**ANTONETTA KARLE,**

**Grievant,**

**v.** **DOCKET NO. 98-BOT-258**

**BOARD OF TRUSTEES/**
**MARSHALL UNIVERSITY,**

**Respondent.**

**DECISION**

This grievance was filed by Grievant Antonetta Karle against the Board of Trustees/Marshall University, Respondent ("Marshall"), on or about April 22, 1998, when she was denied tenure. As relief she seeks to be tenured, effective the Fall term of 1998 (the school year following the denial of tenure). (See footnote 1) A candidate for tenure at Marshall must prepare a tenure application outlining her accomplishments. In order to obtain tenure, a candidate must demonstrate effective performance in all major areas of responsibility. The major areas of responsibility are teaching and advising, scholarly and creative activities, service to the university, and service to the community. The candidate must also demonstrate excellence in either teaching and advising or scholarly and creative activities.

Grievant is an Assistant Professor in the School of Nursing. School of Nursing applications are first reviewed by the five member Faculty Affairs Committee. The Committee makes a recommendation on the application, and the application and recommendation are forwarded to the two Associate Deans of the School of Nursing for review and recommendation, Dr. Judith Sortet and Dr. Giovanna Morton. They each review the application and make their recommendations on the application. The application and recommendations are then forwarded to the Dean of the School of Nursing, Dr. Lynne B. Welch. The Dean's recommendation is forwarded to the Vice- President of Health Sciences at the Marshall School of Medicine, Charles H. McKown, Jr., M.D. The Vice-President is to review the application and make a recommendation, which is next sent to the President of Marshall University, Dr. J. Wade Gilley, who makes the final decision. None of those

reviewing Grievant's tenure application recommended she be awarded tenure.

Grievant argued two procedural violations committed by Marshall required that the decision to deny tenure be reversed. The two alleged procedural errors were the failure to perform an annual evaluation of Grievant, specifically for the academic years 1994/95 and 1996/97, and the failure to provide Grievant with a formal written evaluation of her progress toward tenure after the completion of her third year of instruction. Grievant further argued she was denied procedural due process because one member of the Faculty Affairs Committee did not review her tenure application.

Respondent argued a progress toward tenure evaluation was not required, that Dean Welch's annual meetings with Grievant sufficed for annual evaluations, and that the error by one member of the Faculty Affairs Committee was not fatal because no one recommended Grievant for tenure, and the member who erred still would not recommend Grievant for tenure.

Finally, Grievant argued she had demonstrated excellence in teaching and advising, noting her clinical instruction is as important as, if not more important than, classroom instruction, and that the entries made to her personnel file shortly before her tenure application was submitted, after four years without any entries, were suspect.

Respondent denied Grievant had demonstrated excellence in teaching and advising, arguing her teaching was only effective, and her advising was defective. Respondent also argued Grievant's scholarly and creative activities were deficient. Respondent did not dispute that Grievant's service was at least effective, and that area need not be addressed.

While Grievant certainly demonstrated she was an excellent clinical instructor, she failed to demonstrate she was at least effective in the area of scholarly and creative activities. Accordingly, the suspect entries in her personnel file are irrelevant.

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 1992 as an Instructor in the Marshall School of Nursing. She was promoted to Assistant Professor in 1996.

2. Grievant has a Master's Degree in Nursing. She has earned 27 credit hours beyond her Master's Degree, and obtained certification from Marshall's Family Nurse Practitioner program in

1996. Grievant does not hold a doctorate, nor is she enrolled in a doctoral program.

3. The Marshall Greenbook is the official Faculty Handbook. The Greenbook requirements for tenure are: demonstrated effective performance in the four major areas of responsibility; and demonstrated excellence in 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. Grievant was aware of the Greenbook requirements.

4. The School of Nursing has not developed any quantitative standards for excellence.

5. Grievant prepared her tenure application, and submitted it in January 1998.

6. One member of the five member Faculty Affairs Committee was on sabbatical, and did not participate when Grievant's tenure application was reviewed. Another member, Becky Rider, did not recall reviewing Grievant's tenure application, and relied upon what she was told by another member, Jane Fotos, was in the tenure application.

7. The Faculty Affairs Committee did not recommend Grievant for tenure.

8. Neither of the Associate Deans of the School of Nursing, Dr. Giovanna Morton and Dr. Judith Sortet, recommended tenure for Grievant.

9. The Dean of the School of Nursing, Dr. Lynne B. Welch, did not recommend Grievant for tenure.

10. The Vice-President of Health Sciences of the School of Medicine, Charles H. McKown, Jr., M.D, did not recommend Grievant for tenure, and President J. Wade Gilley did not grant Grievant's tenure request.

11. Grievant received a supervisor's evaluation by Dean Welch in 1992, 1993-94, and 1995-96. The 1993-94 evaluation rated Grievant's instruction and advising as satisfactory, noting Grievant needed to meet office hours and course obligations. Grievant was rated as needing improvement in scholarly and creative activities, with a comment that she had presented no programs or papers, and she had no publications or research. Her 1995-96 evaluation noted students and peers saw her as effective, but students complained she did not keep her office hours. Under scholarly and creative activities Dean Welch noted Grievant needed to pursue her doctorate and she needed publications. She received an overall rating of satisfactory.

12. It is not the practice of the School of Nursing to perform a progress toward tenure evaluation. Grievant did not receive an evaluation of her progress toward tenure after her third year

of employment at Marshall, nor did she receive a written evaluation of any kind by her supervisor at the end of the 1994-95 school year. Dean Welch met with Grievant at the end of her third year of employment and offered her advice, and encouraged her to pursue a doctorate.

13. Grievant also did not receive a supervisor's evaluation for 1996-97. At the end of that year she prepared a Planning Page for the next year, and Dean Welch met with her.

14. Grievant's tenure application contains many letters from nurses and administrators at the Veterans Administration Hospital in Spring Valley where Grievant provides clinical instruction to students, who have observed her instruction, and found her to be an excellent instructor. Karen Bailey, an Assistant Professor at Marshall, rated Grievant's clinical teaching skills as excellent.

15. Grievant developed a game to help students learn pharmacology, which was effective. She took students to Barboursville Middle School to teach middle school students CPR. She involved students in presenting and preparing topics to screen or teach at a Health Fair. She used clinical staff at the Veterans Administration Hospital to act as buddies to students.

16. Dean Welch saw no evidence of special aids for instruction, special lectures, special teaching methodologies, or case studies in Grievant's tenure application, which would indicate excellence in teaching.

17. None of those voting on Grievant's tenure had ever observed her teaching or clinical instruction.

18. The majority of Grievant's students over the period from 1994 through the Spring of 1997, rated her teaching performance as excellent. Grievant received few ratings of less than good. In one class, she received an excellent rating in every category from every student, with one exception where she was rated good.

19. Each year students complained to Sharon Dorsam, the Records Officer at the School of Nursing, who was responsible for assigning advisees to faculty, that they could not find Grievant during her office hours, and that she had not posted extra hours during the two week advising period when extra hours were to be posted.

20. During the Fall semester of 1997, Grievant's clinical at the Veterans Administration Hospital in Spring Valley was scheduled to end at noon, and Grievant scheduled her office hours to start at noon. It takes between 15 and 35 minutes to get from the Hospital to Grievant's office on the Marshall campus, depending on traffic.

21. A doctorate is not required in order to be tenured in the School of Nursing.

22. Dr. Morton and Dean Welch believe it is necessary to be enrolled in a doctoral program in order to be tenured, except in instances where the candidate for tenure has a very strong record otherwise.

23. Dean Welch has continually encouraged Grievant to pursue her doctorate, beginning in Grievant's first year of employment.

24. At least 50% of the nursing faculty at Marshall's School of Nursing must hold a doctorate in order for the School of Nursing to maintain its accreditation.

25. Grievant's research and scholarly activities consisted of obtaining the credit hours to achieve Family Nurse Practitioner ("FNP") certification in 1996, her FNP research project, which has not been published or presented, reviewing two books written by others and offering suggestions for improvement, preparing a childhood obesity information poster displayed for six weeks in a primary care clinic waiting room in 1996 and preparing an opinion survey for patients to complete on the subject, a joint study with a community health nurse at the Veterans Administration Hospital in 1997, and a few proposals.

26. Grievant's service to Marshall and to the community was at least effective.

## Discussion

The review of an institution of higher learning's tenure 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).

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 tenure. 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 tenure 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).

"Promotion 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 tenure. It states, in pertinent part:

> 1. Tenure shall not be granted automatically, or for years of service, but shall result from a process of peer review and culminate in action by the president. The granting of tenure shall be based on a two-fold determination:
>
> a. That the candidate is professionally qualified;
>
> b. That the university has a continuing need for a faculty member with the particular qualifications and competencies of the candidate. This determination shall be in accordance with the provisions of Series 36, Section 8.2. (See footnote 2)
>
> 2. The professional qualifications of a candidate for tenure will be evaluated on the basis of the guidelines which pertain to promotion.
>
> 3. The grant of tenure requires that a candidate must have demonstrated effective performance and achievement in all of his or her major areas of responsibility. Additionally, the candidate must have demonstrated excellence in either teaching and

> advising or in scholarly and creative activities.

Grievant presented testimony about matters which those making the tenure decision had not been made aware. Likewise, Respondent presented weak evidence about acts allegedly committed by Grievant which were discovered after this grievance had been filed. None of this may be considered by the undersigned in evaluating whether the judgment of Grievant's tenure application was arbitrary and capricious or clearly wrong.

It became clear from the evidence presented that the primary reasons Grievant was not granted tenure were her failure to pursue her doctorate, and her failure to do much of anything in the area of scholarly and creative activities. It is also clear that, although it was not thoroughly documented over the years, Grievant simply did not ever make an effort to stick to her scheduled office hours. It would have been a simple matter for Grievant to schedule her office hours at times when she could be there, and to keep her office hours. Likewise, it would have been a simple matter for Grievant to have checked to see what doctoral programs, if any, would accept the credit hours she had earned in the FNP Program, and to report this to Dean Welch, and develop a plan for her doctoral education. Grievant, however, did not take these simple measures.

Grievant proved Marshall failed to adhere to the procedural requirements of an annual performance evaluation. The Greenbook provides in regard to evaluations:

> 10.1 All faculty shall receive a yearly evaluation of performance directly related to responsibilities as defined by the institution.

Grievant did not receive a written annual evaluation two years, and there is no documentation that the meetings she had with Dean Welch those two years equated to a performance evaluation.

Grievant did not demonstrate Marshall's policy required that she receive a third year progress toward tenure evaluation. The parties agreed that Marshall's policy in regard to the progress toward tenure evaluation is currently as follows:

> A formal evaluation of progress toward tenure should be conducted during the third year of employment.

A body is required to abide by its own lawfully established policies, however, its actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that `a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm

from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96- BOT-507 (Aug. 20, 1997). See Walker v. Dep't of Public Safety, Docket No. 98-DPS- 056 (Sept. 11, 1998).

Grievant presented the testimony of Dr. Joseph Wyatt, professor of psychology at Marshall, who has served seven years on the tenure committee in the Psychology Department, and six years on the Institutional Hearing Committee. He testified that an annual evaluation is required, and a progress toward tenure evaluation is required after the third year. Dr. Wyatt stated that the third year tenure evaluation is to summarize the performance over three years, and to let the faculty member know how she is doing. In his opinion, it was a clear violation of proper procedure to omit annual evaluations. He believed, as a matter of principle, that the omission of the third year progress toward tenure evaluation was so serious it would merit reversal of the denial of tenure. He did not believe the employee would know what she needed to do to improve without the third year evaluation.

Respondent argued in regard to the progress toward tenure evaluation, that it was not required, and that Marshall's policy in this regard had changed in 1997. Although there was quite a bit of discussion at the Level IV hearings about changes in various policies, there was no indication that this particular provision had been changed in 1997. This policy, however, does not require an evaluation of an employee's progress toward tenure at the end of her third year. It says one should be conducted. That means it is a good idea, not a requirement. If it were a requirement, the policy would say one "must" be conducted, or "it is required that" one be conducted. Certainly, Grievant could have asked for this evaluation, but she declined to take it upon herself to do so. The policy was not violated.

Under the facts of this case, Grievant was not prejudiced in any way by the lack of annual evaluations or a progress toward tenure evaluation. Grievant admitted she had access to the Greenbook, which sets forth the tenure requirements. Grievant has no publications or presentations, and very little activity of any kind in the area of scholarly and creative activities. Once she received her FNP certificate in 1996, she failed to continue to pursue her own education, which also would be considered acceptable progress in scholarly and creative activities by the School of Nursing. It should have been crystal clear to someone with Grievant's education, without anyone having to tell her, that she was failing to meet her obligations in the category of scholarly and creative activities. See Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-1046 (Dec. 29, 1995). She was,

nonetheless, specifically told in those evaluations which were conducted that publications were needed, and that her failure to achieve in this area was unsatisfactory. Under the facts of this case, the procedural defects did not affect the outcome.

Grievant's argument that Becky Rider's failure to properly review her tenure application was fatal, must fail for the reasons advanced by Respondent. Although Dr. Wyatt testified that such a procedural deficiency was prejudicial to Grievant and would taint the entire process, it is clear under the facts of this case that even had the Faculty Affairs Committee voted to recommend tenure, neither of the two Associate Deans or Dean Welch would have recommended Grievant for tenure. Second, Ms. Rider testified at Level IV that she still would not recommend Grievant for tenure. Grievant failed to prove a different outcome had Ms. Rider read her tenure application, and the procedural defect again is harmless.

As to whether Grievant met the tenure standards, it is clear from the evidence that Grievant did, in fact, do an excellent job in clinical instruction, that she cared about her students, and that her student evaluations were excellent. It is likewise clear that Grievant consistently was unable or unwilling to keep her office hours, particularly during the Fall of 1997, and Grievant had repeatedly been advised of the need to keep her office hours. Several of Respondent's witnesses testified that Grievant's evaluations were not outstanding, and they were aware she had received some bad evaluations for the Spring 1997 semester. None of Respondent's witnesses offered a comparison of Grievant's student evaluations to those of other faculty. Dr. Morton testified, however, that although she did not believe Grievant's student evaluations were outstanding, she would consider student evaluations to be outstanding if the majority of the students rated the faculty member's performance as excellent. The evidence of student evaluations indicates that this is indeed the rating received by Grievant from a majority of her students. The conclusion that Grievant's student evaluations were not outstanding is arbitrary and capricious and clearly wrong.

During the Spring of 1997, Grievant's student evaluations showed the majority of the students continued to rate her performance as excellent, with 174 excellent responses, and the next highest rating was again good, with 98 good responses. Grievant received one rating of unsatisfactory in ten questions, two unsatisfactories in four questions, three unsatisfactories in two questions, and five unsatisfactories in one question. While Grievant did in fact receive a few poor student evaluations, overall, her evaluations were consistently excellent over the years, including the Spring 1997

semester. (See footnote 3)

However, student advisees complained that Grievant was not available during her office hours. 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). Dean Welch repeatedly told Grievant she needed to be in her office during her office hours, yet Grievant did not take this to heart. Grievant presented the testimony of several students that she was always available to them, and they had no trouble finding her, and she testified that she was willing to meet with students at times other than scheduled office hours, and did so. However, it is also clear that during the Fall semester of 1997, Grievant could not be in her office at noon on Wednesdays for her office hours, and at the same time be finishing her clinical instruction 15 to 35 minutes away from the Marshall campus. Grievant decided to post her office hours as 12 to 5 on Wednesdays, even though she knew she could not be there. It was her own choice. The evidence supports a finding that Grievant had always had a problem keeping her office hours. In addition, Grievant's tenure application contains no evidence of peer review of exams or syllabi or development of new courses.

Whether Grievant demonstrated excellence in teaching and advising in her tenure application is a close question. It is apparent that Grievant's teaching and advising were not fairly evaluated by the Associate Deans or Dean Welch.

Regardless, however, of whether Grievant met the standards of excellence in teaching and advising, the evidence of scholarly and creative activities was scant. Grievant presented evidence that two School of Nursing faculty had been granted tenure who did not hold a doctorate and were not progressing toward one. However, no evidence of their overall performance in scholarly and creative activities was presented, so a comparison to Grievant's situation cannot be made. Since Grievant received her FNP certificate in 1996, she has failed to produce in the area of scholarly and creative activities. Respondent's conclusion that Grievant's performance in this area did not meet the standards for tenure is not clearly wrong or arbitrary and capricious.

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. In order to be granted tenure 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 activities, service to the university, and service to the community. The candidate must also demonstrate excellence in either teaching and advising or scholarly and creative activities.

5. A body is required to abide by its own lawfully established policies, however, its actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that `a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered

harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). See Walker v. Dep't of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998).

6. Grievant demonstrated Marshall failed to follow its own policies by not evaluating her on an annual basis. She also demonstrated that one member of the Faculty Affairs Committee failed to properly review her tenure application. These procedural defects, however, did not affect the outcome in this case, as Grievant was well aware of the requirement that she produce in the area of scholarly and creative activities, and failed to do so.

7. Grievant did not demonstrate her performance in the area of scholarly and creative activities was at least effective.

8. Grievant did not demonstrate that the decision to deny her tenure was arbitrary and capricious or clearly wrong.

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. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: April 19, 1999**

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*Footnote: 1*

*The grievance was denied at Level I on May 4, 1998, and Grievant appealed to Level II. A Level II hearing was held on June 18 and 29, 1998, and a decision denying the grievance at Level II was issued by Marshall President J. Wade Gilley on July 7, 1998. Level III was waived by Respondent, and Grievant appealed to Level IV on July 20, 1998. Three days of*

*hearing were held at Level IV, on November 2 and 10, 1998, and January 6, 1999. The parties supplemented the record with the evidentiary depositions of Judith Sortet and Lynne B. Welch, Dean, taken on January 18, 1999. Grievant was represented by Raymond A. Nolan, Esquire, and Respondent was represented at hearing by Michael L. Glasser, Esquire, and post-hearing by Connie A. Bowling, Esquire. This case became mature for decision on March 15, 1999, upon receipt of the parties' post-hearing written arguments.*

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*Footnote: 2 Respondent did not argue Grievant's services were not needed due to her failure to hold a doctorate.*

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*Footnote: 3 Several witnesses testified that Grievant and Rebecca Appleton, who is responsible for classroom instruction for one of Grievant's clinicals, had a lot of trouble with one student that semester, and that it was thought that he and other students had cheated on an exam. Ms. Appleton testified she also received a few negative comments on student evaluations that semester, and the comments were nearly identical, leading her to believe that this group of students had completed the evaluations together.*