THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NICHOLAS A. MARTIN,
Grievant,

v. **DOCKET NO. 2009-0022-SU**

SHEPHERD UNIVERSITY,
Respondent.

DECISION

Grievant, Nicholas A. Martin, an Associate Professor of Mathematics, filed a grievance against his employer, Shepherd University, on July 11, 2008, contesting the decision to deny him merit pay. As relief Grievant sought "approval of my 2008 merit pay application."

A hearing was held at level one on August 11, 2008, and the grievance was denied at that level on August 26, 2008. Grievant appealed to level two on September 10, 2008, and a mediation session was held on December 16, 2008. An Order of Unsuccessful Mediation was entered on December 29, 2008, and Grievant appealed to level three on January 10, 2009. A level three hearing was held before the undersigned Administrative Law Judge on March 20, 2009, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by K. Alan Perdue, General Counsel. The parties declined to submit written Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision at the conclusion of the hearing, on March 20, 2009.

Synopsis

Grievant applied for merit pay in 2008. Grievant's annual report submitted in support of this request was very brief, providing little detail of his work. The Merit Evaluation Committee did not find Grievant's service, the area chosen by Grievant, to exceed expectations based upon the information provided in Grievant's annual report, and did not recommend him for merit pay. Grievant did not demonstrate that this decision was arbitrary and capricious, based upon the information provided to the Committee in his annual report.

The following Findings of Fact are made based upon the evidence presented at levels one and three.

Findings of Fact

1. Grievant has been employed by Respondent, Shepherd University ("Shepherd"), for 20 years, and is a tenured Associate Professor of Mathematics in the Computer Science, Mathematics and Engineering Department.

2. Shepherd's Board of Governors adopted a Salary Policy, Policy 26, effective March 8, 2007. Policy 26 provides that to qualify for merit pay, a faculty applicant must exceed expectations in the award area the applicant has selected, and meet expectations in the other two areas. The three areas considered are instructional performance (teaching), professional/institutional service, and professional development (research and creative activities). The Policy further provides that the applicant for merit pay must submit an annual report, which is the "substantive basis for making the merit evaluation."

3. Policy 26 contains evaluation procedures at Section 3.1.3F, which provides guidelines for faculty on performance expectations. This Section provides examples of what type of activities would qualify as exceeding expectations in service, stating:

> Active state, regional, or national professional service related to the profession, significant university service, significant community service related to the profession; service award recipient. Professional leadership in area of interest; strong community service related to the profession, or active participant in professional meetings.

4. The Merit Evaluation Committee reviews applications made by faculty for merit pay. The Committee is composed of 14 members: 12 faculty elected by the various schools or departments, 1 coach and 1 librarian.

5. By email dated March 11, 2008, Karen Green, Chair of the Merit Evaluation Committee, reminded the faculty at Shepherd that applications for merit pay were due on April 1, 2008, that any full-time faculty member could make application, and this was voluntary. She also reminded faculty of the guidelines for application, and attached Policy 26. She noted that the application letter "must expressly designate the ***merit award area*** (one of three) for which he or she is applying in a memo-style header at the top of the page." In particular, the email reminded faculty that "[t]he annual report is the substantive basis for making the merit evaluation as to any applicant. Therefore, applicants for merit pay should be very liberal in the quantity and quality of the information included in their annual report."

6. Grievant submitted an application for merit pay to the Merit Evaluation Committee on March 30, 2008. The application was comprised of a cover letter and a two page annual report for the year 2007-2008, prepared by Grievant. The cover letter designated the area of award as professional/institutional service.

7. The cover letter states that Grievant received good evaluations in the area of teaching, and that in the area of professional development, "I have a paper ready to be submitted." In the area of professional/institutional service, Grievant highlighted his "effort in the Regional Math Field Day, the State Math Field Day this year and my continued work in the Second Annual Shepherd Open Mathematics Contest." He noted his belief that "this contest will not only bring attention to the University as a whole, but also have a positive impact on the whole area," and would "increase mathematical awareness in the region."

8. Grievant's annual report lists teaching at 30%, and lists three summer courses that he taught, with a total of 34 students, four courses in the fall semester, with a total of 58 students, and three courses in the spring semester, with a total of 36 students. The annual report states that Grievant is using a new textbook for the Foundations of Geometry course, which is "an excellent text, very challenging," and that he had to "solve a lot of problems to prepare for classes and read extensively." He noted that the Abstract Algebra text was also new, and that "many challenging problems" were solved from it in class. He also stated he had been discussing a project with Amin Benkiran involving Sperner's Lemma.

9. Grievant's annual report lists research and creative activities at 30%. Under this category Grievant stated that he was awarded a West Virginia Space Grant last year for his project "'Reconciling the intuitive concept of tangents to curves with calculus,'" and that the "paper is almost ready to be submitted."

10. Grievant's annual report lists professional service at 40%. With regard to this category Grievant's complete statement reads as follows:

> This year we continued with the Second Annual Shepherd Open Mathematics Contest. I made up the problems and graded the papers. This involved a considerable amount of work. We are now preparing the awards ceremony.
>
> This year I was the Shepherd representative for the Regional Math Field Day. I made up all the problems for grades 10-12, wrote up and distributed the solutions, and worked with the teachers the entire day, giving a very short speech at the awards ceremony, to help boost the image of Mathematics opportunities at Shepherd, and calling attention to the Shepherd Open.
>
> I have already started to make up the problems for the State Math Field Day as well, this year to be held at Shepherd. I am also involved in some of the administrative aspects of this contest.
>
> Committee Service: I serve on the Promotion, Tenure and Retention Committee and the Library Committee.
>
> Professional Organization Membership: I am a member of the American Mathematical Society (AMS).

11. By memorandum dated April 30, 2008, the Merit Evaluation Committee stated that it did not recommend Grievant for merit pay for the 2007-2008 academic year. The Committee concluded that Grievant met expectations in each area, but Grievant's application "does not indicate that the candidate exceeds expectations in *Service*. The Committee noted that the "[c]ommittee and community service activities identified in the annual report are expected contributions."

12. By letter dated May 31, 2008, addressed to Mark Stern, Vice President for Academic Affairs, Grievant asked the Merit Evaluation Committee to reconsider his application. This letter went into some detail regarding the difficult process of creating problems for the mathematics contests, and other details of the work involved in these contests. This information was not in Grievant's annual report. On June 4, 2008, Reza Mirdamadi, Chair of Grievant's Department, submitted a one and a half page

memorandum to Dr. Stern, describing in detail the Shepherd Open, and Grievant's role in it, and concluding that Grievant "exceeded our expectations in service to the department and the school of Natural Sciences and Mathematics." This memorandum was not a part of Grievant's application for merit pay.

13. By memorandum dated June 9, 2008, Dr. Stern informed Grievant that he had reviewed Grievant's May 31, 2008 request for reconsideration of his application, and the Faculty Handbook, and that he had concluded that there is no provision for the Merit Evaluation Committee to reconsider an application. He further stated that the Committee makes its recommendations to him, and that he then makes a recommendation to Shepherd's President. Dr. Stern stated that he agreed with the Committee that Grievant's application did not indicate that Grievant exceeded expectations in service. Dr. Stern stated that Grievant had received credit the previous year (when Grievant received merit pay) for establishment of the Shepherd Open Mathematics Contest as a major contribution, and that "preparing questions for the ongoing Contest is an expected contribution, given that you have received credit for establishing the Contest."

14. By letter dated June 17, 2008, Grievant provided additional detail to Dr. Stern regarding his activities, and again asked for reconsideration of his request for merit pay.

15. By memorandum dated July 1, 2008, Dr. Stern advised Grievant that he had again reviewed his application for merit pay, and all the additional information provided to him by Grievant and by Professor Mirdamadi, and that he had had conversations with Professor Mirdamadi and Dean Lidgerding. He noted, however, that the Merit Evaluation Committee had followed the proper procedure, basing its recommendation on the written annual report provided by Grievant, which did not provide nearly the information which had

been provided to him since the Committee's recommendation, and he concluded that the Committee's evaluation was appropriate. Dr. Stern stated:

> I believe that my role is to evaluate whether or not the process by which the Merit Evaluation committee arrived at its decision in your particular case is consistent with the charge and process stated in the "Faculty Handbook," and whether or not any major substantive error was committed by the committee, based on the information that was brought before it for consideration. I believe the committee members acted in a manner that is consistent with the "Faculty Handbook," and that they considered the information that was available to them.

16. The Merit Evaluation Committee's recommendation was accepted by Dr. Stern and Shepherd's President, and Grievant did not receive merit pay in 2008.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant takes issue with the finding of the Merit Evaluation Committee that his service to Shepherd did not exceed expectations. Grievant testified at the level three hearing, explaining exactly what he must do when he creates mathematical problems for the Shepherd Open and the Field Day, and explaining that high school students participate in these events, providing exposure for Shepherd. He stated that he did not know how much time he spends creating problems, and the quality is difficult to evaluate, but it is not

routine work. He felt he should not have to explain all of this to the Merit Evaluation Committee. Respondent argued that Grievant provided very little information in his annual report, and the Committee followed the procedure set forth in Policy 26.

The undersigned cannot reverse the decision of the Merit Evaluation Committee unless Grievant demonstrates that the decision was arbitrary and capricious. This is a significant burden with regard to merit pay decisions. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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). "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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Grievant did not demonstrate that the Merit Evaluation Committee's decision was arbitrary and capricious. The Committee based its decision upon the information Grievant placed before it, as it was required to do. The Committee's view of Grievant's work was

that it met expectations, but did not exceed expectations. It is possible that the Committee would have reached a different result had it been privy to all of the information placed into the record by Grievant at levels one and three of the grievance proceedings to more completely describe his efforts. Grievant, however, chose not to elaborate on his work in his annual report, presenting very little information to the Committee. While Grievant certainly disagrees with the Committee's evaluation, as does his Department Chair, the undersigned cannot conclude from the record developed that the Committee's decision was unreasonable.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

2. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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).

3. "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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

4. The Merit Evaluation Committee's determination not to recommend Grievant for merit pay was based upon the information properly placed before it by Grievant, and was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: June 23, 2009