DR. THOMAS HODGKINS,

Grievant,

v. **DOCKET NO. 02-HEPC-406**

HIGHER EDUCATION POLICY COMMISSION/WEST VIRGINIA UNIVERSITY INSTITUTE OF TECHNOLOGY,

Respondent.

DECISION

Dr. Thomas Hodgkins, Ph. D., filed this grievance on May 30, 2002, stating: “I have been denied tenure, and I believe that I have met the requirements for tenure as described in the Faculty Handbook.” Grievant stated the relief sought as: “I ask that tenure be granted.” The grievance was denied at levels one and three, level two having been bypassed. By motion filed December 12, 2002, Grievant requested leave to amend the statement of grievance and relief sought. By Order dated February 4, 2003, the undersigned Administrative Law Judge granted the motion, amending the Statement of Grievance to read, “The failure of the employer to meet its obligation under West Virginia law and University policy to provide the Grievant with yearly written evaluations and direction for improvement were contributing factors to the employer's written denial of Grievant's application for tenure.” The relief sought was amended to request an additional non-terminal year of contracted employment to allow for evaluation and improvement. A level four hearing was held in the Grievance Board's Charleston office on January 17, 2003. Grievant was represented by attorney Jane Moran, Esq., and Respondent was represented by Assistant Attorney General Jendonnae L. Houdyschell, Esq. This matter became mature for decision upon the filing of the parties' proposed findings of fact and conclusions of law on March 27, 2003.

Based on a preponderance of the credible evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as Assistant Professor of Chemistry. He was hired in 1996 as a Visiting Assistant Professor, and in 1997 moved to a tenure- track position.

2. On January 18, 2002, Grievant applied for tenure and promotion to Associate Professor. By letter dated May 15, 2002, from W. Va. University Institute of Technology (WVU Tech) president Karen R. LaRoe, Grievant was informed that his applications had been denied, and that he would be offered a terminal contract providing for termination of his employment on May 15, 2003. Level three Exhibit No. 19.

3. President LaRoe's letter stated in part:

> . . . This decision reflects an expectation that colleagues in your college, your dean, as well as the Vice President of Academic Affairs have with respect to our primary metric for faculty success _ that of teaching excellence.
>
> Throughout the recently concluded evaluation process, concern is raised with regard to your success in this most important performance area. This concern reflects critical reviews of your teaching performance that have occurred during much of your employment at WVU Tech. Because of the primacy of our teaching mission and the concerns raised over your effectiveness in carrying out your responsibilities in this area, it is not appropriate to promote you nor to award you tenure. . . .

4. When Grievant submitted his application for promotion and tenure, he also submitted his updated Comprehensive Résumé as part of his Faculty Personnel File (FPF). 5. Grievant was evaluated by Dr. Keith Honey in his Chemistry 115 class on November 22, 1996. The standard Faculty Evaluation Form completed by Dr. Honey has 15 areas to be rated from 1 (low) to 5 (high). Dr. Honey rated Grievant in 13 areas, marking three 5's, eight 4's and two marks between 3 and 4. Level IV Grievant's Exhibit No. 2.

6. Grievant had a second in-class observation on April 30, 1997, this time by Ken Bailey in a Chem 116 class. Mr. Bailey rated all 15 areas, with eleven 5's and four 4's. Level IV Grievant's Exhibit No. 1. A second page to this report completed by Mr. Bailey rates Grievant "High" in "Knowledge of Subject," "Organization," "Interaction with students," "Communication Skills," and "Use of teaching aids."

7. A third in-class Faculty Evaluation Form was completed by Scott M. Hurst, then-Chair of the Chemistry Department, on November 17, 2000. Dr. Hurst's ratings included two 4's, six 3's, and

seven 2's, for a mean rating of 2.7. The evaluation included an addendum explaining the average and below-average ratings. On Page 2 of the addendum to the evaluation, Dr. Hurst noted Grievant "can request additional reviews from other individuals." Grievant signed this page, and included the statement, "I do not agree with this evaluation."

8. In a meeting with Dr. Hurst about his evaluation, Grievant and Dr. Hurst entered into an "Agreement for Means of Relief for Thomas G. Hodgkins" after discussing the discrepancies in their opinions of Grievant's teaching. The Agreement, signed by both, provides in part that Grievant will be evaluated by Dorothy B. Kurland during the secondterm of the 2001 academic year, and that "Thomas Hodgkins will request faculty members he chooses to conduct evaluations for himself." Level IV Grievant's Exhibit No. 7.

9. Dr. Dorothy Kurland evaluated Grievant's classroom performance on January 19, 2001. She gave Grievant an average rating of 3.1. There is no evidence in the record that Grievant requested other faculty members to conduct evaluations.

10. Dr. Barry Illman, acting chair of the Chemistry Department, rated Grievant's Inorganic Chemistry 322 class on November 27, 2001. Grievant's average rating on this form was 3.9; however, a notable comment on the form was "Dr. Hodgkins demonstrated slightly below average lecture skills and teaching effectiveness in this lecture." Level IV Grievant's Exhibit No. 9.

11. All of the Faculty Evaluation Forms contained a section explaining the ratings and commenting on the review.

12. Applications for promotion and tenure are subject to a multi-step review process, whereby only the materials submitted by the candidate in his FPF are considered in making the required evaluation. First, the FPF is reviewed by a departmental-level committee of tenured faculty, and next by the department Chair. The FPF is then reviewed by a college-level peer committee, then the dean of the applicant's college and then the vice president for academic affairs and finally the college president. An outside review of the review process and procedure is also made by the University Promotion and Tenure Advisory Panel.

13. Grievant's FPF, which included all his evaluation forms, was first reviewed by a committee of tenured faculty. Since the Chemistry department had no tenured faculty, Professors Joseph Urbanski (mathematics), Keith Honey (physics) and Associate Professor Carl Wellstead (biology) served as the committee. The committee did notactually meet as a committee, but all three

independently reviewed Grievant's FPF and submitted their own recommendations.

14. Professors Urbanski and Wellstead recommended tenure and promotion. Professor Honey recommended tenure but not promotion. Dr. Honey noted, “I have strong reservations with regard to his effectiveness as a teacher at this time.” Dr. Wellstead stated Grievant had “performed well and in directions designed to advance undergraduate education at Tech.”

15. Chemistry Department Interim Chair Dr. Illman recommended tenure, "with reservations," but not promotion. However, he also stated, “In reviewing documents in [Grievant's] FPF and in consideration of the Chair's own working relationship with [Grievant] there emerges a record which offers no compelling reason for either granting or not granting tenure.”

16. The College-level peer committee, or “Cluster E” committee, unanimously recommended tenure but not promotion.

17. Dean Brown of the College of Business, Humanities and Sciences, recommended against both tenure and promotion. Dr. Brown commented, “To be promoted in rank and recommended for tenure requires that one demonstrate significant contributions in a number of areas, such as in teaching, research/professional development, and service. Since his employment in 1996, there is little evidence that Dr. Hodgkins has met these goals, especially in teaching and research/professional development.”

18. Dr. John Russell, Executive Vice President of Academic Affairs reviewed Grievant's FPF next, and recommended to President LaRoe that Grievant be neither tenured nor promoted. 19. Based on all the recommendations and Grievant's FPF, President LaRoe, who has the final decision, denied both tenure and promotion as set forth in her letter described in Findings of Fact No. 2 and 3, above.

20. The University Promotion and Tenure Advisory Panel concluded, “Based on the materials available for our review, it is our conclusion that all published procedures and criteria were followed in making the recommendations regarding the requested promotion to the rank of Associate Professor and the award of tenure.” Grievant's Exhibit No. 21.

21. The "excellence in teaching" standard used by Dr. LaRoe is a subjective standard evaluated by faculty peers using their professional judgment.

22. In order to assess Grievant's teaching and other professional performance, his peers reviewed only the documents contained in his self-prepared Comprehensive Résumé and FPF.

These materials are all they are allowed to examine.

23. Grievant provided student evaluation data for 37 classes over eight of his 11 semesters at WVU Tech (no data were provided by Grievant for the Spring semesters in 1999, 2000 or 2001). Each question on the student evaluation is to be rated on a scale of 1 to 5. In every semester, according to his own summarized results, Grievant's weighted average rating was below the institutional average. Grievant's averages in Fall 1996, 2000 and 2001 are his highest ratings, but he did not show consistent improvement from his first semester to his last, although his ratings for a particular course did tend to improve when he taught that course again.

24. Three student evaluation questions particularly address excellence in teaching: No. 9, “The course material was presented clearly;” No. 10, “The instructor was consistently well prepared for class presentation;” and No. 15, “Overall, I would consider this instructor to be an effective teacher.” Except for one semester in which Grievantexceeded the institutional average for Question No. 15, his scores on these three questions were markedly below the institutional averages. In only four semesters did Grievant rate 4.0 or above on any of these three questions.

25. In the Fall, 1999 semester, Grievant taught five classes with a total of 125 students, the most of any semester for which data are provided. This was the semester in which Grievant received his lowest ratings overall and on the three questions identified in Finding of Fact No. 24, above.

26. It is understood that student evaluations are less reliable than peer evaluations, but comparison to institutional averages, in which each faculty is rated with the same handicap, minimizes the effect of spurious ratings.

27. Grievant's FPF also contained evidence of his academic credentials, institutional involvement, grant applications, research accomplishments, publications, community involvement, seminars attended, student achievement on standardized tests, and his written responses to the in-class faculty evaluations forms. Each person who reviewed Grievant's FPF for his tenure and promotion application had access to these documents.

28. The most recent Comprehensive Résumé in Grievant's FPF is dated December 31, 2001. It lists “Evaluations of lectures by faculty” on: November 22, 1996; April 30, 1997; April 13, 1998; April 15, 1998; November 16, 2000; November 17, 2000; January 19, 2001; and two on November 27, 2001.

29. West Virginia Higher Education Policy Commission (HEPC) policy states in part:

7.1.1 There shall be demonstrated evidence that promotion is based upon a wide range of criteria, established by the institution in conformance with this document and appropriate to the mission of the institution. Examplesappropriate to some institutions might be: excellence in teaching; publications and research; professional and scholarly activities and recognition; accessibility to students; adherence to professional standards of conduct; effective service to the institution, college or department; significant service to community; experience in higher education and at the institution; possession of the earned doctorate, special competence, or the highest earned degree appropriate to the teaching field; continued professional growth; and service to the people of the State of West Virginia. *Ultimate authority regarding the application of guidelines and criteria relating to promotion shall rest with the institution.* [Emphasis added.]

7.1.2 There shall be demonstrated evidence that, in the process of making evaluations for promotions, there is participation of persons from several different groups, such as: peers from within and without the particular unit of the institution, supervisory administrative personnel such as the department/division chairperson and the dean, and students.

9.1 Tenure is designed to ensure academic freedom and to provide professional stability for the experienced faculty member. It is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community. 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 duties or responsibilities. Tenure applies to those faculty members who qualify for it and is a means of making the profession attractive to persons of ability. There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; publications and research; professional and scholarly activities and recognition; accessibility to students; adherence to professional standards of conduct; effective service to the institution, college or department; significant service to community; experience in higher education and at the institution; possession of the earned doctorate, special competence, or the highest earned degree appropriate to the teaching field; continued professional growth; and service to the people of the State of West Virginia. *Ultimate authority regarding the application of guidelines and criteria relating to promotion shall rest with the institution.* [Emphasis added.]

11.1 All faculty shall receive a yearly written evaluation of performance directly related to duties and responsibilities as defined by the institution.

11.2 Evaluation procedures shall be developed at the institutional level, and a copy sent to the Policy Commission and filed in the Central Office. Such procedures must be multidemensional and include criteria such as peer evaluations, student evaluations, and evaluations by immediate supervisors 30. The evaluation policy developed at the institutional level and applicable to Grievant is contained in West Virginia University Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure (1997), which states in part:

> The primary evidence to be weighed must be contained in the faculty member's personnel file. To it are added professional judgments as to the quality of the faculty member's teaching, research, and service, as applicable. An official faculty personnel file shall be established and maintained for each faculty member in the office of the chairperson or, when appropriate, in the office of the dean. In principle, the record in the personnel file should be sufficient to document and to support all personnel decisions.
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> . . .
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> In order to be recommended for tenure a faculty member normally will be expected to demonstrate significant contributions in teaching in the classroom or other settings and in research. . . . In the teaching context, “significant contributions” are normally those which meet or exceed those of peers recently (normally, within the immediately previous two-year period) achieving similar promotion and/or tenure who are respected for their contributions in teaching at West Virginia University.

31. The annual formal evaluation process begins with the faculty member preparing or updating his Comprehensive Résumé and submitting it by the first week of the second semester each year to his department chair. Until the 2000 school year, Grievant had never done this.

32. In Part V of his January 26, 2000, Comprehensive Résumé, which is a response to Dr. Hurst's comments, Grievant refutes almost all of those comments, and states, “I believe that a great deal of [Dr. Hurst's] criticism of my performance is either not justified or is unduly harsh.” While he claims he “shall work hard to address [Dr. Hurst's] concerns during the coming year,” he also “simply hope[s] that he gives me a fair evaluation next time.” 33. Grievant's response to Part II of his December 31, 2001, Comprehensive Résumé [Grievant's Exhibit No. 6] also demonstrates a tendency to blame other for his performance rather than an aim to improve. His new chair, Dr. Illman, found in Part II that “there are serious questions concerning [Grievant's] teaching effectiveness,” and that Grievant must find an area in which he can develop above-average competence. Grievant responds by blaming his past record on his nervousness during evaluations and friction between himself and prior chair Dr. Hurst. He also states, “I realize there is room for improvement in this area [teaching effectiveness], and I shall work hard during the coming year to improve my lecture skills.”

DISCUSSION

The Grievance Board's review of tenure and promotion decisions is narrow, and is "generally

limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, *supra*; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994).

Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. [Citations omitted.]" Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” Eads, *supra.* “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education.” Trimboli, *supra*, Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant believes he did deserve tenure based on his performance, and that Respondent had a responsibility, if it was dissatisfied with his teaching, to provide annual written evaluations so he would know what to improve and how. Respondent asserts it followed all policies and procedures for reviewing an application for tenure, and that its review revealed Grievant did not demonstrate an excellence in teaching, that he had ongoing feedback on his teaching and that he knew about his deficiencies. Respondent denied Grievant tenure and promotion because its review of his FPF showed he lacked the necessary excellence in teaching required for tenure.

Given that, as the applicable policy states, “Continuous self-evaluation, as well as regular evaluation by peer and administrative personnel, is essential to the viability of the tenure system,” Grievant's argument does have merit. However, as discussed below, Grievant's actions and inactions defeat his own argument, leaving the decision to one of whether Respondent's decision was arbitrary and capricious.

Grievant attempts to place the full responsibility for his lack of yearly, formal, written evaluations

on Respondent, but in all his years at the institution, he never took the step required to initiate the process until his last year. He did not regularly submit Part I of his Comprehensive Résumé to his department chair, who uses it and classroom observationsas part of the annual evaluation. Grievant never explained his inaction in this regard. Grievant also had the opportunity to invite other faculty members to his class to observe and evaluate his teaching, but never did so of his own accord.

A body is required to abide by its own lawfully established policies, however, its actions will not always be reversed where it has failed to follow its policies. “The grievant must prove that the error was harmful, in that 'a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10.” Karle v. Brd. of Trustees/Marshall University, Docket No. 98-BOT-258 (Apr. 19, 1999); Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). *See* Walker v. Dep't of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998). Grievant presented no convincing evidence that, had Respondent provided yearly written evaluations as required by its policies, he would have meet the standard required for tenure and promotion.

Grievant also appears to assert that it is only this yearly, written evaluation which has any utility in providing him feedback and reliable critique. The record and Grievant's FPF is replete with contradictions to this theory, showing that he did receive student evaluations in each year, and that on several occasions other faculty did visit his classrooms and make a written report. Invariably, they reported Grievant appeared nervous at being evaluated, which could have affected his performance, but they did provide Grievant with suggestions and constructive criticism, much of which is consistent with student comments. Also, as Dr. Hurst pointed out in Part II of Grievant's 2000 Comprehensive Résumé [Grievant's Exhibit No. 5], “The evaluator's presence could affectthe typical demeanor of Dr. Hodgkins' presentation. However, it should not affect the content and competency of Dr. Hodgkins' presentation.”

Grievant's responses to these written evaluations point out the likely futility of allowing another year with further evaluation and opportunities for improvement. In Part V of his January 26, 2000, Comprehensive Résumé, which is a response to Dr. Hurst's comments, Grievant refutes almost all of those comments, and states, “I believe that a great deal of [Dr. Hurst's] criticism of my performance is either not justified or is unduly harsh.” While he claims he “shall work hard to address [Dr. Hurst's]

concerns during the coming year," he also "simply hope[s] that he gives me a fair evaluation next time."

Grievant's response to Part II of his December 31, 2001, Comprehensive Résumé [Grievant's Exhibit No. 6] also demonstrates a tendency to blame others for his performance rather than an aim to improve. His new chair, Dr. Illman, found in Part II that "there are serious questions concerning [Grievant's] teaching effectiveness," and that Grievant must find an area in which he can develop above-average competence. Grievant responds by blaming his past record on his nervousness during evaluations and friction between himself and prior chair Dr. Hurst. He also states, "I realize there is room for improvement in this area [teaching effectiveness], and I shall work hard during the coming year to improve my lecture skills." Although he made the same vague claim the prior year, he did not demonstrate or document any such effort.

Turning to Respondent's decision to deny tenure and promotion, which is evaluated under the standard articulated above, Grievant has failed to prove the decision was arbitrary and capricious. "Generally, when applying an "arbitrary and capricious" standard of review, the inquiry is limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment." Rider v. Brd.of Trustees/Marshal University, Docket No. 99-BOT-348 (Apr. 7, 2000). "Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation." Rider, *supra*.

Respondent conducted a multi-level and multi-departmental review of Grievant's credentials, and the material it reviewed was Grievant's FPF, to which he may add anything he believes would support a decision in his favor. Although some reviewers did recommend granting tenure, none found Grievant to measure up to the "excellence in teaching" standard required by Respondent for an award of tenure. His department chair, Dr. Illman, stated that he "recommends (with reservations) that Dr. Hodgkins be granted tenure." However, he also states, "In reviewing documents in [Grievant's] FPF and in consideration of the Chair's own working relationship with [Grievant] there emerges a record which offers no compelling reason for either granting or not granting tenure." Grievant's Exhibit No. 10. Dr. Honey, who served as a peer reviewer, recommended tenure but not

promotion, despite the similarity in requirements for each. In making this recommendation, he stated, “I have strong reservations with regard to his effectiveness as a teacher at this time.” Dr. Carl Wellstead, recommended tenure and promotion, stating he had “performed well and in directions designed to advance undergraduate education at Tech.” The Cluster E committee unanimously recommended tenure, but not promotion, noting in its promotion review that Grievant's student and peer evaluations indicated a need for improvement, but in his tenure review that the had improved over time. Grievant's Dean, Dr. Stephen Brown, recommended against both tenure and promotion. (See footnote 1) In doing so, he stated he had reviewed all the lower-level recommendations, and that “To be promoted in rank and recommended for tenure requires that one demonstrate significant contributions in a number of areas, such as in teaching, research/professional development, and service. Since his employment in 1996, there is little evidence that Dr. Hodgkins has met these goals, especially in teaching and research/professional development.”

Dr. John Russell, who conducts the next level of review as the Executive Vice President for Academic Affairs, recommended neither tenure nor promotion. Again, Grievant's lack of teaching effectiveness is cited as a primary reason for the recommendation. Finally, Dr. LaRoe denied tenure and promotion based primarily on a lack of teaching excellence.

Grievant attacks the findings that he lacked excellence in teaching by demonstrating that he was a moderately effective teacher, but a demonstration of mere adequacy is not excellence. While Grievant contends his student evaluation scores were improving, (See footnote 2) the evidence shows they were not consistently improving, and at no point were they in all areas above even the institutional average, let alone in the range one might consider indicative of excellence. Reviews of Grievant's teaching and academic performance by his peerswere less than glowing, and pointed out consistent and significant shortfalls. Although Grievant did demonstrate laudable achievements in the areas of institutional and community service, he fell far short in areas of recognition and research.

Grievant argued that the “excellence” standard itself was too subjective, as it appeared obvious that not all tenured professors could be excellent or even above average. While the standard is subjective, it is supposed to be. Further, any shortcomings with a subjective standard are minimized by the multi-step review process. Grievant was judged on his own merits, and even though the measure is subjective, he was evaluated by competent professionals who were able to make the required subjective judgment.

Grievant did not prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious. The following conclusions of law support these findings.

CONCLUSIONS OF LAW

1. The Grievance Board's review of tenure and promotion decisions is narrow, and is "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

2. "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, *supra*; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93-BOT-391 (Aug. 26, 1994). "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shownto be arbitrary and capricious or clearly wrong." Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984); *See also* Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994).

3. Thus, a grievant attempting to prove wrongful denial of promotion and tenure must demonstrate by a preponderance of the evidence that the denial was arbitrary and capricious, clearly wrong, or a violation of college policy. *See* Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-104 (Dec. 29, 1995); McMullin v Higher Educ. Policy Comm'n/W. Va. Univ., Docket No. 01-HE-081 (July 31, 2001).

4. Generally, an action is considered arbitrary and capricious if the agency 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 was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

5. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in

disregard of facts and circumstances of the case." Eads, *supra,* citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982).

6. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *Seegenerally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*, Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

7. "Generally, when applying an "arbitrary and capricious" standard of review, the inquiry is limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20- 537 (Mar. 22, 1995)." Rider v. Brd. of Trustees/Marshal University, Docket No. 99-BOT-348 (Apr. 7, 2000).

8. "[I]n applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. Gruen v. Bd. of Directors, Docket No. 95- BOD-281 (Mar. 6, 1997); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); Cohen v. W. Va. Univ., Docket No. BOR1-86-247-2 (July 7, 1987). See [Siu], supra; Kauffman v. Shepherd College, Docket No. BOR1-86-216-2 (Nov. 5, 1986)." Rider, *supra*.

9. Grievant did not prove by a preponderance of the evidence that Respondent's decision to deny him tenure and promotion was arbitrarily and capriciously made.

10. A body is required to abide by its own lawfully established policies, however, its actions will not always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that 'a different result would likely haveoccurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Karle v. Brd. of Trustees/Marshall University, Docket

No. 98-BOT- 258 (Apr. 19, 1999); Kloc v. Bd. of Trustees, Docket No. 96-BOT-507 (Aug. 20, 1997). *See* Walker v. Dep't of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998).

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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 18, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant objected to Dr. Brown's testimony on consideration of promotion, but the evidence was allowed. In the end, it was given little weight since the standards for tenure and promotion were generally the same, Grievant is not seeking promotion, and the outcome would be the same without considering that issue.

Footnote: 2

Grievant attempted to admit as evidence at level four graphs and charts showing new comparisons of his student evaluation scores, but they were objected to by Respondent and they were not admitted, as they appeared to be derivative of other information contained in the record and were therefore cumulative, and as they were not available in Grievant's FPF at the time of the reviews, they had little relevance to the decision made.