THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DR. P. E. (See footnote 1) ,

Grievant,

v.

DOCKET NO. 06-HE-216

MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievant, Dr. P. E., after he received a letter from his employers, Marshall University ("Marshall") and University Physicians & Surgeons, Inc., advising him that they would not be renewing his probationary contract as an Assistant Professor, or his appointment as a member of the medical staff.

The relief sought by Grievant is:

> I desire to have my contract renewed for the fiscal year 2006; to be permitted to continue my professional clinical and research practice without restriction or interference; to be paid my contractually agreed upon salary of $250,000 for the entirety of the past fiscal year 2005, as well as, for the fiscal year 2006; to have the entirety of the contractually agreed upon research funding immediately released, without restriction or interference; to be provided with the agreed upon adequate staff and facilities for the development of a Pediatric Craniofacial Clinic; to be permitted to

practice medicine in an environment of respect and cooperation; and, any other relief deemed appropriate. In addition, I would like to be reimbursed by the Department ofSurgery for personal funds used for establishing and conducting research, service, clinical practice building, and other activities. (See footnote 2)

This grievance was filed at level two of the grievance procedure (See footnote 3) on March 14, 2006. A level two conference was held on March 17, 2006, and Dr. David A. Denning, Chairman, Department of Surgery, denied the grievance on that same date. Grievant appealed to level three on March 24, 2006. A level three hearing was held on April 25, 2006, and a level three decision denying the grievance was issued on June 27, 2006. Grievant appealed to level four on June 30, 2006. Five days of hearing were held at level four before Senior Administrative Law Judge Janis I. Reynolds, on February 21 and 22, 2007, in Huntington, West Virginia, and March 3, April 3, and April 25, 2007, in the Grievance Board's Charleston office. (See footnote 4) Grievant was represented at level four by John A. Proctor,Esquire, and Respondent was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on June 19, 2007. This matter was reassigned to the undersigned Administrative Law Judge for administrative reasons on December 14, 2007.

Synopsis

Grievant challenged the joint decision of Marshall and University Physicians & Surgeons, Inc., not to renew his contracts, as an arbitrary and capricious decision. Grievant also alleged his contract was not renewed in retaliation for reporting and complaining about certain matters to Associate Dean Gretchen Oley, and that Marshall and University Physicians & Surgeons, Inc., breached Grievant's contract by reducing his salary, and refusing to provide funding and other support for his research. (See footnote 5) While some of the stated reasons for nonrenewal were not supported by fact, the main reason Grievant's contract was not renewed was Grievant's lack of interest in seeing general plastic surgery patients at the Third Avenue Clinic, which was the primary reason he was hired, and the primary reason he was being paid a salary of $225,000.00 annually by University Physicians & Surgeons, Inc. This was a valid reason for nonrenewal.

The following Findings of Fact are made based upon the record developed at levels three and four.

Findings of Fact

1. University Physicians & Surgeons, Inc., which is affiliated with Marshall University, determined that it needed an additional plastic surgeon. In early 2005, it advertised, in conjunction with Marshall University ("Marshall"), for a general plastic surgeon. Grievant responded to the advertisement.

2. Grievant was employed by Marshall as an Assistant Professor in the Department of Surgery, for the fiscal year beginning July 1, 2005, and ending June 30, 2006. This appointment was a tenure track probationary appointment, and was "full-time effective on or about September 1, 2005." The appointment required Grievant to engage in educational and service activities, but it did not state that Grievant was required to provide medical services to patients. If such services were being provided, however, the notice of faculty appointment stated that "all full-time faculty assigned to medical schoolswill render patient care services only at facilities affiliated with their assigned institution, ... Under the terms of this appointment participation in the clinical practice of medicine in the area(s) of your specialty or training is required to be conducted through University Physicians & Surgeons, Inc. (UP&S) . . .."

3. Grievant's annual state salary under the notice of faculty appointment was $0, and his grant or contract salary was $25,000.00 annually.

4. University Physicians & Surgeons, Inc., is a corporation, qualifying under the Internal Revenue Code as a 501(c)(3) organization. It was set up by Marshall to run the medical practice of those physicians employed by Marshall as faculty. All physicians employed by this corporation are employed as faculty by Marshall.

5. University Physicians & Surgeons, Inc., offered Grievant an appointment to its medical staff, which stated, in pertinent part, as follows:

> [p]ursuant to your concurrent appointment to the full-time faculty of the School of Medicine, . . . for the fiscal year beginning July 1, 2005[,] and ending June 30, 2006.
>
> This appointment is a full-time supplemental appointment effective on or about September 1, 2005, and is offered pursuant to the provisions of the West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9[,] and is concurrent with and dependent upon your faculty appointment in the School of Medicine. This appointment is contingent upon your performance of the following

duties and responsibilities pursuant to your faculty appointment:

1. Participation as appropriate in the development and delivery of the educational curriculum of the School of Medicine to students, residents, fellows and others subject to the direction of the Chair of your academic department, the Dean of the School of Medicine, or such other appropriate official as may be designated by the Dean.

2. Participation in the clinical practice of medicine in your area(s) of specialty and/or training, provided that UP&S does not have authority to and will not exercise control over your clinical decision making. Clinical decision-making is the province of the individual clinician aided, where appropriate, by consultation with his or her colleagues in the School of Medicine and the medical community at large.

3. Maintenance of all appropriate state and federal licenses necessary to conduct the clinical practice of medicine in your area(s) of specialty and/or training.

4. Maintenance of practice privileges at one or more affiliated hospitals and/or other health care facilities as may be appropriately required for the practice of medicine in your area(s) of specialty and/or training.

5. Adherence to School of Medicine and University Physicians & Surgeons, Inc. compliance policies and procedures, including participation in educational sessions, audits and improvement activities.

6. Initiation of and/or participation in scientific research or other scholarly activity which is consistent with your educational background, training and/or experience and which is consistent with the mission and goals of the Marshall University School of Medicine.

7.

> Participation in such public service programs and activities, including managed care contracts as may be developed by Marshall University, the School of Medicine, UP&S and/or your Department and which are appropriate to your educational background, training and/or experience.
>
> 8. Service on and participation in appropriate University, School of Medicine, UP&S and/or Department Committees.
>
> 9. Such other duties and/or responsibilities as are customarily assigned to the medical staff of UP&S and/or the faculty of the School of Medicine and which are appropriate to your educational background, training, experience and skill.
>
> . . .
>
> UP&S does not engage in the practice of medicine, but functions as an administrative service providing clinical space and support staff and billing, collection and payroll services. Separation from the medical staff of UP&S will occur upon separation of the faculty member from the Medical School and will be non-discretionary upon any such separation from the Medical School.

6. Grievant's annual clinical salary paid by University Physicians & Surgeons, Inc., under the staff appointment was $225,000.00. The appointment stated,

> This amount is payable from funds generated through the clinical practice of medicine, including contractual medical service and fee for service practice, and related activities carried out by UP&S as a whole. Clinical salaries are highly dependent upon your individual productivity and that of your department and UP&S as a whole. In the event that either your department or UP&S as a whole experiences a financial deficit for a period of three or more consecutive months it may be necessary to adjust the amount of the clinical salary identified above during the course of the fiscal year.

The appointment also incorporated the offer letter of May 25, 2005, which provided, in pertinent part, that “[t]he starting salary will be $250,000 (See footnote 6) annually derived from all pay sources and be guaranteed for a period of two years.”

7. While the notice of faculty appointment did not state that Grievant would be required to provide medical services to patients, Grievant would not have been offered the faculty appointment if he had declined the staff appointment with University Physicians & Surgeons, Inc.

8. Grievant is a plastic surgeon, with a specialty in pediatric craniofacial plastic surgery.

9. Grievant's salary of $225,000.00, for the period from July 1, 2005, through June 30, 2006, was a physician's salary, based upon the expectation that Grievant would see patients and generate fees during this period of time, beginning September 1, 2005, or shortly thereafter. 10. Grievant also is a researcher. Marshall and University Physicians & Surgeons, Inc., agreed that Grievant would be allowed to dedicate two days a week to research, and Marshall agreed to fund this research in part, in the amount of $125,000.00 to $150,000.00, in the first year of Grievant's contract. The remaining three week days, Grievant was to provide medical services to patients through University Physicians & Surgeons.

11. Prior to accepting employment with Marshall, Grievant held a medical license in some states other than West Virginia. In order to practice medicine in West Virginia, Grievant was required to obtain a West Virginia medical license. Grievant applied for a West Virginia medical license in June 2005. Information was requested from the University of Florida to support Grievant's application, and the West Virginia Board of Medicine would not consider Grievant's application for licensure to be complete until this information was received. This information was not received by the Board of Medicine until sometime after the end of October 2005. The West Virginia Board of Medicine meets every other month, and Grievant did not receive his West Virginia medical license until January 9, 2006.

12. Following a meeting with Grievant, by letter dated November 7, 2005, Dr. David Denning, Professor and Chairman, Department of Surgery, notified Grievant that, due to the fact that Grievant had not yet obtained his West Virginia medical license, effective November 14, 2005, his salary would be reduced by 50%, and this salary reduction would continue in effect until he obtained a West Virginia medical license. The letter further stated that if Grievant was not able to obtain a West Virginia medical license at the January 2006 meeting of the West Virginia Board of Medicine, Grievant's appointment at Marshall and at University Physicians & Surgeons, Inc., “will be consideredvoid and your services will be terminated.” The letter also notified Grievant that disbursement of research funds would be suspended until a West Virginia medical license was obtained.

13. Grievant was notified by letter dated February 28, 2006, that “Marshall University and University Physicians and Surgeons will not renew your appointment for the upcoming fiscal year

starting July 1, 2006." This letter was on Marshall University School of Medicine letterhead, and was signed by Dr. Denning. This letter further advised Grievant that he should immediately restrict his clinical practice and not accept any new patients, and he would not be expected to participate in the plastic surgery clinic, the craniofacial clinic, or research activity. The letter stated that "effective March 7, 2006, your overall salary will be decreased to $125,000 per year with full benefits staying intact."

14. The $25,000.00 annual salary provided to Grievant under his faculty appointment was not reduced.

15. Grievant requested, and was provided with, a joint statement of reasons for his nonrenewal by Marshall and University Physicians & Surgeons, Inc.

16. One of the reasons for nonrenewal of Grievant's contract was "no documented attendance at Marshall University's Department of Surgery Mortality and Morbidity conference, Surgical Grand Round conference, Basic Science clinical lecture, or Surgery Journal Club," only one CME on file, and no documented academic activity with surgery residents or third or fourth year medical students.

17. Grievant only signed in one time when attending a Grand Round conference, although he did attend more than one, but less than six. Grievant had acquired at least 50 CME's, but he had not reported these to the record keepers at Marshall. Grievant had notbeen assigned any medical students or surgery residents, and did not engage in any academic activity with students or residents. There is no requirement that faculty at Marshall attend Mortality and Morbidity conferences, Surgical Grand Rounds, Basic Science clinical lectures, or Surgery Journal Club, but many faculty members do so.

18. One of the reasons for nonrenewal of Grievant's contract was the lack of any documentation of research activity, and another of the reasons was the lack of documentation of public service activities.

19. During the fall of 2005, Grievant spent most of his time preparing for and taking his board examinations in October, trying to acquire some journals, trying to use the software that was available to him, trying to reconnect his personal computer so he would have enough space on it, researching articles, trying to acquire laboratory space, trying to line up collaborators, and preparing grant applications. Grievant also worked on bylaws to set up the West Virginia Craniofacial Organization, was a reviewer for the Cleft Palate Journal (about one article every other month), was Chair of the Exhibiter Committee for the American Cleft Palate Craniofacial Association (between 6

and 20 hours per month), prepared for a medical assistance trip to Vietnam, prepared for and taught a course at the national meeting of the American Society of Plastic Surgeons in Chicago (about 10 hours per week), worked on a presentation for the Dog Bite Awareness Campaign (about 2 to 3 hours per week), attended a three day medical conference in Charleston in November and a conference in Morgantown, and visited Charleston Area Medical Center. Grievant submitted one research proposal to the Marshall University Research Corporation for review. He made contact with a few members of the local medical community to make them aware of his specialty in pediatric craniofacial surgery, and the craniofacial clinic hewas starting. He met with Terry Fenger, Director of the Marshall Forensic Science Center, and talked to him about working together on a project using computers for facial reconstruction. (See footnote 7)

20. Dr. Denning was aware of some of the activities outlined in the preceding finding of fact, and Chris Carter, RN, MSN, Administrator for University Physicians & Surgeons, was aware of some of these activities.

21. Dr. Denning would not release the research funding promised to Grievant until Grievant had received his West Virginia medical license. This limited the research Grievant could do. In addition, Grievant needed dedicated laboratory space, and had some difficulty getting this from Marshall.

22. The statement of reasons lists lack of committee service as one of the reasons for nonrenewal. While Grievant did not serve on any committees, he could not serve on a committee unless invited to do so, and he was not invited. Usually medical school faculty do not serve on committees until their second year. Grievant did not, however, discuss serving on a committee with Dr. Denning, who was his supervisor at Marshall. Grievant attended three of the monthly faculty meetings in the fall of 2005.

23. The statement of reasons states as one of the reasons for nonrenewal that Grievant “met with UP&S Risk Management officer, Beth Hammers, after his appointment. No other educational sessions, audits or improvement activities are documented.” Grievant also met with Gretchen Oley, Associate Dean of Clinical Affairs at Marshall. The record does not reflect what other educational sessions, audits or improvement activitiesshould have been documented, if any, other than that Grievant was to go through a series of compliance talks.

24. The statement of reasons lists the failure to obtain a West Virginia medical license until

January 9, 2006, and his failure to see any patients for almost six weeks after that, as one of the reasons for nonrenewal.

25. Grievant applied for his West Virginia medical license in June 2005. The reason for the delay in issuance of a West Virginia medical license was the failure of the University of Florida to respond to requests for information regarding Grievant's training there.

26. The statement of reasons lists as one reason for nonrenewal that Grievant had seen only four patients through University Physicians & Surgeons, Inc., and that he had not committed to any particular days to see patients. From the time he received his West Virginia medical license through the end of February, Grievant saw 10 to 14 patients, but most of these patients were not seen through University Physicians & Surgeons, Inc. Grievant did not see any patients from September 1, 2005, to February 2006. From the time he obtained his West Virginia medical license, through February 28, 2006, Grievant had not performed any surgery.

27. University Physicians & Surgeons, Inc., maintains a Clinic on Third Avenue in Huntington, referred to as the Third Avenue Clinic, where the plastic surgeons see patients. Grievant was offered office space in the Clinic, but did not ever set up an office there. From September 1, 2005, until January 2006, Grievant had been in the Third Avenue Clinic fewer than five times, and at the level four hearing on this grievance, could not recall from memory the full names of the two women who staffed the Clinic. FromJanuary 1, 2006, through February 28, 2006, Grievant was at the Third Avenue Clinic fewer than five times.

28. During the fall of 2005, Grievant spent most of his time at the library at the Marshall School of Medicine, the campus library, and in his basement where his personal computer was set up.

29. It was not until February 6, 2006, that Grievant committed to any particular days when he would work in the Third Avenue Clinic. Grievant told Chris Carter that he would work in the Third Avenue Clinic only one day a week, on Thursdays. After meeting with Mr. Carter, Grievant met with Amy Merritt, the Office Manager at the Third Avenue Clinic, and Deborah Bess, RN at the Third Avenue Clinic, and told them he was not sure Thursday would be the day he would be in the Clinic. It was impossible to schedule patients for Grievant to see at the Clinic until the Clinic personnel knew which days Grievant would be there to see patients.

30. Grievant planned to spend one day per week at the craniofacial clinic he was trying to establish, one day per week performing surgery, and two days a week doing research. Mr. Carter

explained to Grievant that he needed to focus on his practice at the Clinic, rather than the craniofacial clinic, but Grievant did not accept this.

31. Once Grievant obtained his medical license in January 2006, he still expected that he would be allowed two days a week for research, without interruption, even though he had not seen any patients during the months of September, October, November, December, or January.

32. The statement of reasons lists the failure to request hand surgery or breast surgery privileges as one of the reasons for nonrenewal. Grievant applied for surgeryprivileges at Cabell-Huntington Hospital and St. Mary's Hospital in Huntington. Grievant did not apply for hand surgery privileges, nor did he apply for breast surgery privileges. Cabell-Huntington Hospital granted Grievant surgery privileges for those areas for which he had applied on February 14, 2006. Grievant never received surgery privileges from St. Mary's Hospital.

33. Grievant was limited in the types of plastic surgery patients he could serve, and his ability to provide meaningful on-call coverage and coverage at the Third Avenue Clinic when the other plastic surgeon at the Clinic was out of town, due to the fact that he had not applied for and did not receive surgery privileges for hand and breast surgery. Grievant was not interested in doing these types of surgeries.

34. After reviewing the hospital privileges Grievant had been granted, Grievant's supervisor at University Physicians & Surgeons, Inc., Dr. Adel Faltaous, told Grievant he needed to request hand surgery and breast surgery privileges, so that he could perform these surgeries when needed. Grievant did not ever apply for these privileges.

Discussion

In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. *Turman v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-199 (Nov.8, 1999); *Fasce v. Bd. of Directors*, Docket No. 94-BOD-1072 (Sept. 13, 1995). *See Baroni v. Bd. of Directors*, Docket No. 92-BOD-271 (Feb. 11, 1993). 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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Series 9 (133 C.S.R. 9) governs Marshall's actions, and provides that the appointments of probationary faculty members are "issued on a year-to-year basis." Marshall may decline to renew the contract of any probationary faculty member, such as Grievant, "for any reason that is not arbitrary, capricious, or without factual basis." 133 C.S.R. 9 § 10.4. This rule provides Respondent with broad discretion.

"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*, 198 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." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283(W. Va. 1982)." *Trimboli, supra*. *See Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999).

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, 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 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). In this instance, Grievant's probationary contract as faculty member was not renewed, nor was his appointment as a physician with University Physicians & Surgeons, Inc. The first issue is whether the failure of University Physicians & Surgeons, Inc., to renew Grievant's appointment is grievable. While University Physicians & Surgeons, Inc., has been incorporated as a separate legal entity from Marshall, it is clear that Grievant's employment by Marshall was dependent upon his employment by University Physicians & Surgeons, Inc., and vice versa. In fact, the two entities acted in concert in every aspect of Grievant's employment, and it is impossible to separate the two for purposes of analyzing what occurred here during the entire course of Grievant's employment. In fact, Dr. Denning was acting on behalf of both entities when he sent the nonrenewal letter to Grievant.

This is not the first time this issue has been addressed in a grievance. In *Graf v. West Virginia University*, Docket No. 30-86-047 (September 26,1986) (See footnote 8), the administrative law judge was presented with a similar situation where the actions of West Virginia University and the corporation which it had established to provide medical services were interdependent.

> Throughout the record information provided by both parties establishes a relationship between the Corporation and the medical school so interwoven as to create an interdependence resulting in a joint participation in the execution of the State's business. It appears highly questionable how individuals in their capacity as employees of a state institution could establish a private corporation which exists and functions solely for the purposes of the medical school at a state university. Indeed, it would be intolerable to allow a public institution, and it's employees, to beplaced under the control of a private organization. Therefore, the PFO must be found to be an entity created and endowed with authority by individuals who were powerless to do so, or a public corporation functioning cooperatively with the West Virginia School of Medicine. As it is not the purpose of this decision to determine the legitimacy of the PFO, this examiner adopts the interpretation that to the extent the corporation is a joint

> participant with the School of Medicine and affects Board of Regents employees, it is public in nature and subject to the jurisdiction of the Education Employees Grievance Board.

Id. The undersigned finds the situation here to be the same, and that, under these circumstances, University Physicians and Surgeons, Inc., has made itself subject to the jurisdiction of the Grievance Board.

It is apparent from the findings of fact set forth above that not all of the reasons for nonrenewal of Grievant's contract were supported by fact. It is clear from the record, however, that the main reason Grievant's contract was not renewed was Grievant's lack of interest in seeing general plastic surgery patients at the Third Avenue Clinic, which was the primary reason he was hired, and the primary reason he was being paid a salary of $225,000.00 annually by University Physicians & Surgeons, Inc. It is evident that Grievant had little interest in doing what he was hired to do. Grievant's primary interests were in researching and in establishing his craniofacial clinic. While Marshall and University Physicians & Surgeons, Inc., agreed to allow Grievant time for both of these interests, Marshall was not recruiting a researcher, and these were not Grievant's primary duties. The undersigned cannot conclude that the decision not to renew Grievant's contract was arbitrary and capricious.

Grievant argued Marshall's decision not to renew his contract was in retaliation for reporting and complaining to Dr. Gretchen Oley, Associate Dean of Clinical Affairs atMarshall, about his name being placed on the emergency room on call schedule, apparently when he was doing research and thought he was not to be on call, which Grievant characterized as an error in the on call schedule. Grievant's written argument also asserts that Grievant talked to Dean Oley about problems with getting his research funding, research space, the reduction of his salary, personnel for the craniofacial center, “resident abuse/supervision issues, [Dr. Denning] wanting Dr. Edwards to misrepresent research space on federal grants, [and] wanting him to telling [sic] referring physicians from the emergency room to wait for up to 8 hours on the days he has to do research (instead of adequately protecting his research time.” The record does not reflect that there was ever any “resident abuse/supervison issue”, or that such was reported to Dean Oley. It is not clear to the undersigned that Grievant discussed anything with Dean Oley except Grievant's disagreement with being on the on call schedule on his “protected” research days, or that Dr. Denning was aware of

such a discussion.

W. Va. Code § 6C-1-3(a) provides as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

In general, a grievant alleging discrimination or retaliation in violation of *W. Va. Code §* 6C-1-3, must establish a *prima facie* case, by showing:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). *See Whatley v. Metropolitan Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 91-HHR-282 (Apr. 22, 1992).

Once a *prima facie* case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller, supra. See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981);*Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n,* 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26- 56 (Sept. 29, 1989).

Assuming Grievant's discussion with Dean Oley rises to the level of an activity protected by the

statute, Respondent presented legitimate, non-retaliatory reasons for not renewing Grievant's contracts, and Grievant did not demonstrate these reasons were pretextual. Grievant argued Marshall breached his contract when it reduced his salary (See footnote 9) and did not release his research funding. The $25,000.00 salary provided to Grievant under his contract with Marshall was not ever reduced. University Physicians & Surgeons, Inc., reduced Grievant's salary.

"As a general rule, contracts between a college and its employees are governed by the ordinary rules of contract, except as restricted by constitution or statute. *Oconee County v. Rowland*, 129 S.E.2d 373 (Ga. 1962); *McCoy v. Southern W. Va. Community College*, Docket No. 90-BOD-099 (Nov. 9, 1990)." *Chezik v. Marshall Univ.*, Docket No. 93-BOT-126/130 (May 19, 1994).

The staff appointment from University Physicians & Surgeons, Inc., required Grievant to participate "in the clinical practice of medicine in" his areas of practice, which Grievant was to begin September 1, 2005. Grievant did not perform clinical services under the contract for nearly six months, because he had not acquired his West Virginia medical license. Respondent knew Grievant did not have a West Virginia medical license when the appointment was offered, and that it would take some unknown period of time to acquire this license, yet the staff appointment did not set a specific time by which Grievant had to acquire this license. However, the staff appointment, which was signed in June 2005, did not require Grievant to begin to perform services until September 2005. The staff appointment requires Grievant to maintain all necessary licenses and practice privileges,indicating that the parties contemplated that Grievant would have these necessary items by that time.

While Grievant's salary was guaranteed by the appointment for a period of two years, this guarantee was contingent upon Grievant performing his part of the bargain and the appointment being renewed. Grievant did not participate "in the delivery of clinical Plastic Surgery" as was required by the appointment from September 1, 2005, through mid-February 2006. In fact, Grievant provided minimal clinical services in February 2006, and then was relieved of this requirement entirely. The failure on Grievant's part to deliver clinical plastic surgery services as required, relieved University Physicians & Surgeons, Inc., of the requirement to provide Grievant with a guaranteed salary. Grievant has not demonstrated that the reduced salary of $100,000.00 from University Physicians & Surgeons, Inc., was inadequate to compensate him for the minimal medical services he provided.

As to Marshall's failure to release research funding, this issue is moot, as the money was to be used by Grievant for research activities while he was an employee, which he no longer is, and the relief requested cannot be granted.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. *Turman v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-199 (Nov.8, 1999); *Fasce v. Bd. of Directors*, Docket No. 94-BOD-1072 (Sept. 13, 1995). *See Baroni v. Bd. of Directors*, Docket No. 92-BOD-271 (Feb. 11, 1993). 2. Series 9 governs Marshall's actions, and provides that the appointments of probationary faculty members are "issued on a year-to-year basis." Marshall may decline to renew the contract of any probationary faculty member, such as Grievant, "for any reason that is not arbitrary, capricious, or without factual basis." 133 C.S.R. 9 § 10.4. This rule provides Respondent with broad discretion.

3. "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*, 198 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)).

4. "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. *See generally, Harrison v. Ginsberg,* [169 W.

Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra. See Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999). 5. The decision by Marshall and by University Physicians & Surgeons, Inc., not to renew Grievant's appointments was not arbitrary and capricious.

6. Marshall and University Physicians & Surgeons, Inc., had good reason not to renew Grievant's appointments.

7. In general, a grievant alleging discrimination or retaliation in violation of *W. Va. Code §* 6C-1-3, must establish a *prima facie* case, by showing:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). *See Whatley v. Metropolitan Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 91-HHR-282 (Apr. 22, 1992).

8. Once a *prima facie* case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller, supra. See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S.248, 252-53 (1981);*Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n,* 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89- 26-56 (Sept. 29, 1989).

9. Assuming Grievant's discussion with Dean Oley rises to the level of an activity protected by *W. Va. Code § 6C-1-3,* Marshall and University Physicians & Surgeons, Inc., presented legitimate, non-retaliatory reasons for not renewing Grievant's contracts, and Grievant did not demonstrate

these reasons were pretextual.

10. As Grievant failed to provide the clinical plastic surgery services he was engaged to provide from the beginning of the contract term through mid-February 2006, University Physicians & Surgeons, Inc., did not breach its contract with Grievant when it reduced his surgeon's salary.

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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: March 5, 2008

Footnote: 1

Grievant asked that he be identified by his initials in this decision, due to a concern that someone searching for his name as a surgical reference would misinterpret this matter as involving malpractice litigation. Respondent did not object to this request.

Footnote: 2

Respondent represented at the last day of hearing at level four that it was in the process of reimbursing Grievant for professional expenses he had paid for out of his pocket, up to the maximum amount allowed by Marshall annually.

Footnote: 3

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-

6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 4

Except for one part of Grievant's Level Four Exhibit 27, which part was specifically not admitted during the hearing by ALJ Reynolds, no ruling was made at the level four hearing on the admission of Grievant's Level Four Exhibit 27. Respondent objected to admission of this exhibit on the grounds that it was subject to the attorney-client privilege. The parties briefed this issue in their proposed findings. None of the emails comprising this exhibit is marked confidential, and when the document was turned over to Grievant's counsel by Respondent in response to a discovery request, no objection on the basis of attorney-client privilege was made. Relying upon the case law cited by the parties, theundersigned ORDERS the remainder of Grievant's Level Four Exhibit 27 ADMITTED into evidence.

Footnote: 5

On December 22, 2006, Grievant submitted a revised Statement of Grievance, in which he alleged, for the first time, that he had been discriminated against during his employment, that Respondent had created and maintained a hostile work environment, and that Respondent had breached his contract by altering the original offer of Associate Professor status, backdating one of the documents, refusing to allocate 16 hours of uninterrupted research time, infringing on his academic freedom, and refusing to assist him in developing his clinical practice. Respondent objected to several parts of the revised Statement, including these sections, citing the provisions of W. Va. Code § 29-6A-3(j), which discuss the procedure when evidence offered at level four substantially alters the original grievance or renders it a different grievance. The undersigned could not find any ruling on this issue as it relates to these particular arguments during the course of the hearing. The original statement of grievance did not include any claim of discrimination, hostile work environment, or breach of contract based upon these items; therefore, these claims constitute a new grievance. However, these issues are now moot. The undersigned would further note that Grievant knew when he signed the appointments (contracts) that he was being brought in at the Assistant Professor level, and that the document to which he refers had been back dated. Finally, the record does not supporta finding that Grievant was refused any assistance in developing his clinical practice.

Respondent also objected to the claims of retaliation in the revised Statement of Grievance. Grievant has always objected to the nonrenewal of his contracts. This is just a new argument relating to the same grievance. Respondent was on notice of this argument prior to the level four hearing. This argument will be addressed in this decision.

Footnote: 6

The offer letter apparently combined the salary of $25,000.00 to be paid by Marshall, and the $225,000.00 to be paid by University Physicians & Surgeons, Inc.

Footnote: 7

It is not clear from the record that Grievant was working on these activities even 40 hours per week.

Footnote: 8

This decision was affirmed by the Supreme Court of Appeals of West Virginia in Graf v. West Virginia University and West Virginia University Medical Corporation, 429 S.E.2d 496 (W. Va. 1992), and remanded to determine damages.

Footnote: 9

Respondent raised a timeliness defense, arguing Grievant had delayed too long in complaining about the reduction of his salary in November 2005. The undersigned concludes that this issue need not be addressed, as it does not matter how much Grievant's salary was reduced in November 2005. The nonrenewal letter states Grievant's annual salary is being reduced to $125,000.00 per year.