**SUNDAR NAGA,**

**Grievant,**

**v.**

**DOCKET NO. 99-BOD-258**

**WEST VIRGINIA BOARD OF DIRECTORS/**

**WEST VIRGINIA STATE COLLEGE,**

**Respondent.**

**D E C I S I O N**

Grievant, Sundar Naga, filed this grievance on or about June 22, 1998, protesting his notice of non-retention by his employer, West Virginia State College ("State"), by letter from President Hazo Carter, dated June 22, 1998:

> On May 15, 1998, I received a letter from President Carter informing me of nonretention, and that the appointment for the period August 17, 1998 through May 18, 1999 will be a terminal appointment. I feel this action is violative of BOD procedural rule Series 36 in that it is arbitrary and capricious and not based on facts, and that the process which led to the decision does not conform to applicable college policy.

A lengthy level two hearing was held on this grievance, and a level two decision recommending denial by Hearing Examiner Robert Parker was issued on May 26, 1999. President Hazo Carter affirmed the decision to deny the grievance by letter dated June 14, 1999. Grievant appealed that decision to level four on June 17, 1999, and the parties agreed to submit the grievance on the record developed at level two. This case became mature for decision on November 15, 1999, following receipt of the parties' proposedfindings of fact and conclusions of law, as well as responses. Grievant was represented by David M. Fryson, Esq., and State was represented at level two by Dr. Charles Ledbetter, and at level four by Kristi A. Rogucki, Assistant Attorney General.

FINDINGS OF FACT

1. Grievant was appointed to a probationary tenure track position by President Hazo Carter in August of 1992. Grievant was assigned to the Division of Chemistry ("Division") at the rank of Assistant Professor of Chemistry.

2. Grievant applied for tenure on October 1, 1997 (Ex. 23-7). (See footnote 1) Grievant submitted his completed tenure portfolio on December 1, 1997. See Grievant's Tenure Portfolio. Because Grievant failed to meet the effective teaching criteria required for tenure, Grievant was not granted tenure. Ex. 23-4.

3. Dr. Barbara Oden is the Vice President of Academic Affairs and has held this position for twelve years. Prior to serving as Vice President for Academic Affairs, Dr. Oden was a member of the biology faculty beginning in 1957, served as Chairperson for the Department of Biology for over fifteen years, as well as served as the Division Dean for a number of years.

4. Dr. Katherine Harper-Morris was Division Dean throughout Grievant's entire probationary tenure period.

5. Dr. Virgil Mathews was Chairperson for the Division for the 1992-1994 academic years. 6. Dr. Vernon Fletcher was Chairperson for the Division for the 1994-1997 academic years.

7. Dr. Harold Pinnick was Chairperson for the Division for the 1997-1998 academic year.

8. During the first, second, third and fourth years of Grievant's tenure period, the Division Chair, Division Dean, Retention Committee, and Dr. Oden recommended Grievant's retention. Grievant's Tenure Portfolio.

9. During the fifth year of Grievant's tenure period, neither the Division Chair nor the Division Dean recommended Grievant's retention.

10. Specifically, the Division Chair stated in his recommendation against retention of Grievant:

> The most important reason for the faculty at a four-year college, such as WVSC, is to be effective teachers. There are other areas of importance, such as research and scholarly activities as well as department, college, and community services. But teaching is the reason we are here as a faculty. The first criteria listed in the Faculty Handbook for making a strong portfolio in a request for tenure is evidence demonstrating excellence in teaching.

. . .

> Dr. Naga is completing his fifth year at WVSC in the Department of Chemistry. His student-evaluations each semester have been below faculty average for both the department and the College. His averages are in the range of 3.81-4.19, while the average for WVSC is 4.4 each semester.
>
> . . .
>
> I have found that the student feedback to me as Department Chair, the results of the student-faculty evaluations, and my perceptions of the instructors teaching are parallel. The majority of the Chemistry faculty receive ratings at or above the college average in the student-facultyevaluations. It is true that an easy course generally receives higher ratings, but faculty with stringent grade distributions also have favorable ratings.
>
> Students comment that Naga jumps around presentation of subjects and his lectures are disorganized, making it hard to follow and understand him. . . He has tendency to get behind in the materials that are important to be covered due to the amount of time he spends on how certain concepts of chemistry were developed. . . His class assignments at the end of the last semester in 301 were so heavy students were ready to quit the class.
>
> . . .
>
> In doing this recommendation, the prime question is whether he is doing a good job in the majority of his courses. It is my opinion that he is not and his nine semesters of teaching at WVSC have been below average for both the department and the College. I feel Dr. Naga has had enough time to develop his teaching and it is now representative of what it will be for the future. I feel the quality is too risky for a long term investment. I am sorry to say, I am not recommending Dr. Naga for retention.

Ex. No. 27G.

11. Likewise, the Division Dean noted her own observations of Grievant's unorganized lectures. Noting Grievant's excellence in other scholarly areas, the Division Dean stated that nothing can substitute for good teaching. Tenure Portfolio Ex. No. 10. She specifically stated in her recommendation against retention:

> Dr. Fletcher observes that Dr. Naga's lectures are disorganized and difficult to

> understand. This semester when I observed Dr. Naga, I too noticed this disorganization. . . Very few students took notes or participated in the lecture. Most appeared bored.
>
> . . .
>
> It is easy to see how Dr. Naga might well spend too much time on introductory subjects and be forced to rush to finish in the latter part of the semester. . .
>
> I was especially distressed to learn that Dr. Naga had to schedule extra class sessions to complete the material for Chemistry 301. In a letter to me [ ], Dr.Naga explains that these extra sessions were help sessions that were not mandatory for students. While faculty are encouraged to provide help sessions, I get the sense from Dr. Naga's letter, that students seem to feel the need to attend but often cannot. If Dr. Naga offers these sessions to work problems because he doesn't have the time to work them in class, this would be evidence of poor planning on his part. It seems this lack of planning is routine for Dr. Naga (see Dr. Fletcher's letter to me dated 3/17). Dr. Fletcher points out that one month into Chem. 102, Dr. Naga was testing students on material from Chapter 7 of the Intro. General Chemistry II Text. Dr. Naga apparently did not follow a departmental decision to begin second semester Chemistry with Chapter 10. Dr. Fletcher also noted that students coming out of Dr. Naga's Chem 105 and 106 courses lacked exposure to topics necessary for successful completion of Chem 205 and 206, the next two courses in the sequence. This lack of organization or poor planning is inexcusable and has a negative impact on our students.
>
> . . .
>
> Dr. Fletcher comments that Dr. Naga's student evaluations have been consistently low in his specialty courses (Physical Chemistry) and for the introductory courses he teachers, and that he has had sufficient time to develop his skills. I agree and must recommend against Dr. Naga's retention.

Grievant's Tenure Portfolio Ex. 10.

12. Despite the recommendations of nonretention by the Division Chair and Division Dean, the Retention Committee and Dr. Oden both recommended Grievant's retention. Dr. Oden recommended Grievant for retention in an effort to give him yet another year of opportunity in order to better improve his teaching performance.

13. During the sixth and final year of Grievant's tenure period, the Division Chair recommended

Grievant for tenure, noting again that Grievant still needed to improve certain areas of his teaching.

14. The Division Dean recommended Grievant for tenure with reservation and did not recommend Grievant for promotion. She noted that Grievant's student evaluationswere often below the college average for 1992-1993 and 1996-1999, needed to improve his teaching performance, and, in fact, stated that she did not consider Grievant an excellent teacher. Specifically, the Division Dean noted:

> This year Dr. Pinnick recommends promotion and tenure. He acknowledges Dr. Naga's problems but considers them to be trivial. He believes that detailed syllabi will help Dr. Naga pace himself throughout the semester. This strategy was offered too late for Dr. Naga to implement in his syllabus for Inorganic Chemistry this semester. His syllabus neither provides the schedule of exams and other assignments nor a detailed schedule of lecture topics. In general, I have not heard many complaints about Dr. Naga from students. Nevertheless, a group of students that had Dr. Naga for Chemistry 101 appealed to Dr. Fletcher to teach 102. Apparently they did not want to take Dr. Naga again. This inconsistency concerns me. A small department cannot afford faculty not being consistently effective with students. Excellence in teaching is among the criteria for tenure, but is required for promotion. I do not consider Dr. Naga an excellent teacher but I believe he can improve. If he is receptive to constructive criticism, I trust he will make the changes necessary to correct his shortcomings. Because his teaching record is inconsistent, I recommend tenure with reservation but I do not believe he meets the criteria for promotion in rank.

Ex. 27B.

15. The Promotion and Tenure Committee ("PTC") did not recommend Grievant for tenure. Grievant was notified of the PTC decision by correspondence dated April 29, 1998. Ex. 23-6.

16. Dr. Jack Magan was Chairperson of the PTC during the final year of Grievant's tenure period.

17. After evaluating Grievant's Tenure Portfolio, Dr. Oden did not recommend Grievant for tenure. Grievant was notified of Dr. Oden's decision by a May 14, 1998 letter. Ex. 1. 18. Unlike the Retention Committee, both Dr. Oden and the PTC examined Grievant's entire body of work from the beginning of his tenure process in August 1992, to the time he applied for tenure in 1998.

19. In its recommendation not to grant Grievant tenure, the PTC stated:

> Professor Naga has been active in the prescribed areas of scholarship and service to the college and community, but the committee focused on his teaching. It is true that numerous students have declared him outstanding, especially those in the advance chemistry classes or who have done research with him. However, in the everyday teaching of lower level chemistry classes, he has a record of not finishing the content that is expected of whomever is teaching the next course in the sequence. His portfolio is evidence of a tendency to go over and over the same material. The same

> letters and evaluations appear numerous times, and his rebuttal about last year's recommendation of non-retention goes on and on.
>
> . . . Tenure is for life, unless there is severe economic downturn, or the faculty member does something heinous or willfully insubordinate, neither of which is likely. In fact, [Dr. Naga] is such a willing worker and please person that it is painful to recommend against his tenure. . . but the realities of tenure dictate that in the sixth year of continuous employment, there is no opportunity for “another chance.”

Ex. 23-7.

20. In her letter to Dr. Carter not recommending Grievant for tenure Dr. Oden stated:

> [Dr. Naga's] six year performance was carefully reviewed and assessed by the Department Chair, the Division Dean, and the [PTC] before being forwarded to the Vice President for Academic Affairs. In no instance was there unconditional support for the awarding of tenure. The department chair acknowledged deficiencies and indicated a willingness to work with Dr. Naga. The Division Dean made reference to deficiencies and recommended tenure with reservation. The [PTC] recommended denial of tenure.
>
> The decision to award tenure represents a long and costly commitment by the institution and greatly impacts future flexibility in a department. Therefore, I cannot recommend a candidate about whom there are serious and continuous reservations in spite of six years of opportunities to improve.
>
> His portfolio is available for your review.

Exs. 1, 28C.

21. Dr. Carter issued a letter to Grievant on May 14, 1998, advising him that his tenure request was denied, and that he would be issued a terminal contract. Exs. 2, 28B. Grievant was issued a terminal contract June 6, 1998. Ex. 3.

22. Grievant requested reasons for his denial of tenure by letter dated May 27, 1998. Ex. 4.

23. Grievant was advised his tenure was denied because:

(a) his Department Chairs failed to consistently rate him as an excellent teacher;

(b) consistent failure of the Division Dean to rate him as an “excellent” teacher;

(c) the student evaluations failed to rate him as an excellent teacher;

(d) the “Retention and Tenure Committee” assessments consistently expressed concern regarding his lack of excellence as a teacher;

(e) the Vice President for Academic Affairs' assessment of his portfolio consistently led her to expressions of concern regarding his lack of excellence as a teacher.

Ex. 23-4.

24. Grievant initiated a grievance on June 6, 1998, and formally requested a hearing by letter dated June 22, 1998. Exs. 7. 8.

25. Grievant met all tenure criteria except for effectiveness in teaching. Ex. 20.

## DISCUSSION

A.

Denial of Tenure.

“In a grievance challenging promotion and/or tenure of a probationary faculty member, the grievant has the burden of proving each element of [the] complaint by a preponderance of the evidence.” Castiglia v. Bd. of Trustees/W. Va. Univ., Docket No. 97- BOT-360 (May 27, 1998)(citing Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 91-BOD-271 (Feb. 11, 1993)). See also McMullen v. Bd. of Directors/West Liberty State College, Docket No. 96-BOD-473 (Apr. 14, 1998).

"The decisional 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." Karle v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-258 (Apr. 9, 1999). See also Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Castiglia, supra; Brozik v. Bd. of Trustees/Marshall Univ., 98-BOT-149 (Nov. 30, 1998); Shackleford v. Bd. of Trustees/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997); Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOT-220 (Mar. 18, 1994). "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 [administrative law judge] may not substitute [his/her] judgement for that of the decision-maker." Baker, supra (citing Harrison v. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). "Generally an action by an institution of higher learning is arbitrary and capricious if the decision maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998). See generally Cutright v. BOD/W. Va. Univ. of Parkersburg, Docket No. 95-BOT-090 (Nov. 3, 1995)". Baker, supra.

"Deference is given to the subjective determination made by the official administering the process." Baker, supra (quoting Harrison, supra; Gardener v. BOT/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994)). See also Brozik, supra. The rules governing promotion and tenure for State faculty members are set forth in the West Virginia State College Faculty Handbook (See footnote 2) ("Handbook") and Board of Directors Procedural Rule Title 131, Series 36 ("Series 36"). Pursuant to the Handbook, State faculty members are expected to be knowledgeable of all regulations and policies governing academic activities and to abide by them. Specifically, the Handbook states:

> Full-time faculty appointments are made in accordance with Board of Directors Procedural Rule Series 36 which is reprinted in full in Appendix B. All faculty should read this document carefully and refer to it regarding all personnel matters.

Ex. 44. Series 36 states in pertinent part:

Section 9.1. Tenure is designed to ensure academic freedom and to provide professional stability for the experienced faculty member. . . Continuous self-evaluation, as well as regular evaluation by peer and administrative personnel is essential to the viability of the tenure system. Tenure should never be permitted to mask irresponsibility, mediocrity, or deliberate refusal to meet academic requirements or professional responsibilities. . . There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; publications and research; accessibility to students; adherence to professional standards of conduct; professional and scholarly activity and recognition; significant service to the community and the college; experience in higher education and at the institution; possession of the earned doctorate, or the highest earned degree appropriate to the teaching field, granted by a regionally accredited institution, or special competence that is deemed to be the equivalent to such academic credentials; potential for continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application and guidelines and criteria relating to tenure shall rest with the institution.

Section 9.2. In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. The institution, while not maintaining “Tenure Quotas”, shall be mindful of the dangers of losing internal flexibility and institutional accountability to the citizens of the state as a result of an overly tenured faculty. Tenure may be granted only to the faculty in positions funded by monies under the control of the State College System.

Section 9.3. Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution following consultation with appropriate academic units.

Section 9.5. Tenure may be attained only by faculty who hold the rank of assistant professor or above.

Section 10.2. During the tenure-track period, the terms and conditions of every reappointment shall be stated in writing, with a copy of the agreement furnished to the individual concerned within fifteen days following receipt of the Board's budgetary allocations and guidelines.

Section 10.3. The maximum period of tenure-track status shall not exceed seven years. Before completing the sixth year of a tenure-track appointment, any non-tenured faculty member shall be given written notice of tenure, or offered a one-year written terminal contract of employment. During the tenure-track period, faculty members may be granted tenured appointment before the sixth year of service, such appointment to be based upon the criteria established by the institution and copies provided the Chancellor.

State incorporated the language of Series 36 into its Handbook tenure policy. Ex. 44. Pursuant to Series 36, § 9.1, State developed specific guidelines and procedures for granting tenure. The State tenure process, as required by Series 36, is multidimensional and involves several different levels of review. At the close of a six-year probationary period, tenure applicants must apply for tenure. Unlike the Retention Committee that determines retention on a year-to-year basis, the tenure decision is based upon an assessment of the applicant's six year tenure portfolio. Ex. 43.

"[F]aculty members wishing to apply for tenure initiate the process by filing their applications and supporting portfolios with the department chair or program director. (A copy of the cover letter is sent to the division dean, the Chair of the Faculty Personnel Committee and the Vice-President for Academic Affairs.)" (Ex. No. 44). Strong portfolios for tenure include demonstrated evidence that tenure is based upon a range of criteria as set forth in Series 36, supra. Portfolios should also contain evidence of the required number years of service, should not be limited to the self-report, and should include activities during the entire probationary period rather than the one year prior to the application for tenure. Id.

Following submission of the portfolios, the department chair reviews the materials, and submits the portfolio with a written recommendation to the division dean. The divisiondean likewise reviews the material and makes a written recommendation to the PTC. The faculty member receives a copy of both recommendations.

During this evaluation process, the PTC reviews the portfolio and "may do any of the following:

a.

request more information;

b.

observe the faculty member's teaching;

c.

interview the candidate and interview other faculty members."

Ex. 44 (emphasis added). See also Ex. 44. The PTC then forwards its recommendation and all tenure documents to the Vice President of Academic Affairs who then transmits his/her recommendation to the President for final action. Id.

After the decision regarding retention has been made by the President, he shall notify the tenure-

track faculty member of the decision as soon as practicable. In cases of nonretention of faculty who began service at the start of the fall term, formal notification shall be given at least one year before the expiration of an appointment after two or more years of service to the institution. 131 C.S.R. 36 § 10.5.3 (1997). Ex. 44.

Pursuant to Series 36 and the Handbook "[t]here are six general criteria used for the evaluation of faculty members, teaching effectiveness, professional growth, research and creative activities, recognized activity in professional and/or learned societies, service to the college, and public and community service." Ex. 44. The Handbook states that "[t]eaching effectiveness is the most important of the six criteria, and excellence in other areas cannot compensate for a deficiency in teaching effectiveness." Effective teaching is defined as:

> Quantitatively, "above average" and "outstanding" teaching experience also means that the faculty member must have had a majority of above average and outstanding ratings on peer, student, and chairperson's evaluations. "Above average" ratings on student evaluations are defined as being higher than the faculty average.

Handbook.

Grievant has failed to prove by a preponderance of the evidence that his teaching was at least qualitatively or quantitatively effective. Evidence found in Grievant's tenure portfolio substantially supports Grievant's denial of tenure.

Quantitatively, Grievant's student evaluations failed to meet the above-average standard set forth in the Handbook. Grievant was consistently advised of the need to improve upon his student evaluations but failed to do so. Grievant asserts that the aforementioned definition of "above average" was improperly promulgated by Dr. Oden, not approved by the Faculty Senate, and therefore inapplicable to him. This position is untenable. The Board of Directors of the State College System of West Virginia has the authority to delegate powers relating to the financial, administrative, and educational affairs to college presidents or other administrative officers of the institution. W. Va. Code § 18B- 1-6 (1993). It follows that the President may delegate his assigned powers to his own administrative officers.

Dr. Oden testified that Dr. Carter delegated to her the responsibility for managing all things related to the academic workings of the institution, including establishing tenure and promotion

guidelines. Specifically, Dr. Oden, as the Vice President of Academic Affairs, "[a]s the senior officer in the President's Executive Staff, this Vice President serves in the President's stead as requested and had the major responsibility for the defense ofthe academic freedom and tenure at [State]. . .". Transcript Vol. V-A, Testimony of Dr. Oden, p. 60). Therefore, Dr. Oden, pursuant to her authority as Vice President for Academic Affairs, appointed a committee to determine a definition for "above average" teaching to be used in making tenure decisions.

This Grievance Board has held that Faculty Senates serve as advisory bodies and all administrative decisions need not be funneled through the Faculty Senate. McCoy v. Bd. of Directors/Southern W. Va. Community and Technical College, Docket No. 97-BOD- 182 (Aug. 18, 1998), aff'd Kanawha County Circuit Court No. 99-AA-126 (Apr, 2, 1999). In McCoy, this Grievance Board rejected grievants' assertions that the President of the institution could not require faculty members to use IPSI software to develop course syllabi without first bringing this issue to the various faculty committees for input. There, the Faculty Senate Constitution provided that the Faculty Senate "has the right and responsibility to express its opinion on policies of the administration of the college" subject to approval and acceptance by the President. Id.

Here, Dr. Oden, acting pursuant to the authority delegated to her by the President, and with the assistance of a faculty committee, determined the definition of "above average" for tenure purposes without first consulting the Faculty Senate. Here, as in McCoy, the purpose of the State Faculty Senate is to "take action" on various educational policies subject to review by the faculty, and by the President. Ex. 44. The Faculty Senate was afforded an opportunity to make a recommendation on the definition presented by Dr. Oden. In any event, Dr. Carter adopted Dr. Oden's definition as evidenced by the Faculty Handbook. Ex. 44. Furthermore, Grievant was fully aware that he was required tomaintain "above average" numbers in the student evaluations as evidenced by the May 5, 1997 letter written to the Chairperson of the 1996-1997 Retention Committee, Dr. Patricia Shafer, as well as by the numerous peer evaluations he received indicating a need to improve his student ratings. Dr. Oden further testified that it has been the practice of State since the initiation of student evaluations in 1993 to define "above average" in the manner formalized by the aforementioned definition and that the faculty in fact determined that definition. Therefore, Dr. Oden did not circumvent any established procedures by appointing a committee to define the term "above average", it is clear that President Carter adopted this definition by its inclusion in the Handbook, and

Grievant's argument that this definition did not apply to him must fail.

Grievant further attacks the validity of the student evaluations. "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." Brozik; supra *(citing* Shackleford v. W. Va. Bd. of Directors, No. 96-BOD-414 ( Oct. 9, 1997) and Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995)). Here, the student evaluations used by State were approved and adopted by the Faculty Senate.

Not only did Grievant fail to establish quantitatively that his teaching was effective, he also failed to prove by a preponderance of the evidence that his teaching was effective "qualitatively." Grievant's tenure portfolio contained information from his entire tenure process. Following a careful assessment of the various sources of information found in Grievant's Tenure Portfolio, Dr. Oden felt compelled not to recommend Grievant for tenure. Dr. Oden noticed some tendencies in Grievant's teaching performance that were not indicative of a teacher worthy of tenure. For example, Dr. Oden noted that Grievant's student evaluations were consistently low, that his lectures notably were unorganized, that he enjoyed teaching about Chemistry but did not teach Chemistry, he often did not cover all of the required material, that his syllabi still required additional improvements, and that his lectures were not easily comprehensible. Dr. Oden indicated that Grievant had not met the level of teaching excellence required for a recommendation of tenure even though he had been given six years to improve his teaching performance. Dr. Oden also noted the Division Dean's recommendation of tenure with reservation and carefully examined the Division Chair's recommendation. The evidence found in Grievant's tenure portfolio as assessed by Dr. Oden, therefore, substantially supports Grievant's denial of tenure.

Although Grievant has submitted numerous letters written in support of his position, (See L-II Exhibit Nos. 23-3; 23-14 and 96), as well as has presented testimony of students (L-IITr.,Vol. IV-A, Testimony of Various Students, pp. 85-150), and prior evaluators,"[t]he [Administrative Law Judge] , 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 [his] qualifications for tenure. If [he] 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, supra. See also Castiglia, supra." Karle, supra. Grievant had the opportunity to submit any letters of support with his tenure portfolio at the time he applied for tenure. As a result, the letters of support Grievant has submitted following his denialof tenure as well as any similar testimony may not be considered as part of his grievance. Grievant's grievance therefore must be denied.

B.

Discrimination.

Grievant has failed to show that he was discriminated against due to race or national origin. Discrimination is defined as any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W. Va. Code § 18-29-2 (m)(1992). To establish a prima facie case of discrimination, Grievant must show:

(a)
that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee( s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Shackleford v. Bd. of Trustees/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997), ( citing Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 98-T&R-214 (Sept. 24,1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id.

In the present case, Grievant amended his original grievance at Level ll to include a claim of discrimination in order "to preserve the argument for appeal." Grievant, however, has failed to

present any evidence establishing that he was discriminated against in any manner including race or national origin. Grievant states that he was discriminated againstdue to his accent because students could not understand his lectures. Grievant was once advised that students complained that his accent made the lecture hard to follow. Grievant however, corrected this problem. Students, however, could not comprehend the content of Grievant's lectures. For example, students often complained that Grievant skipped around in class and the students of one class even complained that they did not want to take any more classes taught by Grievant. Aside from this one example, Grievant has failed to present any evidence that he was discriminated against due to race or national origin.

Although Grievant alleges that Dr. Anaporte, a Caucasian female, was granted tenure, he has nevertheless failed to show that his denial of tenure was discriminatory in nature. Grievant alleges that Dr. Anaporte was permitted to interject additional evidence into her tenure process while he was denied the same opportunity. Specifically, Grievant alleges that Dr. Magan failed to tell the PTC of his request to present additional evidence to the PTC, but Dr. Anaporte was permitted to present additional evidence in support of her tenure application. This position is not supported by the evidence. Grievant's Promotion and Tenure decisions were based upon the information contained in the Tenure Portfolio that he compiled. The PTC, as it was empowered but not required to do, did not elect to interview the Grievant or to request any additional information from him. Therefore, Grievant's denial of tenure was not adversely affected by Dr. Magan's failure to inform the PTC of Grievant's request.

Grievant further alleges that Dr. Anaporte was granted tenure following a personal conference with Dr. Oden as well as after submission of a letter not previously included inher tenure portfolio. Once the tenure process reaches the Vice President of Academic Affairs, a tenure applicant is not entitled to present additional information that is not contained in the Tenure Profile. (L-ll Tr., Vol. V A, Testimony of Dr. Oden, pp. 585- 592). Furthermore, Dr. Oden testified that upon attempts by applicants to discuss the tenure process or submit additional information not contained in the tenure portfolio, she advised them that such attempts fell outside the tenure process and additional information would not be considered. (L-ll Tr., Vol. V A, Testimony of Dr. Oden, p. 592).

Although Dr. Anaporte and Dr. Oden met prior to Dr. Anaporte's receipt of her tenure notice, Dr. Anaporte testified that the content of the discussion focused on the educational approaches to teaching poetry, not Dr. Anaporte's tenure process, and that her attempts to discuss her tenure

process were "derailed" by other topics. (L-ll Tr., Vol V A, Testimony of Dr. Anaporte, pp. 774,776-777). Grievant and Dr. Anaporte, therefore, were afforded the benefits of the same tenure process.

C. Procedure.

Grievant further alleges that State violated its own policies and procedures by failing to adhere to the time lines set forth in the Faculty Personnel Committee (hereinafter "FPC") tenure calendar, as well as because Dr. Fletcher submitted his 1996-1997 letter not recommending retention to the Division Chair prior to obtaining Grievant's signature. (See L-II Exhibit No.5 and Grievant's Proposed Findings of Fact and Conclusions of Law, p. 5). Grievant further alleges that Dr. Magan' s failure to disqualify himself from the PTC in light of his alleged conflict of interest constitutes procedural error.

First, pursuant to Section 10.3 of Series 36 and the Handbook, the maximum period of tenure-track status shall not exceed seven years. Before completing the sixth year of a tenure-track appointment, any non- tenured faculty member shall be given written notice of tenure, or offered a one year written terminal contract of employment. This calender is the only calender State is required to follow with regard to Grievant's tenure process. This Grievance Board has previously held that an institution's failure to adhere to an internal tenure calendar it created does not constitute a fatal error in the tenure process. Shackleford, supra. In Shackleford, the grievant failed to prove by a preponderance of the evidence a calendar created by the institution setting deadlines for filing various tenure documents was a "policy, procedure or rule" because no evidence was presented that such tenure calendar was meant to be binding upon the faculty.

Here, Grievant alleges WVSC violated the time lines for submitting tenure documents set forth by the FPC. Dr. Oden testified that the purpose of the time lines set forth by the FPC was to ensure the time lines set forth in Series 36 were met. (L-ll Tr., Vol. IV B, Testimony of Dr. Oden, p. 382). Specifically, Dr. Oden testified: "I'm concerned with meeting the Board's dates of December 15, March 1, and the end of the year mandated date." Id. Clearly this indicates that State did not intend for its FPC calendar to be binding. Furthermore, Grievant was timely notified of his nonretention and denial of tenure prior to the close of his sixth year of service as required by Series 36. As a result, as in Shackleford, Grievant has failed to prove that State violated any policy or procedure by failing to adhere to the tenure deadlines set forth by the FPC. Even if Grievant had proven by a preponderance of the evidence the time lines set forth by the FPC consitute a policy, rule, or procedure, Grievant has failed to show a different result would have occurred had State strictly follow

the procedure. A body is required to abide by its own lawfully established policies, however, its actions will not be always 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)." Karle, supra. (citing Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997); Walker v. Dept. of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998)).

In the present case, Grievant's denial of tenure would likely have occurred even if State would have adhered to the aforementioned deadlines. Grievant was advised that his tenure was denied because:

(a)

his Department Chairs failed to consistantly rate him as an excellent teacher;

(b)

consistent failure of the Division Dean to rate him as an "excellent" teacher;

(c)

the student evaluations failed to rate him as an excellent teacher;

(d)

the "Retention and Tenure Committee" assessments consistently expressed concern regarding his lack of excellence as a teacher;

(e)

the Vice President for Academic Affairs' assessment of his portfolio consistently led her to expressions of concern regarding his lack of excellence as a teacher.

Neither the contents of Grievant's tenure portfolio nor the substance of his previous evaluations or Dr. Oden' s assessments of his portfolio would have changed even if the FPC deadlines were followed.

Second, Dr. Fletcher's 1996-1997 letter to the Division Dean does not constitute procedural error. Although this letter was sent to the Dean prior to obtaining Grievant's signature, Grievant was given a full and fair opportunity to respond to that letter prior to the time the Division Dean made her recommendation for nonretention. (See L-II Exhibit No. 27-V-l). Furthermore, Grievant did not grieve that alleged procedural error at the time it occurred and may not be permitted to do so at this time. Therefore, even if State failed
to follow the FPC guidelines, and Dr. Fletcher failed to follow proper procedure in 1997,
Grievant has failed to show that a different result would have occurred.

Third, Dr. Magan's failure to recuse himself from the PTC does not constitute procedural error. Grievant produced absolutely no testimony from any of the PTC members
indicating Dr. Magan was advocating against granting Grievant tenure. In fact, the only evidence Grievant produced in support of this allegation was an e-mail correspondence from Dr. Magan to the committee members indicating that Grievant's case was one of the two hardest to decide. (L-II Exhibit No.24). A perusal of the PTC notes clearly indicates that the PTC gave equal consideration to all tenure applicants, and when needed, in fact requested additional information from tenure applicants. (L-II Exhibit No.24). In Grievant's case, however, the PTC, notwithstanding Dr. Magan's position, voted against granting Grievant tenure. While Grievant offered testimony from Dr. Anaporte that she felt Dr. Magan influenced her tenure process, that does not compensate for Grievant's failure toproduce evidence that Dr. Magan's alleged bias affected his own tenure process in any way. (See L- II Tr., Vol. VA, Testimony of Dr. Anaporte, p. 715). Therefore, Dr. Magan's failure to recuse himself from the PTC does not constitute any procedural error .

Grievant also alleges State erred by allowing Dr. Fletcher to evaluate him during the fifth year of his tenure process because Dr. Fletcher was on the same tenure track as himself. Grievant and Dr. Fletcher may have been in the same tenure track, however, tenure applicants do not compete against each other in the tenure process. Rather, each tenure applicant is evaluated on the strengths and weaknesses of his or her own tenure portfolio. Dr. Oden testified that Grievant was not the first tenure applicant to be evaluated by a Department Chair that was following the same tenure track. (L-II Tr., Vol. VA, Testimony of Dr. Oden. pp. 555-556).

Furthermore, Grievant failed to properly grieve any of his prior evaluations or retention recommendations made by Dr. Fletcher, and as a result, cannot attack their validity at this time. See

Aglinsky v. Bd. of Trustees/West Virginia University, Docket No. 97-BOT-256 (Oct. 27, 1997)(citing Jones v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996)(reversed in part on a separate issue, Bd. of Trustees/West Virginia University v. Aglinsky, 99-AA-19 (Oct. 20, 1997)). See Stamper v. W. Va. Dept. Health and Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30,1994). All of the information contained in Grievant's prior evaluations must be accepted as true. *See* Perdue v. De~t. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). Grievant was given a full opportunity to grieve any of the actions taken during his tenure process.Grievant, however, chose to write letters of rebuttal in support of his case, letters that were submitted with his tenure portfolio and considered during his tenure process. (For example see L- II Exhibit No. 27V and Tenure Portfolio Exhibit No. 23). Grievant did not, however, grieve Dr. Fletcher's recommendation. Therefore, Grievant's argument that Dr. Fletcher's evaluations and recommendations should be disregarded must be rejected.

D.

Denial of Promotion.

Series 36 and the Handbook provide the guidelines for promotion. Pursuant to the Handbook, to be eligible for promotion to the rank of Professor, a faculty member must have met the following criteria:

1

Earned Doctorate in the field in which one teaches plus five (5) years of "above-average" full-time teaching in the rank of Associate Professor.

2.

Have demonstrated achievement in at least three of the following areas:

(a) professional growth;

(b) research;

(c) recognized activity in professional or learned societies;

(d) service to the college community; and

(e) public and community service.

Exhibit No.44, p. 17. Additionally, pursuant to Section 7.2 of Series 36, promotion "shall not be granted automatically, but shall result from action by the president of the institution following consultation with the appropriate academic units."

In the present case, Grievant has failed to meet the five years of "above-average" teaching criteria required for his promotion in rank. Furthermore, Grievant was notrecommended for promotion by his Division Dean due to his low student evaluations and inconsistent teaching performance. Dr. Oden herself determined that Grievant's had failed to demonstrate consistently "above-average" teaching throughout his tenure process. Therefore, Grievant is not entitled to promotion in rank.

CONCLUSIONS OF LAW

1. “In a grievance challenging promotion and/or tenure of a probationary faculty member, the grievant has the burden of proving each element of [the] complaint by a preponderance of the evidence." Castiglia v. Bd. of Trustees/West Virginia University, Docket No. 97-BOT-360 (May 27, 1998); (citing Fasce v. Bd. of Directors, Docket No. 94- BOD-I072 (Sept. 13, 1995); Baroni v. Bd. of

Directors/Fairmont State College, Docket No. 91-BOD-271 (Feb. 12, 1993)). See also McMullen v. Bd. of Directors/West Liberty State College, Docket No. 96-BOD-473 (Apr. 14, 1998).

2. "The decisional 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." Karle v. Bd. of Trustees/Marshall University, Docket No. 98-BOT-258 (April 19, 1999). See also Sui v. Johnson, 784 F. 2d 238 (4th Cir. 1984); Castiglia v. Bd. of Trustees/West Virginia University, Docket No. 97-BOT-360 (May 27, 1998); Brozik v. Bd. of Trustees/Marshall University, 98-BOT-142 (Nov. 30, 1998); Castiglia, supra; Shackleford v. Bd. of Trustees/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997); Carpenter v. Bd. of Trustees/West Virginia University, Docket No. 93-BOT-220 (Mar. 18, 1994). 3. "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 [administrative law judge] may not substitute [his/her] judgement for that of the decision- maker." Baker, supra, (citing Harrison v. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995)).

4. "Generally an action by an institution of higher learning is arbitrary and capricious if the decision maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No., 97-20-255 (Mar. 19, 1998). See generally Cutright v. Bd. of Directors/West Virginia University at Parkersburg, Docket No. 95-BOT-090 (Nov. 3,1995)." Baker, supra.

5. "Deference is given to the subjective determination, made by the official administering the process." Baker v. Bd. of Trustees/West Virginia University, Docket No. 97-BOT-359 (April 30, 1998) (quoting Harrison, supra; Gardener v. Bd. of Trustees/Marshall University, Docket No. 93-BOT- 391 (Aug. 26,1994)). See also Brozik v. Bd. of Trustees/Marshall University, 98-BOT-142 (Nov. 30, 1998)).

6. The [Administrative Law Judge] is limited to considering the record before the decision-maker at the time orthe decision. An applicant is responsible for informing the decision-maker of his qualifications for tenure. If he 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. Barker, supra. See also Castiglia, supra. Karle, supra.

7. The Grievant has failed to prove by a preponderence of the evidence that State's denial of his tenure was arbitrary or capricious.

8. To establish a prima facie case of discrimination, Grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee( s );

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual j ob responsibilities orthe grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Shackleford v. Bd. of Trustees/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997), (citing Hendricks v. W. Va. Dept. of Tax and Revenue, Docket NO. 98-T&R-214 (Sept.24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id.

9. Grievant has failed to prove by a preponderance of the evidence that he was discriminated against in any manner.

10. An institution's failure to adhere to its own internally created tenure calendars does not consitute error if such calendar was not intended to strictly bind the faculty. Shackleford, supra. 11. State's failure to follow the FPC's guidelines does not constitute a procedural error in Grievant's tenure process because the FPC calendar was not intended to bind the faculty but

instead was intended to insure compliance with the Series 36 Guidelines.

12. Even if Grievant has proven that the FPC calendar was a "policy or procedure," he has still failed to show that any procedural errors resulted. "A body is required to abide by its own lawfully established policies, however, its actions will not be always 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). Karle, supra, (citing Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997); Walker v. Dept. of Public Safety, Docket No. 98-DPS-056 (Sept. 11,1998).

13. Grievant has failed to prove by a preponderance of the evidence that a different result would have occurred if WVSC had adhered to the FPC guidelines.

14. Even if Grievant has proven by a preponderance of the evidence, State's denial of tenure was arbitrary and capricious, Grievant is not entitled to a promotion in rank. Pursuant to the Faculty Handbook, Grievant must demonstrate five years of"above- average" teaching in order to receive a promotion in rank.

15. Grievant is not entitled to a promotion in rank because his teaching performance was not "above-average" for five years.

Therefore, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: December 30, 1999**

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*Footnote: 1*

*A Summary of Evidence is attached as Addendum A.*

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*Footnote: 2*

*The 1997-98 Faculty Handbook was in effect at the time of Grievant's denial of tenure, however, the provisions are unchanged in the 1998-99 version.*