LEWIS RUTHERFORD,

Grievant,

v.

DOCKET NO. 05-HE-229

WEST VIRGINIA UNIVERSITY

at PARKERSBURG,

Respondent.

D E C I S I O N

Grievant, Lewis Rutherford, filed this grievance against his employer, West Virginia University at Parkersburg ("WVUP") on March 2, 2005. His Statement of Grievance reads, "I received an evaluation of 'satisfactory' on Growth and Development and 'good' on Contribution to the college." Relief sought was, "I expect justice. I should have received an 'excellent['] in both categories." At Level IV, Grievant clarified he wanted the evaluation by the Peer Review Committee expunged, and an explanation placed in his file to explain its absence.

This grievance was denied at all lower levels. Grievant filed to Level IV on June 30, 2005, and a Level IV hearing was held on September 9, 2005, at the Grievance Board's office in Charleston. This case became mature for decision on October 13, 2005, the date of the receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a tenured, full professor in Communication Studies. He has been employed by WVUP for thirty years.

2. All faculty at WVUP are expected to compile and submit an Annual Evaluation Report (See

footnote 2) for review by the Peer Review Committee, their Chairperson and the Dean of Academic Affairs. The faculty member is evaluated in three areas: Teaching/Service to Students; Professional Growth and Development; and Service to the Institution and Community. The purpose of the Annual Evaluation Report is to provide "an on-going critique of strengths and weaknesses, and documents that support recommendations and decision concerning reappointment. . . ." The Annual Evaluation Report should be related to the faculty member's assignment and performance and should be "formative and summative." Exh. 15 at Level III, "West Virginia University Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure" § IX. A.

3. "Responsibility for faculty evaluation is shared by members of the university community. Primary responsibility for the quality and presentation of an individual's work lies with the particular faculty member." Exh. 15 at Level III, "West Virginia University Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure" § II. A. See Exh. 4, "[WVUP] Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure" § II. A.

4. Evaluations are to be based on both quantitative and qualitative evidence, and the faculty member should place in his file all information that relates to the quality of his performance. This information may include teaching evaluations, professionalpresentations, published materials, awards, research, grants, and other creative scholarship. " **A self-evaluative statement by the faculty member is strongly encouraged**." (Emphasis added). Exh. 15 at Level III, "West Virginia University Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure" § VII. 7. See Exh. 4, "[WVUP] Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure" § VII. 7.

5. Grievant's ratings from the Peer Review Committee for the past four years are:

Year	Teaching/Service to Students	Professional Growth and Development	Service to the Institution and Community
2001	Good	Satisfactory	Satisfactory
2002	Excellent	Good	Good
2003	Unsatisfactory	Unsatisfactory	Excellent
2004	Excellent	Satisfactory	Good

6. The rating of the Peer Review Committee is a consensus of the members, and this assessment can vary somewhat from year to year because of the change in the make-up of the committee.

7. Grievant's past reviews by the Peer Review Committee indicated his Annual Evaluation Report was disorganized, incomplete, and confusing. His evaluation for the 2002 academic year informed Grievant that, "In order for his reviewers to give him a fair and accurate evaluation, Dr. Rutherford needs to make his self-evaluation clear, consistent and complete." His 2003 academic year evaluation by the Peer Review Committee statedthat "problems with Dr. Rutherford's file make it exceedingly difficult, if not impossible, to give him a fair and accurate evaluation." The Peer Review Committee noted there was no self-evaluation statement, materials were out of order, materials listed in the inventory sheets were not in the file, and there were materials in the file that were not on the inventory sheets. The Peer Review Committee was concerned that last year it had "admonished" Grievant to make "his self-evaluation clear, consistent and complete," but the same problems existed again this year. For the 2003 year, Grievant was rated as unsatisfactory in Teaching/Service to Students and Professional Growth and Development because of "insufficient documentation."

8. Prior to submitting his Annual Evaluation Report for the 2004 academic year, Grievant attended a session where Dr. Joseph Badgley, the Dean of Academic Affairs, discussed with faculty how to complete their Annual Evaluation Reports. Grievant was told, "You better tell [the Peer Review Committee] exactly what you do." Test. Grievant, Level III Hearing.

9. Grievant submitted his Annual Evaluation Report late, but his supervisor, Nancy Nanny, Chair of the Humanities Division, told the Peer Review Committee to review Grievant's Annual Evaluation Report anyway, and they did. The Peer Review Committee has been instructed that if the information given in the self-evaluation is not supported by documents in the file, it did not occur. The Peer Review Committee is to base its assessment only on the file, and the Peer Review Committee should not look outside the materials contained in the file. (See footnote 3) 10. Grievant's self-evaluative statement for the 2004 academic year for all three categories and only written explanation of his Annual Evaluation Report stated: (See footnote 4)

> Dr. Rutherford received the Who's Who Among America's Teachers award. Both his students and peer evaluations echo a high appreciation of his teaching. As Speech Coordinator, he continues to create new courses, make schedules, monitor budgets, order books and participate in hiring adjunct faculty.

> For his own professional growth and development, Dr. Rutherford has joined five professional organizations and has participated directly in the activities of two. He now receives six professional journals in his field.
>
> This year, Dr. Rutherford submitted several articles for publication. (See footnote 5) He participated in a WVADE Workshop and made a presentation at the WVCAA Convention. In addition, he attended four workshops at WVU-P In- services [sic].
>
> Dr. Rutherford's service to the institution and community remains steady. He is a Senate Alternate for the Humanities Division. He is a member of four college committees and gave 16 oral presentations on behalf on WVU-P. He also served as a Department Coordinator.
>
> Dr. Rutherford rates his contribution and services in all four [sic] categories as excellent.

Grt. No. 8 at Level III.

11. Grievant's Annual Evaluation Report for the 2004 academic year was better organized and documented than the 2003 year, but still did not explain the documents he placed in the file. For example, Grievant placed the front/cover sheets of approximately seven journals he received on a regular basis in his Annual Evaluation Report, but did notgive any information about why he included these sheets. He did not say these were the top journals in his field, that he read and applied this information in his classes and in his professional growth and development, or that he used this information in any way. (See footnote 6) Grievant knew the Peer Review Committee was made up of English faculty, and these faculty members would not know these journals were the top refereed ones in the area of speech communications. Test. Grievant, Level III Hearing.

12. Grievant did not summarize or explain the documents he submitted and listed in his Faculty File Evaluation Inventory Sheets. Occasionally, there were handwritten comments on these documents. Some of the documents were not explained at all, some were out of order, and some were listed on the Inventory, but were not in the section indicated. It was unclear what the purpose of some documents was.

13. After examining Grievant's Annual Evaluation Report, the Peer Review Committee rated

Grievant as excellent in Teaching/Service to Students, satisfactory in Professional Growth and Development, and good in Service to the Institution and Community.

14. Dr. Nanny evaluated Grievant next and she considered information she knew about Grievant's work that was not contained in his file. She rated him as excellent in all areas.

15. Dean Badgley evaluated Grievant next. In addition to the information provided in the Annual Evaluation Report, he considered information he knew aboutGrievant's work and the two rebuttals Grievant had written after the report from the Peer Review Committee.

16. Neither the Chair nor the Dean found any bias in the ratings of the Peer Review Committee. Test. Nanny & Badgley, Level III and IV Hearing.

17. Grievant had not had any difficulties with any of the Peer Review Committee members. Test. Grievant, Level IV Hearing.

Issues and Arguments

Grievant asserts he should have received an "excellent" in all of the three assessed areas of his annual evaluation, and the materials he submitted were sufficient to support this expectation. He maintains the evaluation by the Peer Review Committee was not fair and did not give an accurate portrayal of his actual performance. He believes the decision of the Peer Review Committee was arbitrary and capricious.

WVUP argues Grievant did not include the necessary information in his Annual Evaluation Report for the Peer Review Committee to find his performance was excellent in all areas. Additionally, Respondent avers while the assessment of the Peer Review Committee is different from the assessment of the Chair of the Humanities Division and the Dean of Academic Affairs, there is no evidence to establish the Peer Review Committee's conclusions were arbitrary and capricious or biased. The Chair of Grievant's Department and the Dean based their ratings, in part, on additional evidence that was not contained in Grievant's Annual Evaluation Report, such as personal knowledge or the rebuttals supplied by Grievant to the Dean before his review.

The issue before the undersigned Administrative Law Judge is whether the Peer Review Committee unfairly, inaccurately, or arbitrarily and capriciously rated Grievantbased on the information presented in his Annual Evaluation Report. The issue is not what Grievant's performance was for the academic year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Evaluations are not disciplinary actions, and as such, Grievant has the burden of proving his case by a preponderance of the evidence. Turner v. Kanawha County Bd. of Educ., Docket No. 00-20-300 (Feb. 26, 2001); Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995). Further, this Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse that would thwart the primary purpose of the evaluation process. Beckley v. Lincoln County Bd. of Educ., Docket No. 99-22-168 (Aug. 31, 1999); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13- 87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1(May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. See generally Siu v. Johnson, 784 F.2d 238 (4th Cir. 1984); Smith v. Univ. of N. Carolina, 632 F.2d 316 (4th Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). 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. 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).

This strategy generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." Kunda, supra, at 548. See also Bina v. Providence College, 39 F.3d 21 (1st Cir. 1994), cert. denied, 115 S. Ct.1406 (1995); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980). This same discretion should be applied to the evaluation of faculty members.

The standard for assessing an evaluation is the arbitrary and capricious standard. "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 Res., 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 (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

First, a clarification: the issue before the undersigned Administrative Law Judge is not Grievant's performance for the 2004 academic year. Through the testimony of Dr. Nanny, Dean Badgley, and Grievant, and the statements in Grievant's rebuttals, a much more complete picture of Grievant's performance for the 2004 academic year emerged, and it is much more positive than the picture presented by the disorganized and incomplete file he gave to the Peer Review Committee with limited explanation. The question before the undersigned Administrative Law Judge is whether the

assessment made by the PeerReview Committee was inaccurate, biased and/or arbitrary and capricious based on the information Grievant placed in his Annual Evaluation Report.

The undersigned Administrative Law Judge finds the assessment of the Peer Review Committee is not biased, inaccurate, and/or arbitrary and capricious. The Peer Review Committee made a sound and thorough decision on the evidence before it. While it is true reasonable minds might differ given the same information, this does not make the decision reached by the Peer Review Committee inaccurate, biased and/or arbitrary and capricious. Additionally, Grievant presented no reason why the Peer Review Committee members would be biased against him. Indeed, he stated he had a good professional relationship with all the members. Accordingly, Grievant did not demonstrate arbitrary and capricious abuse of the WVUP faculty evaluation process.

Grievant repeatedly stated he assumed the Peer Review Committee was aware of what he did and the importance and magnitude of these duties. This statement does not comport with his testimony that Dean Badgley told faculty members, "You better tell [the Peer Review Committee] exactly what you do." It is unclear why Grievant, who is apparently an excellent and knowledgeable professor in communication, did not communicate with greater accuracy and detail with the Peer Review Committee. For example, he stated he did the scheduling for the Speech Section of his Division, but the evidence he placed in his Annual Evaluation Report to support this assertion, appeared to be notices placed in newspapers stating when registration began. As another example, Grievant stated he was on the Honors Committee and submitted a document titled "Guiding Principles for a WVUP Honors Program" with other attachments, but did not explain where the document came from, or what his input into the document was, if any. As another example, Grievant submitted a letter stating he was appointed to the Residency Appeals Committee, but he did not say what his role on this committee was, or if he even attended the meetings. While these things were known to Grievant, the purpose of the Annual Evaluation Report is to explain clearly to the reviewers what he did and why it is important.

Grievant had been told he needed to do this in the past two evaluations. He made the change in the area of Teaching/Service to Students and received an Excellent rating, but he elected to not follow this advice in the areas of Professional Growth and Development and Service to the Institution and Community. Consequently, he did not obtain the evaluation he felt he deserved.

It is not the responsibility of the Peer Review Committee to seek out this information. Indeed, the

Peer Review Committee is not allowed to go beyond the four corners of the documents which are submitted to them. Accordingly, the undersigned Administrative Law Judge finds the evaluation of the Peer Review Committee was not biased, inaccurate, and/or arbitrary and capricious, but was based in the disorganized and incomplete data Grievant placed in his Annual Evaluation Report.

Conclusions of Law

1. Evaluations are not disciplinary actions, and as such, Grievant has the burden of proving his case by a preponderance of the evidence. Turner v. Kanawha County Bd. of Educ., Docket No. 00-20-300 (Feb. 26, 2001); Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995). See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient thata contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. This Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse that would thwart the primary purpose of the evaluation process. Beckley v. Lincoln County Bd. of Educ., Docket No. 99- 22-168 (Aug. 31, 1999); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).

3. Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. See generally Siu v. Johnson, 784 F.2d 238 (4th Cir. 1984); Smith v. Univ. of N. Carolina, 632 F.2d 316 (4th Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). The 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). This same discretion should be applied to the evaluation of faculty members. 4. The standard for assessing an evaluation is the arbitrary and capricious standard. Beckley, supra.

5. "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 Res., 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 (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

6. Grievant did not meet his burden of proof to demonstrate the evaluation of the Peer Review Committee was biased, inaccurate or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 2005

Footnote: 1

Grievant was represented by Chris Barr of the AFT-West Virginia/AFL-CIO, and WVUP was represented by Jendonnae Houdyschell, Senior Assistant Attorney General.

Footnote: 2

This self-evaluation report appears to go by several names.

Footnote: 3

For example, if a faculty member states they have an article accepted for publication, the Annual Evaluation Report must contain some evidence to support thisassertion, such as a letter from the editor of the publication or galley proofs.

Footnote: 4

This statement was not labeled in any way, but Grievant testified this was his self- evaluative statement.

Footnote: 5

These articles were undated, less than one page letters published in a newspaper. The other article was a one page opinion piece published in "Gambit," his Division's literary magazine.

Footnote: 6

The journals were not correctly numbered.