G. THOMAS TURMAN,

Grievant,

v. **Docket No. 99-BOT-199**

BOARD OF TRUSTEES,
MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

G. Thomas Turman (Grievant) challenges the actions of Respondent Board of Trustees, Marshall University (MU), whereby his probationary, tenure-track teaching contract was not renewed beyond the 1997-98 school year, his initial year of teaching at MU. Grievant's challenge to this action was initially heard by an Institutional Hearing Panel (IHP) at MU in accordance with the MU Faculty Handbook (The Greenbook) on June 9, 10, 11, and 17, 1998. On July 13, 1998, by a vote of 3-2, the IHP majority recommended that Grievant be offered another one-year, probationary teaching contract. As permitted by procedures set forth in The Greenbook, majority and minority reports of the IHP were forwarded to MU President J. Wade Gilley. On August 17, 1998, President Gilley rejected the majority report, adopted the findings of the minority report, and denied Grievant's claim that his probationary teaching contract should be renewed for another year. As authorized by Series 36 of the Procedural Rules of the University System of West Virginia Board of Trustees (Series 36), 128 C.S.R. 36 (1997), Grievant appealed MU's rejection of the IHP majority report under the grievance procedure for education employees, W. Va. Code §§ 18-29-1, et seq. This matter proceeded through the lower levels of the grievance procedure, based upon the record developed before the IHP. The matter again came before MU President Gilley at Level II, and he denied the grievance in a written decision issued on May 13,1999. Grievant appealed to Level IV on May 20, 1999, waiving further review at Level III as authorized in W. Va. Code § 18-29-4(c). On September 1, 1999, a Level IV

hearing was conducted in this Grievance Board's office in Charleston, West Virginia. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on October 6, 1999, following receipt of the parties' written post-hearing arguments. (See footnote 2)

In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See W. Va. Code § 18-29-6; Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993). The Greenbook and Series 36 provide that the appointments of probationary faculty members, such as Grievant, may be terminated at the end of the contract year "for any reason that is not arbitrary, capricious, or without factual basis." R Ex 3 at 18; 128 C.S.R. 36 § 9.4 (1997). Grievant asserts MU's decision not to renew his probationary teaching contract beyond the initial 1997-98 academic year was an arbitrary and capricious action prohibited under Series 36.

In order to determine whether MU's decision not to renew Grievant's probationary teaching contract as a tenure track faculty member beyond his initial year of employment was properly accomplished in accordance with The Greenbook and Series 36, the following Findings of Fact are made, based upon a preponderance of the credible evidence of record established at the IHP and Level IV hearings.

FINDINGS OF FACT

1. Grievant was employed by Respondent Board of Trustees, Marshall University (MU), as a tenure track Assistant Professor in the College of Business for the 1997-98 academic year.

2. Grievant holds a Bachelor of Arts in Economics and Political Science, and a Masters of Business Administration from Virginia Polytechnic University, a Masters of Science with a specialization in Taxation from the University of Virginia, and a Doctor of Philosophy in Business specializing in Taxation from Virginia Commonwealth University (VCU). He has been licensed as a Certified Public Accountant since 1982. 3. Grievant worked as a graduate teaching assistant at VCU. He taught one class in Accounting for one semester at VCU as an adjunct faculty member. Grievant taught Accounting and Advanced Taxation at Old Dominion University for one year as a Visiting Professor. Thereafter, he taught Income Taxation for one semester at a community college in Maryland. Grievant was subsequently recruited to teach at MU.

4. On June 23, 1997, Grievant was appointed to a probationary tenure track position as an Assistant Professor in the Division of Accounting and Legal Environment in MU's College of Business for the 1997-98 academic year. R Ex 1.

5. Neal Adkins is Chair of the Department of Accounting and Legal Environment in the College of Business at MU. In that capacity, Mr. Adkins served as Grievant's immediate supervisor.

6. Dr. Calvin Kent is Dean of MU's College of Business. In that capacity, Dean Kent served as Grievant's second-level supervisor.

7. Grievant was unable to attend MU's orientation session for new faculty members at the beginning of the 1997-98 academic year, because he was in Dallas, Texas, presenting two professional papers before a national conference of the American Accounting Association.

8. On September 15, 1997, Dr. Gary Saunders, a tenured member of the MU College of Business faculty, was assigned to serve as Grievant's Mentor, as provided in the Mentor Program established by the College of Business to assist new faculty members in making the transition to a new teaching environment. IHP Ex G-E. 9. On September 30, 1997, Grievant and Mr. Adkins executed a planning form for Grievant's 1997-98 job performance evaluation wherein Grievant indicated that he would dedicate 60% of his time to teaching and advising, 39% to scholarly activities (research and writing), 0.8% to university service and 0.2% to community service. IHP Ex U-I.

10. Grievant was assigned to teach three courses during the first semester of the 1997-98 academic year; two sections of Accounting 215, an introductory accounting course required of all business majors, and one section of Accounting 348, an upper-level course in Federal Taxation, Grievant's area of special expertise. This represents three- fourths of the normal workload for faculty members in the MU College of Business. Usually, full-time faculty at MU teach four courses.

11. Grievant excels at conducting research and producing scholarly papers. Indeed, Grievant's output of professional publications during his relatively brief academic career equaled or exceeded all other members of the College of Business faculty. G Ex 1.

12. Grievant's Mentor, Dr. Saunders, visited Grievant's Accounting 215 class, Principles of Accounting, on October 21, 1997, to observe Grievant's teaching. Beyond recommending to Grievant that he close the door to his classroom as a signal that it was time for class to begin, Dr. Saunders made no constructive comments regarding Grievant's teaching, and generally considered Grievant's presentation to be adequate. Dr. Saunders did not complete a written evaluation of Grievant's

teaching performance as required by the Mentor Agreement. 13. Although the mentor agreement explicitly requires that the Mentor observe two class sessions, Dr. Saunders saw no need to return to another class session, and did not visit any more of Grievant's classes during the first semester.

14. Lorraine Anderson is Associate Dean for Undergraduate Studies in MU's College of Business. She has held this position since 1993. During the first semester of the 1997-98 school year, Ms. Anderson, and counselors working under her direct supervision, received numerous student complaints regarding Grievant's classroom teaching performance. MU does not have a standard policy for documenting student complaints, and none of these complaints were specifically documented and presented to Grievant for a response. Ms. Anderson received more complaints about Grievant's teaching than any other first-year faculty member during her tenure as Associate Dean.

15. Additional informal student complaints were made directly to Dean Kent and Mr. Adkins. During the five years he has served as Dean, Dean Kent received more student complaints regarding Grievant's teaching than all other faculty in the College of Business combined.

16. In addition, Dean Kent spoke to Grievant in a casual conversation during the first semester, vaguely noting that he had received a number of student complaints regarding his teaching. This conversation was not documented, and Grievant was not informed that Dean Kent was concerned about the magnitude of the complaints, or that this was a serious matter warranting corrective action.

17. MU requires faculty members to conduct student evaluations in every class each semester. The first nine questions included in these evaluations were adopted bythe MU Faculty Senate for use in all departments. Additional questions were selected by a committee within the College of Business and approved by Dean Kent.

18. In accordance with standing MU policy, Grievant obtained student evaluations from the students in the three courses he was teaching toward the end of the first semester. The results of these evaluations were not available until after the beginning of the second semester.

19. Students rate faculty on a numerical scale from 1 to 5 where 1 equates to “excellent,” 2 is “very good,” 3 is “adequate,” 4 means “needs improvement,” and 5 is considered “unsatisfactory.” G Ex G. Grievant's student evaluations resulted in an average rating of 2.47 for all courses, the second lowest rating in the College of Business. MU Ex A.

20. MU has not established a minimum score for new faculty members to attain on their student evaluations in order to have their probationary teaching contract renewed for a subsequent year.

21. The standard evaluation forms used by MU to obtain student input on faculty teaching performance include space for students to make narrative comments, both positive and negative. In addition to low numerical student ratings, Grievant received a substantial number of critical comments from students complaining about his manner and method of teaching.

22. On February 17, 1998, Dr. Saunders met with Grievant outside his classroom and advised him that the results of the student evaluations were “not good.” Dr. Saunders told Grievant he could administer evaluation forms to the students in his current classesto determine if there had been any improvement, but Grievant declined as he was administering examinations that day, and returning test results the following class period, not the most opportune time to gauge student opinion of their instructor.

23. On February 25, 1998, Mr. Adkins issued a formal evaluation of Grievant's performance during the first semester of the 1997-98 academic year. He rated Grievant “good” in the area of scholarly activity, “needs improvement” in the area of service to university, “effective” in service to community, “effective” in the area of other professional goals, and “unacceptable” in the area of instruction/advising. Mr. Adkins' overall rating of Grievant's performance was “unacceptable.” IHP Ex U-I.

24. On February 25, 1998, Mr. Adkins recommended to Dean Kent that Grievant's teaching contract not be renewed for the 1998-99 academic year. IHP Ex U-B.

25. In determining whether to renew Grievant's teaching contract for another academic year, Grievant's job performance was evaluated in three areas; scholarly activity, service, and teaching effectiveness. Grievant's performance in the areas of scholarly activity and service were fully adequate for reappointment.

26. Based upon the low overall student evaluations and the volume and nature of student complaints, Dean Kent agreed with Mr. Adkins' recommendation that Grievant's teaching contract not be renewed for another year. This determination was processed in accordance with the time limits and procedures specified in MU's Greenbook.

DISCUSSION

MU is bound by the substantive and procedural requirements set forth in Series 36 and The Greenbook. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977);Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993). However, these rules provide Respondent with broad discretion to terminate a non-tenured probationary faculty member for any reason that is not arbitrary and capricious, or without factual basis. MU relies upon Grievant's low student evaluations covering his first semester of teaching, as well as the volume of complaints concerning his teaching performance which were received through various channels, to support its nonretention decision. Although these complaints and evaluations may be inherently subjective, that does not mean they may not provide a “factual basis” for a retention decision authorized by the applicable rules. Grievant presented evidence and argument suggesting that there are a number of preferable ways to evaluate teaching performance and gauge student opinion. However, it was not demonstrated that the methodologies chosen by MU, whether formal or informal, were inconsistent with any established law, policy, rule, or written procedure, or were so contrary to the academic norm, as to constitute an abuse of the considerable discretion accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. See generally, Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Smith v. Univ. of No. Carolina, 632 F.2d 316 (4th Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980).

Grievant also contends MU's actions in this matter were arbitrary and capricious. Generally, when applying an "arbitrary and capricious" standard of review, the inquiry is limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-BestFreight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995). Further, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. Gruen v. Bd. of Directors, Docket No. 95- BOD-281 (Mar. 6, 1997); Gomez-Avila v. W. Va. Bd. of

Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); Cohen v. W. Va. Univ., Docket No. BOR1-86-247-2 (July 7, 1987). See Sui, supra; Kauffman v. Shepherd College, Docket No. BOR1-86-216-2 (Nov. 5, 1986). This generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." Kunda, supra, at 548. See also Bina v. Providence College, 39 F.3d 21 (1st Cir. 1994), cert. denied, 115 S. Ct. 1406 (1995); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980). Although the arbitrary and capricious standard of review requires a searching and careful inquiry into the facts, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the decision maker. Hattman v. Bd. of Directors, Docket No. 98-BOD-439 (Apr. 30, 1999). In this matter, the fact that the IHP split 3-2 over whether Grievant was treated properly, suggests that reasonable individuals, including persons with academic credentials, may differ in their opinion over the proper resolution of Grievant's status. Even though Grievant may have received substandard treatment when his superiors essentially adopted a “sink or swim” approach to Grievant's teaching performance, leaving him to muddle through with very limited constructive guidance, the bottom line decision reached by Mr. Adkins and Dean Kent, that Grievant's potential as an effective classroom teacher was not demonstrated during his initial semester at MU, was not shown to be without a rational basis in fact.

MU has elected to emphasize effective teaching as its primary focus in the College of Business, and there is ample evidence to support MU's determination that Grievant's teaching performance during his first semester on the MU faculty failed to measure up to their expectations. Despite their arguable shortcomings, student evaluation scores constitute an accepted method for evaluating teaching performance. See Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995). Accordingly, Grievant has not met his burden of establishing that the challenged decision was made in violation of the established standards applicable to probationary faculty members serving under their initial annual contract. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See W. Va. Code § 18-29-6; Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. The decision process in non-retention is similar to the decision process in awarding tenure and promotion. The subjective process by which promotion and tenure is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Fasce, supra.

3. In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). A decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

4. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an administrativelaw judge may not substitute his judgment for that of the decision maker. Hattman v. Bd. of Directors, Docket No. 98-BOD-439 (Apr. 30, 1999).

5. Grievant failed to establish that MU's decision not to renew his contract as a probationary faculty member beyond the 1997-98 academic year was arbitrary, capricious, or without factual basis. See 128 C.S.R. 36 § 9.4 (1997); Kilburn v. Bd. of Directors, 94-BOD-1064 (Dec. 29, 1995); Fasce, supra.

Accordingly, this grievance is **DENIED**.

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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 8, 1999

Footnote: 1

Grievant was represented by counsel, James W. St.Clair. Respondent was represented by Assistant Attorney General Kristi A. Rogucki.

Footnote: 2

Respondent's post-hearing argument includes extensive discussion of Grievant's claim for default pursuant to W. Va. Code § 18-29-3(a). However, Grievant makes no reference to this issue in his post-hearing brief. Accordingly, to the extent such issue was ever raised before the undersigned Administrative Law Judge at Level IV, it is deemed abandoned. See Hoffman v. Mingo County Bd. of Educ., Docket No. 99-29-162 (Aug. 6, 1999); Davis v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-435 (July 30, 1999); Long v. Bd. of Trustees, Docket No. 94-MBOT-725 (June 30, 1997). Even if this issue was not abandoned, it appears that this question was previously resolved by agreement of the parties, resulting in a Dismissal Order being issued by this Grievance Board. Turman v. W. Va. Bd. of Trustees, Docket No. 98-BOT-349D (Apr. 15, 1999).