PATRICK BROWN, et al.,

Grievants,

v.,

DOCKET NO. 02-HEPC-427

WEST VIRGINIA HIGHER EDUCATION

POLICY COMMISSION/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievants are faculty of the Basic Medical Sciences Division of the Joan C. Edwards School of Medicine, Marshall University ("Marshall"). (See footnote 1) They filed this grievance against Marshall on January 12, 2002:

> Grievants assert that, contrary to the policies of the Marshall University Greenbook, adopted pursuant to the directives of the West Virginia Legislature, the faculty of the Basic Medial Sciences Division of the Joan C. Edwards School of Medicine has not been afforded salary equity with their peer institutions, nor with other Marshall University Colleges, with the Clinical Sciences Division of the Joan C. Edwards School of Medicine; or between members of the faculty of the Basic Medical Sciences Division. This inequity is continuing and, if measures are not taken to bring the salaries of the Basic Medical Science Division in equivalence with their peers, these imbalances will grow more inequitable in the future.

Relief sought:

> 1. The salaries of the Basic Medical Sciences Division be brought into equity with the salaries of the other Colleges of Marshall University, and with the salaries of the external peer group designated by the West Virginia State Legislature no later than the conclusion of the 2001-2002 school year.
>
> 2. The plan for equalization of the salaries of the Basic Medical Sciences faculty include provisions to address the salary inequities which have developed within the

Division as a result of the need to hire new members at a salary commensurate with the economy. The long-range impact of salary advances and promotion on their initial salaries has created increasing inequity between the salaries of the younger faculty and those who have been in service longer.

3. Payment of back wages and benefits to the Basic Medical Sciences faculty, with interest, for the period their salaries have not been brought into equity with the remainder of the University faculty.

4. A long-range University plan which will insure equitable distribution to the Basic Medical Sciences Division of funds made available for salary increase and adjustments.

The grievance was denied at level one on February 15, 2002, by Dr. Charles H. McKown, and at level two on April 8, 2002, by Sarah N. Denman. A level three hearing was held on November 18, 2002, and the grievance was again denied on December 18, 2002, by F. Layton Cottrill, Jr. Grievants appealed to level four on December 31, 2002, and a level four hearing was held on May 12, 2003. This grievance became mature for decision on June 12, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievants were represented by Jane Moran, Esq., and Marshall was represented by Jendonnae Houdyschell, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Grievants' Exhibits

Ex. 1 -

June 6, 1996 memorandum from Charles H. McKown, Jr. to addressees subject: FY 1996-97 Basic Science General Salary Increases (“the Simmons Plan”).

Level Three Marshall Exhibits

Ex. 1 -

June 21, 1993 memorandum from Dr. Charles H. McKown, Jr. to Dr. J. Wade Gilley with attachment.

Ex. 2 -

Senate Bill No. 547.

Ex. 3 -

Senate Bill No. 653.

Ex. 4 -

Executive Policy Bulletin No. 5.

Level Four Grievants' Exhibits

Ex. 1 -

Marshall University School of Medicine ("MUSOM") Total Salary: % Southern Regional Mean, Basic Science v. Clinical Science, Full-Time Faculty 1996-2000.

Ex. 2 -

MUSOM Total State Salary Allocation, Basic Science v. Clinical Science, 1995- 2000.

Ex. 3 -

MUSOM Utilization of Yearly Increase in State Salary Allocation, Basic Science v. Clinical Science, 1995-2000.

Ex. 4 -

MUSOM Number of Faculty Receiving State Salary Money, Basic Science v. Clinical Science, 1995-2000.

Ex. 5 -

MUSOM Amount Required to Fully Fund Basic Science Based on Simmons Plan, 1996-2000.

Ex. 6 -

Comparison of Available State Funds to the Amount Needed to Fully Fund Simmons Plan, MUSOM Basic Science, 1996-2000.

Ex. 7 -

Comparison of Governor's Budget Recommendation to FY 2003 Base Budget and HEPC FY 2004 Request.

Ex. 8 -

Americans for Insurance Reform, *Medical Malpractice Insurance: Stable Losses/Unstable Rates in West Virginia, January 2003*.

Level Four Marshall Exhibits

Ex. 1 -

MUSOM Personnel Services Salary Distribution by Source (All Funds), 1996-2000.

Ex. 2 -

Report on Medical School Faculty Salaries, 1996-2000.

Ex. 3 -

Faculty Personnel Committee Recommendation, April 1996.

Ex. 4 -

1997-2003 State-Funded Base Salaries, MUSOM Comparison of Basic Science Faculty.

Testimony

Grievants presented the testimony of Gary Wright, Dr. Stephen Fish, Richard Niles, Christy Wright, and Dallas Brozik. Marshall presented the testimony of James Schneider, Michael McGuffy.

Based upon a review of the testimony and evidence in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievants are tenured members of the Basic Sciences Division faculty of the Joan C. Edwards School of Medicine, Marshall University (“Medical School” or “Marshall”). The Medical School includes a Clinical Science Division with a for-fee Practice Plan which is staffed with physicians who are Medical School faculty. Faculty of both Departments are paid with a combination of State appropriated funds and funds generated from other sources.

2. Operating expenses for the Medical School are provided for through the Practice Plan, State appropriations, grants and contracts with the Federal and State governments, student fees, and various small funding sources. The funds allocated to the Medical School are administered and distributed by Medical School administration.

3. During the period between school years 1995-96 and 2000-01, the Medical School peer group recognized by the administration for purposes of comparison of salaries, were medical schools of the Southern region as designated by the Association of American Medical Schools. Peer group comparison is a valid indication of market place salaries.

4. Recognizing a need throughout the institution to bring equity to faculty salaries, Marshall formed an ad hoc committee in 1995 to study the issue and make recommendations for a University salary plan. The plan was created and approved by then-President Gilley, and was used as the basis for Executive Policy Bulletin No. 5 of the Marshall University Green Book.

5. Executive Policy Bulletin No. 5 expresses Marshall's policy and commitment to equity in salaries. It sets forth a formula for allocating and prioritizing the state funds made available to each Department of the University for operating expenses, in a mannerdesigned to insure the funds are utilized to address existing inequities in salaries as a matter of high priority. The Policy Bulletin includes a statement of commitment to salary policies which are fair, easily understood, reflect market conditions, and provide for merit recognition.

6. Executive Policy Bulletin No. 5 provided an “opt out” provision for those Departments that chose to develop a spending formula that would more directly impact on their unique needs. Several schools, including the Basic Sciences Division of the Medical School, opted out, creating their own formula for achieving salary equity. The alternative plans created by those Departments that opted out, if agreed upon by the faculty and administration of the Department, were binding on the University.

7. In 1995, the average salary paid to Basic Science faculty members was 83% of the average salary being paid to their peers in the Southern region.

8. In 1995, the average salary paid to Clinical Science faculty members was 92% of the average being paid to their peers in the Southern region.

9. In 1995, the West Virginia Legislature, recognizing that West Virginia higher education facilities were under-funded, enacted legislation (W. Va. Code §§ 18B-1-1, et seq.), popularly known

as Senate Bill 547 ("SB547"). SB547 set forth, among other things, goals that higher education should try to fulfill. One of the goals of SB547 was to achieve higher salaries in higher education.

10. SB547 did not require health sciences or basic sciences faculty to be funded at any particular level. W. Va. Code § 18B-1-1c(a)(1)(1995)(repealed 2000). See also LIII Marshall Ex. 2, p. 16. Moreover, SB547 specifically excluded health sciences from increasing its salaries to a level of at least equal to ninety-five (95%) percent of the averagefaculty salaries at peer institutions. W. Va. Code § 18B-1-1c(a)(1)(1995)(repealed 2000). See also LIII Marshall Ex. 2, p. 16.

11. Further, it was the Legislature's expressed intent under SB547 to fund state institutions of higher education as follows:

> [S]ubject to the availability of funds and appropriation therefore, to increase state appropriated funds for state institutions of higher educations in each of the five fiscal years, [1997] through and including, fiscal year [2001], at a rate of at least three and twenty-five one hundredths per year to assist the institutions in achieving their strategic plan of change. . . .

W. Va. Code § 18B-1-1c(g)(repealed 2000). See also LIII Marshall Ex. 2, p. 21.

12. Nothing in SB547 required that the additional funding was to be used exclusively for salaries.

13. The Basic Science faculty received raises for each of the five (5) years covered by SB547, even though they were not required to be provided any amount of raise.

14. During this period of time, the Clinical Science faculty did not receive raises two out of the five years.

15. In 1996, a committee was formed within the Medical School to develop a salary plan for the Basic Science Division. The formation of the committee was consistent with the "opt out" provision of Executive Policy Bulletin No. 5, and the exception of health sciences from SB547. The committee developed a method for allocating raises, which came to be known as the "Simmons Plan". The Simmons Plan was unanimously adopted by the Basic Science faculty, and passed on to the administration for approval.

16. The Simmons Plan provided that the Basic Science faculty would agree to accept salaries below the regional mean for a five year phase-in period to bring theirsalaries to a level more consistent with their regional peers, and provided a formula for this goal.

17. By letter dated June 6, 1996, Charles McKown, Dean of the Medical School, approved the use of the formula proposed by the Simmons Plan for the upcoming school year only. LIII G. Ex. 1.

18. Despite the one-year limitation set forth in Dean McKown's letter, the administration has attempted to utilize the Simmons Plan and involve the Basic Science faculty in how additional money should be distributed among the faculty.

19. Like their peer groups, the Basic Science faculty salary is obtained from two areas. The first area is their state-funded salary. The second area is from grants or research incentives they receive.

20. In an attempt to address the faculty salary issue, the medical school has changed its research incentive plan from allowing a return of 60% of the state salary savings to a return of 100% from the research incentive plan to the individual faculty member of the Basic Science faculty.

21. Further, because the figures used to compare peer institution salaries are a total salary, including both the state-funded portion and those portions funded by other sources such as grants, it is impossible to compare what percentage level of Marshall's Basic Science faculty salary component relates to the peer institution salaries.

22. Each peer institution has different expectations as to what portion of the salary of their basic sciences faculty should come from grants; some may be as high as 30% to 50%.

23. Presently at Marshall, the portion of the Basic Science faculty salary obtained from grants is about 10%.

24. Clinical Science faculty salaries at Marshall are comprised of a state salary component and a component from the practice plan, which is funded by the fees clinicians receive from their private practices.

25. The starting salary for a clinician at Marshall is $25,000 per year, with the remainder of his salary made up from private practice.

26. The starting salary for a Basic Science faculty member at Marshall is $55,000 per year, with the remainder of his salary made up from any grants he receives.

27. In 2000, the Legislature passed Senate Bill 653, as an extension of Senate Bill 547, which was codified, in pertinent part, as W. Va. Code § 18B-1-1a (2000)(LIII R. Ex. 3).

28. The Legislature again had a “goal” of increasing salaries, but no affirmative mandate. W. Va. Code § 18B-1-1a(c)(7)(2000).

29. Funding for salaries is the top priority of the School of Medicine after it has met all of its fixed costs.

30. When available, additional funds have been used to increase the amount of raises received by Basic Science faculty.

31. For example, although the state appropriation to the Medical School from the period 1997 to 2003 had increased at the rate of only 18.47%, the Basic Science faculty have received a 22.43% increase over the same period. LIV R. Ex. 4.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievants allege they were promised salary increases by the administration which they have not received; that the method of disbursement of available funds by the Medical School is arbitrary and capricious; that the administration has violated the Simmons Plan and legislative mandates in failing to increase their salaries; and that they have been discriminated against with respect to salaries compared to clinical staff and other Marshall teaching staff.

Marshall alleges this grievance is untimely, and further, denies any violations, contends Grievants have failed to prove any entitlement to any salary increases greater than those they have received, and denies any discrimination has occurred with respect to Grievants.

1.

Timeliness.

A timeliness argument is an affirmative defense. As the resolution of the timeliness issue could be determinative of the grievance as a whole, it will be addressed first. Wherethe employer seeks to

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

W. Va. Code § 29-6A-4(a) provides:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the Grievants, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the Grievants or the designated representative, or both, may file a written grievance with the immediate supervisor of the Grievants. At the request of the Grievants or the immediate supervisor, an informal conference shall beheld to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v.Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievants are grieving events which occurred beginning in 1995, with passage of SB547. Grievants' level four exhibits 1 through 6 exclusively deal with the period 1995 through 2000, yet this grievance was not filed until January 12, 2002.

However, "[t]his Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within [ten] days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No.

98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996)." (See footnote 2) Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999). Therefore, while the alleged failure of Marshall to comply with the terms of the Simmons Plan since 1996, if proven, would be a continuing violation, because Marshall has raised the timeliness issue, Grievants are limited to any recovery from ten days prior to the filing of the grievance, in accordance with Martin, supra.

However, Grievants have failed to prove by a preponderance of the evidence that Marshall violated any promises, policies, laws, or otherwise acted in an arbitrary and capricious manner, in its allocation of funds to the Medical School operations and salaries.

Grievants claim the administration agreed to the allocation of funds in conformance with the formula set forth in the Simmons Plan, and except for the first year, failed tocomply with the Plan. Grievants presented evidence that pursuant to the appropriations mandated by SB547, the Medical School received a 3.25% increase per year in operational funds from 1996 through 2000. In 1996, Grievants' average total salary from all sources stood at 83% of the Southern regional mean. That same year, the clinical faculty salaries had reached 92% of the mean. LIV G. Ex. 1. Between 1996 and 2000, the clinical faculty salaries increased to 96% of the Southern regional mean. The Basic Sciences faculty, during the same period, decreased to 76% of the mean. Grievants attribute these trends to the Medical School's pattern of distribution of operational funds.

During the years 1995-2000, there was an overall increase in salary expenditures for Basic Science faculty of $307,754.00, and an overall increase in salary expenditures for the Clinical Science faculty of $809,985.00. Grievants' evidence shows that the number of Basic Science faculty receiving State salary money remained comparatively stagnant from 1995 through 2000, while the clinical faculty expanded from 78 to 98 during the same period. Grievants claim this trend shows the administration chose expansion of the Clinical program over the goal of bringing equity to faculty salaries.

Grievants presented evidence to show the amount of money that would have been required to be taken from yearly operational funds available to the Medical School to fully fund the Simmons Plan, and to bring the Basic Science faculty within 95% of the mean salary of their peers in the Southern region. LIV G. Ex. 5. On average, Grievants claim it would have taken only 9% of the total appropriation given to the Medical School each year from 1995-2000 to bring the Basic Science

salaries in line with the Simmons Plan formula, which caps salaries at 95% of the regional mean, noting that Clinical Science salaries exceeded that cap in years 1997, 1998, and 2000. Factually, Marshall does not dispute any of the Grievants' charts and numbers regarding Basic Science and Clinical Science faculty salaries. However, Marshall denies it was obligated to achieve any set salary formula proposed by the Simmons Plan, because that Plan was only agreed to by the administration for the first year of its existence. While Marshall has attempted to follow the guidelines set forth in the Simmons Plan in following years, its failure to allocate funds in the exact manner prescribed by the Plan does not result in a violation of any policy, or a breach of any promise, because no such policy or promise exists which would mandate the expenditure of funds to salaries that Grievants are demanding.

The undersigned agrees with Marshall. The administration's agreement to follow the Simmons Plan for only one year could not be more explicit in Dr. McKown's letter, and Grievants have presented no evidence to indicate there was a promise or written agreement to continue to adhere to the formula set forth in the Plan for any extended period of time. Furthermore, as indicated above, Grievants certainly knew their salaries were not being upwardly adjusted according to the Plan as early as 1998, but did not file this grievance until 2002. Even had there been a promise made by the administration to comply with the Plan, Grievants would be barred from recovery until January 2002.

2. Arbitrary and Capricious.

Grievants claim the allocation of operational funds to salaries has been made in an arbitrary and capricious manner, resulting in the Basic Science faculty salaries decreasing in comparison with the Southern regional mean, while the Clinical Science faculty salaries have increased. 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 amanner 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the agency. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential

ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001) (citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

There is certainly no evidence that Marshall did not carefully plan, review, and implement its appropriations budget for the years in question. It merely comes down to a difference in opinion as to how the money should have been allocated. Grievants believe the money should have gone to increase their salaries, and Marshall believes it was appropriated and spent in the best way possible to ensure the continued efficient operations of the Medical School. First, it is clear the Clinical faculty is growing, which would account for the increase in salary expenditures over the years, while, as Grievants themselves pointed out, the size of the Basic Science faculty has not changed significantly. Moreover, many of the Clinical faculty members fund their own positions by creating positions out of the Clinical Practice income to underwrite the addition of new faculty. As also evidenced, both Clinical and Basic Science faculty have the ability to increase theirown state-funded income through clinical practice and research, respectively. Approximately 10% of a Clinical faculty member's income comes from state funding, and the rest is made up from clinical practice income. Conversely, approximately 90% of a Basic Science faculty member's income comes from state funding, with the rest made up of research grant funds. However, there was also evidence that some Basic Science faculty members managed to almost double their state-funded income through the acquisition of research grant funding, so the opportunity exists for Basic Science faculty to increase their salaries if they so choose.

The income generated by the Clinical Practice goes directly to the operations of the Clinic, and without that income the Medical School would not be able to operate. What Grievants want to see happen is for Marshall to take money generated by the Clinical faculty and direct it to increase the Basic Science faculty salaries rather than to the operations of the Clinic. Clearly, Marshall could do this, but it is a judgment call, and Marshall has determined the Clinic income is better spent toward the continuing operations of the Clinic, and consequently, the Medical School. The undersigned cannot simply substitute her judgment for that of Marshall in this regard, and cannot find its allocation of resources is arbitrary and capricious as it pertains to Grievants' salaries.

3.

Discrimination/Favoritism.

Grievants claim Marshall has engaged in discrimination and/or favoritism with regard to their salaries vis-a-vis the Clinical faculty salaries. W. Va. Code § 29-6A-2(d) defines "discrimination" 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." Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfairtreatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(a)

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

(b)

that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievants establish a prima facie case of discrimination and/or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Simply being a faculty member of the Medical School is not enough to find Grievants are similarly situated to the Clinical faculty. The evidence shows that the combination of state funding and external funding are completely different for the Basic Science and Clinical faculties, and a salary comparison of the two is the proverbial comparing apples to oranges. For purposes of a salary comparison, Grievants are not similarly situated to the Clinical faculty, and have therefore not established a prima facie case of discrimination or favoritism.

CONCLUSIONS OF LAW

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

2. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3. "This Grievance Board has consistently recognized that, in accordance with Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), disputes alleging pay disparity are continuing violations, which may be grieved within [ten] days of the most recent occurrence, i.e. the issuance of a paycheck. See Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996)." Fleece v. Morgan County Bd. of Educ., Docket No. 99-32-090 (Aug. 13, 1999).

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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searchinginquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the agency. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

5. The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001) (citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

6. Grievants failed to establish that Marshall's allocation of funding for the Medical School was

arbitrary and capricious.

7. W. Va. Code § 29-6A-2(d) defines “discrimination” 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.”

8. Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

9. In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, Grievants must show:

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

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that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

10. Grievants have failed to establish a prima facie case of discrimination or favoritism.

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 § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal

petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 11, 2003

Footnote: 1

Patrick Brown, Stephen Fish, William Rhoten, Laura Richardson, Sasha N. Zill, Beverly C. Delidow, Kenneth Guyer, Michael R. Moore, Richard M. Niles, Vernon E. Reichenbecher, Elizabeth Bryda, Terry W. Fenger, Susan Jackman, Donald Primerano, Hongwei Yu, Carl A. Gruetter, Gary Rankin, John Szarek, Monica Valentovic, Todd Green, Elsa I. Mangiarua, William D. McCumbee, Gary L. Wright, Mitchell L. Berk, Rudy Wang, Susan De Mesquita, and Lawrence Grover.

Footnote: 2

The grievance procedure for education employees, codified in W. Va. Code §§ 18- 29-1, et seq, provides employees fifteen days in which to file their grievances.