dr. Adkins refers, as he states in Grievant's 1995-96 evaluation, "[a]s indicated last year I include collegiality under service since it is not currently a seperate [sic] item. Allen Tucker in his Chairing the Academic Department (second edition, p. 147) indicates service includes the consideration of `contribution to the orderly and effective functioning of the academic administrative unit.'" Dr. Adkins did not indicate that Marshall had adopted Mr. Tucker's theories.

Footnote: 5 This is the application at issue in this grievance.

Footnote: 6 Grievant was on approved sabbatical leave the Fall semester of 1995, writing a book.

Footnote: 7 In the portion of the evaluation completed by Grievant, he listed his special departmental assignments as "[w]hipping boy. this is an undocumented Divisional assignment whereby someone gets blamed every time the Division Head makes a mistake." He pointed out in his response to Dr. Adkins' evaluation of him that one example of this was Dr. Adkins' placing blame on him regarding his failure to mentor Dr. Lisa Schwartz. He stated he had never been assigned this role, that Dr. Adkins had assumed that role, and that Dr. Adkins had admitted he had failed in his duty. He also noted an instance in which Dr. Adkins had blamed him for failing to perform a duty when Dr. Adkins had failed to do what was necessary in order for Grievant to comply.

Footnote: 8 The remark was, "[l]et George do it." Grievant explained this remark as a reference to letting the least senior person do jobs while they are still learning the ropes and can do minimal damage.

Footnote: 9 A senior exit interview is conducted by giving graduating seniors a six page questionnaire, which they are required to complete and return. One of the questions requires students to compare faculty.