DAE SUNG HA,

Grievant,

v.

DOCKET NO. 00-HE-333

HIGHER EDUCATION INTERIM GOVERNING BOARD/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Dae Sung Ha, filed this grievance against his employer, the Higher Education Interim Governing Board/Marshall University ("Marshall"), on August 18, 2000, alleging:

> Dr. Ha feels that he is being classified in the wrong discipline. This affects his salary classification and results in a substantial loss of income.
>
> Relief sought: Dr. Ha asks that his discipline be reclassified and that his salary be adjusted accordingly.

A level two grievance hearing was held on October 5, 2000, with Ms. Martha Woodward, Executive Director, John R. Hall Center for Academic Excellence, serving as the Grievance Evaluator. Ms. Woodward recommended denying the grievance by decision dated October 9, 2000, and F. Layton Cottrill, Jr., General Counsel and Designated Representative of the President of Marshall University, informed Dr. Ha on October 10, 2000, that his grievance had been denied. Grievant appealed to level four on October 19, 2000, and a hearing was held in the Grievance Board's Charleston, West Virginia, office on December 7, 2000. Thismatter became mature for decision on January 16, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Mr. Steve Angel, West Virginia Federation of Teachers, and Marshall was represented by Connie Bowling, Esq., Senior Assistant Attorney General.

SUMMARY OF EVIDENCE

Level II Joint Exhibits

Ex. 1 -

The International Association for Management Education, 1999-2000 Faculty Salary Survey by Discipline.

Ex. 2 -

The International Association for Management Education, 1999-2000 Salary Survey Results.

Ex. 3 -

Chart presenting salary comparisons and proposal of Dr. Daesung Ha.

Ex. 4 -

Business Faculty Analysis, Marshall University, Fall 1999.

Ex. 5 -

Table I, Course Schedule Analysis, Daesung Ha and Earl Damewood.

Level II Grievant's Exhibits

Ex. 1 -

Application and appointment Information of Daesung Ha.

Ex. 2(1) -

Implementation of JIT purchasing: an integrated approach, Production Planning & Control, 1997, Vol. 8, No. 2, 152-157. Daesung Ha and Seoun- Lae Kim.

Ex. 2(2) -

Optimal Contract Quantity Versus Optimal Shipping Quantity, Note on an earlier article, Comments on Baker, R., R. Chang, and I. Chang, “Switching Rules for JIT Purchasing,” Vol. 35, no. 3 (1994); 13-17. Daesung Ha and Seung-Lae Kim.

Ex. 2(3) -

An Integrated JIT Inventory Model for a Buyer and a Supplier, Seung Lae Kim and Daesung Ha.

Ex. 3(1) -

October 15, 1998 letter from Mario T. Tabucanon to Dr. Daesung Ha.

Ex. 3 (2) -

A Study of Quantity Discount Pricing Models With Different Ordering Structures: Order Coordination, Order Consolidation, and Multi-Tier Ordering Hierarchy. Haresh Gurnani.

Level II Marshall Exhibits

Ex. 1 -

Chronicle of Higher Education 12/89, advertisement for Chairperson and Faculty Positions, Marshall University.

Ex. 2 -

February 5, 1990 letter from Dae Sung Ha to Dean, Marshall University.

Ex. 3 -

Curriculum Vitae, Dae Sung Ha.

Level IV Grievant's Exhibits

Ex. 1 -

Supervisor's Evaluation of Faculty Member Daesung Ha, November 2, 1998.

Ex. 2 -

Endorsements of Daesung Ha from Dean Calvin Kent, December 3, 1998.

Ex. 3 -

October 8, 1997 memorandum from Dean Calvin Kent to Faculty re: Five Year Plan.

Level IV Marshall Exhibits

Ex. 1 -

April 26, 1990 letter from Dr. Robert P. Alexander, Dean, College of Business, to Dae Sung Ha.

Ex. 2 -

Report on Determination of Salaries of Lewis College of Business.

Ex. 3 -

Report on Annual Evaluation of Faculty Lewis College of Business.

Testimony

Grievant testified in his own behalf, and presented the testimony of Dr. Calvin Kent.

FINDINGS OF FACT

The parties presented stipulations of fact which are adopted and incorporated in their entirety by the undersigned as findings of fact:

1. In 1990, the Grievant, Dr. Dae Sung Ha, was hired by the Marshall University College of Business as an Assistant Professor in the Department of Management.

2. The College of Business was subsequently renamed the Lewis College of Business (LCOB) and the Department of Management was subsequently renamed the Division of Management/Marketing.

3. Dr. Ha is qualified to teach in both the Quantitative Methods (QM) and Operations Management (POM) disciplines of the Management/Marketing Division.

4. Dr. Ha has published articles and has been recognized for his work in the POM field.

5. Faculty salaries in the LCOB are determined by adding together

a.

the faculty member's base salary for the previous year

b. any across-the-board increases and promotion increments

c. any merit salary stipend (merit-market raise). LCOB Handbook.

6. The merit salary stipend (merit-market raise) is determined by

a.

comparing the faculty member's salary to the AACSB's determination of the average salary earned by similarly ranked faculty in the same discipline at peer institutions in the previous year.

b.

multiplying the comparison AACSB average salary by the percentage of salary increase in the comparison salary over the past year to arrive at a target salary.

c.

subtracting the faculty member's actual salary from the inflated comparison salary; and

d.

adjusting the difference to account for longevity. L-II Tr., pp. 7-13

7. The purpose of the merit salary stipend (merit-market raise) is

a. to reward meritorious service, and

b.

to bring faculty salaries up to market level. Brozik v. BOT/MU, Docket No. 99-BOT-357 (Jan. 28, 2000).

8. To be qualified for a merit salary stipend (merit-market raise), a faculty member must

a.

be academically or professionally qualified as specified by AACSB

b. have made intellectual contributions as specified by AACSB c.

be rated as average or above average instructor by both students and the Division Head. LCOB Handbook

9. The method of calculating merit salary stipends (merit-market raises) has been approved by the LCOB faculty and by Marshall University. Brozik v. BOT/MU, Docket No. 99-BOT-357 (Jan. 28, 2000).

10. Each faculty member's discipline is currently based on primary teaching responsibility, *i.e.*, the area in which he/she teaches the most number of sections (or hours).

11. Since his hire in 1990, Dr. Ha has taught 25 sections (75 hours) of Operations Management classes and 48 sections (144 hours) of Quantitative classes.

12. Dr. Ha's salary was determined by comparison with the average salaries of other Associate Professors of Quantitative Management at the peer institutions surveyed by the AACSB.

13. LCOB faculty members are expected, as part of their regular duties, to engage in research and scholarly activities. A faculty member must engage in these activities to obtain promotion and tenure.

DISCUSSION

As this is not a disciplinary grievance, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; 156 C.S.R. 1-4.21 (2000); Thacker v. W. Va. Graduate College, Docket No. 96-BOD-068 (Aug. 27,1997); Kloc v. W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997). Grievant does not dispute the system used by Marshall to calculate the final salary for the faculty in the LCOB. Grievant, does, however, dispute how the Dean selected the discipline Grievant would be placed in for purposes of calculating his final salary. Grievant avers the method currently used, based on the area in which a faculty member teaches the most number of sections, is arbitrary and capricious. Marshall denies the methodology is arbitrary and capricious, and alleges it is supported by peer institutions utilizing the same methodology.

Decisions of the college administration are entitled to deference unless the grievant proves by a preponderance of the evidence that they were clearly wrong, not supported by a rational basis, or were made in an arbitrary and capricious manner. See Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995). 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 her judgment for that of the college. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Brozik v. Marshall Univ., Docket No. 98-BOT-142 (Nov. 30, 1998).

An action is determined to be 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, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Bedford CountyMemorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Harrison v. Ginsberg, supra; Koepke v. W. Va. Univ., Docket No. 99-BOT-060 (Sept.

20, 1999).

Grievant does not dispute that he has taught more sections of QM than POM. However, he stressed that overall numbers are largely biased by one low-level undergraduate course, Management Statistics 218. Because this is an entry-level course of the graduate program, it has been one of the core requirement courses to most upper level business courses. Consequently, all business students register for this course every semester, resulting in four sections of this one course. Each section is counted as a separate QM course for the purpose of determining Dr. Ha's proper discipline for salary purposes.

As a result of counting each section of Management 218 as one course, Grievant ends up teaching that course approximately same amount of time he spends teaching his Management 420 POM course, an upper-level graduate course. Management 420 has two sections each semester and Grievant spends one class hour for each section. Thus, the number of hours that Grievant spends with students for Management 420 and Management 218 are essentially the same.

Since Management 420 is an upper level class, Grievant testified he must spend considerably more time in planning and preparation for this class than he does for Management 218. Grievant believes it is arbitrary and capricious for the Dean to focus only on the number of courses taught in determining a faculty member's discipline, and that other important factors should be taken into consideration. In addition to the time spent planning and preparing for his classes, Grievant believes the amount of time he spendsresearching and publishing in the POM field should be considered. Grievant also notes that he has little control over what, and how many, classes he will teach, as there are only two faculty members who teach all of the QM and POM courses at Marshall's main campus. These classes are presently divided equally between the two faculty members. In addition, Grievant alleges LCOB is paying both him and the other faculty members at the lower QM rate, and thus avoiding paying any faculty member the higher POM rate.

Marshall asserts that the criteria relied on by LCOB to determine Grievant's discipline for salary purposes, *i.e.*, the number of sections taught, is the criteria approved by its accreditation organization and used by other AACSB-accredited business schools. Research, scholarship and prep time were not criteria LCOB was required to consider in determining Grievant's discipline for salary purposes, although these factors were clearly taken into consideration in determining whether to award merit/market raises, promotions, and tenure. While minds could have a differing view of the

methodology used to determine faculty disciplines for purposes of establishing salaries, the use of number of sections taught, rather than research, scholarship and prep time, is not so implausible as to rise to the level of an arbitrary and capricious action.

CONCLUSIONS OF LAW

1. Decisions of the college administration are entitled to deference unless the grievant proves by a preponderance of the evidence that they were clearly wrong, not supported by a rational basis, or were made in an arbitrary and capricious manner. See Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (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 administrative law judge may not substitute her judgment for that of the college. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Brozik v. Marshall Univ., Docket No. 98-BOT-142 (Nov. 30, 1998).

3. An action is determined to be 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, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bowman Transp. V. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Harrison v. Ginsberg, supra; Koepke v. W. Va. Univ., Docket No. 99-BOT-060 (Sept. 20, 1999).

4. The use of number of sections taught, rather than research, scholarship and prep time, to determine discipline for salary purposes is not so implausible that it cannot be ascribed to a difference of opinion.

5. Grievant has failed to prove by a preponderance of the evidence that LCOB acted arbitrarily and capriciously in using number of sections taught to determine Grievant's discipline for salary purposes.

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 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: February 1, 2001