DAVID J. THOMAS,

Grievant,

v v.

Docket No. 98-BOD-407

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, David J. Thomas, employed by the Board of Directors (Respondent) as a professor of English in the Department of Humanities at West Liberty State College (WLSC), filed a level one grievance on or about September 3, 1998, in which he alleged:

Simply stated, my grievance is that Dr. Sarah T. Coyne; Chair, Department of Humanities, and Dr. David T. Javersak; Dean, School of Liberal Arts, are both guilty of violating their responsibilities as objective administrators by capriciously, arbitrarily and discriminatorily misapplying and misinterpreting several college policies and several written agreements. In doing so, they have caused me great duress in their continued unfair and impartial treatment (harassment) of me! This treatment, as a result, has lead to the 'decay of [my] work relationships, dissatisfaction with [my] job, decline in [my] productivity, and [my] loss of confidence in the College.' In essence, I have become disspirited [sic] and unenthusiastic about the prospects of my future as a respected employee at WLSC.

My letters to Dr. Coyne dated 22 July, 13 August, 20 August, and 21 August and my letters to Dr. Javersak dated 22 July, 20 August, and 27 August and his replies dated 4 August and 31 August have, to date, not brought about an acceptable resolution to my concerns, but have served only to raise additional concerns about dubious methods, questionable facts, and administrative veracity!

The relief I request is six-fold:

1 1.

That my last annual faculty/merit evaluation, initiated by Dr. Coyne and 'reviewed and approved' by Dr. Javersak, be rescinded, 2 2.

That my last annual faculty/merit evaluation be reconducted by another administrator in the chain-of- assistance--other than the two aforementioned administrators,

3 3.

That Drs. Coyne and Javersak--owing to their lack of objectivity--be discontinued as subsequent evaluators of me at any time in the future,

4 4.

That Drs. Coyne and Javersak be formally reprimanded for not officially adhering to established policies and written agreements in their most capricious administering of faculty evaluation and recommending of merit-pay stipends,

5 5.

That I receive copies of the aforementioned reprimands, and

6 6.

That Drs. Coyne and Javersak offer me written apologies for their illicit maladministration of established college policies and their arbitrarily ignoring binding written agreements.

The grievance was denied at levels one and two. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-3(c), and advanced his appeal to level four on October 15, 1998. Although Grievant indicated that a decision could be issued based upon the lower-level record, a level four hearing was conducted on February 11, 1999, at Respondent's request. The matter became mature for decision upon receipt of post hearing submissions on or before April 13, 1999. Grievant represented himself, and Gregory G. Skinner, Assistant Attorney General, appeared on behalf of Respondent at level four.

The following formal findings of fact are made based upon a review of the record in its entirety.

Findings of Fact

1. Grievant has been employed by the Board of Directors, assigned as aprofessor of English in the Department of Humanities at WLSC, at all times relevant to this matter.

2. Dr. Sally Coyne serves as chairperson of the Department of Humanities and is Grievant's immediate supervisor. In this capacity, she completes performance evaluations of the Department

faculty, including Grievant.

3. WLSC used the 1997-98 faculty evaluations to determine whether the individual was performing in a satisfactory manner, and to determine allocation of merit pay.

4. Faculty members were rated in three areas: teaching/job effectiveness (with a value of up to fifty points); professional activities (with a value of up to twenty points); and service (also with a value of up to twenty points). The faculty member was also awarded up to ten flex points which he could apply to the area of service or professional activity, but not teaching, at the individual's discretion.

5. Effective the 1997-98 academic year, four levels of merit increments were awarded in the Department of Humanities, with Level III (superior performance) the highest, valued at $1,000.00., followed by Levels II (excellent performance), valued at $600.00, and Level I (good performance), valued at $300.00., with the fourth category being “no merit”.

6. Using the one hundred point scale, “no merit” was awarded to individuals who scored fifty-nine points or below. Those individuals who scored sixty to seventy-four points were awarded a Level I allocation. Those who earned seventy-five to eighty-nine points were assigned to Level II, and Level III placement was earned with ninety to one hundredpoints.

7. Dr. Coyne completed Grievant's evaluation for the 1997-98 school year in May 1998. Her review concluded Grievant was entitled to forty points for teaching/job effectiveness, thirty points for professional activities (including flex points), and fifteen points for service, for a total of eighty-five points, a Level II rating.

8. Dr. David T. Javersak, Dean of the School of Liberal Arts, reviewed and approved the evaluations completed by Dr. Coyne.

9. Grievant was notified on or about July 22, 1998, that he had received a Level II merit evaluation, entitling him to an extra $600. 00 compensation for that academic year.

10. By letter dated July 29, 1998, Grievant requested that Dr. Coyne provide him information relating to the evaluation procedure and how it had been implemented. He also rejected his merit pay, characterizing it as an “insult”. Dr. Coyne responded by letter dated August 5, 1998.

11. By memo also dated July 29, 1998, Grievant requested that Dean Javersak provide him information relating to the distribution rates of merit pay in the School of Liberal Arts. Dean Javersak provided the requested information in a memorandum dated August 4, 1998.

12. By letter of August 13, 1998, Grievant advised Dr. Coyne that her letter was non-

responsive to his request, and again inquired about the evaluation/merit review process. Dr. Coyne responded by letter of August 21, 1998, providing Grievant his merit point scores in each of the three categories, and the number of points needed for each merit level. 13. On August 27, 1998, Grievant again wrote to Dean Javersak, inquiring whether he had concurred with Dr. Coyne's representation in her August 21, 1998 letter, and asked whether the Dean had reviewed and approved the point distributions and final point scores Dr. Coyne had used in evaluating the department members, and the point distributions assigned to Grievant, specifically. Dean Javersak responded by memorandum dated August 31, 1998.

Discussion

Initially, Respondent contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code §18-29-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997);Sayre v. Mason County Health Dep't., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Respondent argues that Grievant became aware of the outcome of his evaluation upon receipt of a letter from Dr. John McCullough, Provost and Vice President of Academic Affairs at WLSC, on or about July 22, 1998, advising Grievant that he had received a Level II merit evaluation. A grievance was not filed within fifteen days of this event. Respondent further argues that on August 5, 1998, Dr.

Coyne explained the evaluation to Grievant in greater detail, but even from that point, he did not file a grievance complaint for approximately twenty-one days.

In response, Grievant asserts that the “argument that I failed to meet some mythical deadline in initially filing my grievance is bunk_more administrative obfuscation!” Grievant asserts that he promptly filed upon discovering Dr. Coyne's “prevarications and Dr. Javersak's cover-ups of her lies.” (Grievant's post-hearing submission, point number 8.)

W. Va. Code §18-29-4(a)(1) provides:

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

“Days” is defined in W. Va. Code §18-29-2(b) as “days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings . . . .” Because Grievant's employment term did not begin until on or about August 16, 1998, the time period between his receipt of Dr. McCullough's July letter advising him of his merit ranking, and the beginning of the academic term cannot be considered when determining the issue of timeliness. Furthermore, documentation in the record supports Grievant's testimony that the delay in filing after his return to campus was caused by his efforts to obtain information regarding the evaluation process. After his receipt of that information in Dr. Coyne's letter of August 21, 1998, and Dr. Javersak's response dated August 31, 1998, Grievant requested an informal conference on September 3, 1998.

This situation would appear to fall under the discovery rule exception to the statutory time limits discussed in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990). In that case, the West Virginia Supreme Court of Appeals determined that the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. Although Grievant knew the results of his evaluation in July, he was not aware of the points allocated to each of the three categories, or the basis for the point allocation, until he received Dr. Coyne's letter dated August 21, 1998, and Dean Javersak's memorandum of August 31, 1998. Because there

is no dispute that Grievant requested an informal conference on September 3, 1998, it is held that the grievance was timely initiated.

Addressing the merits of this complaint, it is noted that because this grievance doesnot involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant asserts that Respondent has violated the following policies:

Policy 214 requires that all faculty be evaluated annually and provides an outline of the criteria to be reviewed (teaching/job effectiveness, service, and professional activity), and the point system previously discussed. It also outlines the evaluation procedure, which begins with the department chair meeting with the faculty to establish the year's merit/evaluation performance factors. The factors must be approved by the Dean, after which the department chair reviews and approves the individual faculty member's performance planning document, which outlines the individual's planned objectives for the academic year, and submits them to the Vice President for Academic Services. The chair conducts annual evaluations in conference with each faculty member before the second Friday in April, and submits the evaluations to the school Dean who reviews and approvesthe documents. Final evaluations are submitted to the Vice President who determines faculty merit bonuses to be awarded, if any.

Policy 245 is Respondent's Institutional Salary Policy for full-time faculty. This policy addresses merit pay, and provides that it shall be the responsibility of the department chair, in conference with the school Dean to determine how merit recognition bonuses will be distributed, but the bonuses must be awarded based upon the evaluation.

Grievant asserts that Dr. Coyne violated Policy 214 by her own admission, when she stated in her

letter of August 5, 1998, that “[instead of points, I used a Level I, II, III category-basis for evaluating all faculty in the Department of Humanities.” Grievant asserts that considering this response, Dr. Coyne apparently fabricated the numbers he was later provided, and Dean Javersak assisted in her attempted cover-up. In response, Dr. Coyne testified that she had misunderstood Grievant's inquiry, and thought he had asked for individual point distribution in terms of dollars, for which she did not use a point system.

Grievant's perception that Dr. Coyne acted in a disreputable manner is not supported by the record. Dr. Coyne provided credible testimony addressing the procedure she utilized, and the basis for her initial response to Grievant's inquiry. Additionally, Dean Javersak testified that he had reviewed the evaluations completed by Dr. Coyne and found they had been properly completed.

Grievant next asserts that Dean Javersak violated Policy 245 as evidenced by his October 23, 1998, memorandum in which he stated, “I did not make any allocation to the Humanities Department or to the other departments in Liberal Arts, and I played no partin determining the monetary awards for each tier level. I made no decision regarding monies.”

The record does not conclusively address this matter; however, Dr. McCullough did acknowledge that this was the first year these policies were effective, and that WLSC had not accomplished strict adherence to each and every detail. Whether that was true in this instance is not clear, but in any event, Grievant does not allege that he suffered any harm from the action or inaction of Dean Javersak in this regard, and any diversion from the policy would be harmless error.

Grievant further argues that Dr. Coyne acted in an arbitrary and capricious manner by her failure to award him points in the area of teaching/job effectiveness for having been named Professor of the Year, and her failure to allocate points to all thirteen activities he had listed in the area of service. As a sub-issue, Grievant complains that he was not given credit for having co-authored an article for the *Pirate Report*, a publication affiliated with the Pittsburgh Pirates baseball team, when Dr. John Hattman, another member of the faculty, was allowed to submit the same article for credit. Grievant acknowledges that the article was not within his field of academic expertise, but notes that he is an expert in baseball.

Dr. Coyne responded that she did credit Grievant for his accomplishments in teaching/job effectiveness, but that she did not allocate points to each specific matter. Dr. Coyne confirmed that Grievant had not received credit for each of the thirteen service activities he had listed. As an

example, she stated that she did not consider his attendance at a $100.00 a plate sports banquet given by the Hilltoppers Club to be aservice activity to WSLC, notwithstanding his characterization that he was maintaining valuable community ties. Addressing the baseball article, Dr. Coyne stated that she advised Dr. Hattman that he could submit the article for consideration, but she did not determine it to be scholarly activity.

Grievant next asserts that Dr. Coyne failed to credit him for his efforts with “integration of new technology with instructional efforts.” Grievant cites a settlement agreement from a prior grievance, dated May 27, 1998, which stated that his non-utilization of the computer laboratory for the first five weeks of the 1997-98 spring semester would not be a factor on his 1997-98 faculty evaluation. Grievant notes Dr. Coyne represented that she complied with the settlement by not evaluating him in this category, but that his evaluation was dated May 21, 1998, a full six days before the agreement was completed. Grievant questions Dr. Coyne's gift of prophecy, and asserts that by her failure to consider this category entirely, he could not earn points in this area, and was effectively penalized. Dr. Coyne confirmed that she did not penalize Grievant for his failure to use the computer lab pursuant to the settlement agreement, and that she did not award him merit credit in this area because he had only completed the minimal amount of work in that area, at her specific instruction.

Although Grievant perceives there to be some mystery involving the dates of the settlement agreement relating to his work in the computer laboratory and his evaluation, the discussions for the settlement may have been ongoing, and the document simply not signed until May 27, 1998. Dr. Coyne could have completed Grievant's evaluation within the parameters of the pending settlement agreement. Other matters raised by Grievant were that Dr. Coyne had erroneously credited him with having no advisees, when in fact he had eight, and that she had failed to discuss with him the possibility that he could have been deemed ineligible for merit pay because he was on sabbatical first semester, prior to his evaluation.

Dr. Coyne stated that she accepted Grievant's representations relating to his advisees. Testimony of Dr. Coyne and the other administrators indicates the issue of merit pay to faculty who had been on sabbatical was not addressed prior to completion of evaluations. If that is the case, Dr. Coyne would have had no opportunity to discuss the matter with Grievant. In any event, Grievant was awarded merit pay for the entire year, and he suffered no harm.

Finally, Grievant disputes that his evaluation was “excellent”. On the contrary, he argues that a

point score of eighty-five is only a grade of “C”, which is average, and that he is by no means average. This claim is simply a matter of linguistic application and is not a grievable issue.

An action is arbitrary and capricious if the agency or individual making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996).

An action may also be arbitrary and capricious if it is willful and unreasonablewithout consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997). 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 administrative law judge may not substitute her judgment for that of the decision maker.

Generally, the Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate “such an arbitrary abuse on the part of the school official to show the primary purpose of the policies . . . has been confounded.” Jones v. Braxton County Bd. of Educ., Docket No. 96-04-282 (June 28, 1997); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). Finally, the mere fact that a grievant disagrees with his evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

Upon consideration of the foregoing, it cannot be determined that the evaluation was arbitrary and capricious. Clearly, Grievant perceives that he was underrated; however, Dr. Coyne provided a reasonable explanation for her allocation of points. Further, her review was deemed sound by Dean Javersak, who testified that he reviewed the evaluations conducted by Dr. Coyne and found them to be comparable to the other four chairs in the department. In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

2. W. Va. Code §18-29-4(a)(1) provides:

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

3. Grievant requested an informal conference to begin the grievance procedure within fifteen days of learning the facts which were the basis of his grievance. The grievance was timely filed. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

4. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997);Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

5. An action is arbitrary and capricious if the agency or individual making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

6. 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 administrative law judge may not substitute her judgment for that of the decision maker.

7. Generally, the Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate "such an arbitrary abuse on the part of the school official to show the primary purpose of the policies . . . has been confounded." Jones v. Braxton County Bd. of Educ., Docket No. 96-04-282 (June 28, 1997); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). 8. The mere fact that a grievant disagrees with his evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988). 9. Grievant failed to prove that Dr. Coyne violated any WLSC policies or acted in an arbitrary and capricious manner in completing his performance/merit evaluation.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: April 30, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE