THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN PENN,
Grievant,

v. **DOCKET NO. 2008-0387-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, John Penn, filed a grievance against his employer, West Virginia University, on May 30, 2007, when he was not promoted to the rank of Professor. As relief, Grievant sought promotion to Professor.

The grievance proceeded through levels one and two of the grievance procedure in effect at that time, and on June 20, 2007, the parties agreed to transfer this grievance to level one of the new grievance procedure, which was effective July 1, 2007.[1] A hearing was held at level one on December 3, 2007, and the grievance was denied at that level on January 22, 2008. Grievant appealed to level two on February 1, 2008, and a mediation session was held on July 2, 2008. An Order of Unsuccessful Mediation was entered on July 2, 2008, and Grievant appealed to level three on July 8, 2008. A level three hearing

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[1] In 2007, the Legislature, 2007 Acts ch. 207, 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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

was held before the undersigned Administrative Law Judge on November 14, 2008, in the Grievance Board's Westover office. Grievant was represented by Jacques R. Williams, Esquire, Hamstead Williams and Shook PLLC, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on December 17, 2008.

Synopsis

Grievant applied for promotion to Professor. While his Department Chair and the Eberly College Promotion and Tenure Committee supported his promotion, the Chemistry Department Promotion and Tenure Committee, the Dean of the Eberly College, and ultimately the Provost, acting for the President, did not support his promotion. The final decision was based upon Grievant's publication record in refereed journals, and his external grant funding record. The Provost did not consider Grievant's entire record since his last promotion, as is required by West Virginia University's written promotion and tenure guidelines, nor did he take into consideration the quality of Grievant's work. Further, in comparing Grievant's record to others in his department who were recently promoted, the Provost did not compare Grievant's record to that of individuals who were promoted, but rather improperly compared Grievant's publication and grant record to the average for the Chemistry Department.

The following Findings of Fact are made based upon the evidence presented at level three.[2]

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[2] The recording of the level one hearing was of such poor quality that it could not be transcribed. Accordingly, the record developed at level one could not be made a part

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University ("WVU"), in the Department of Chemistry, since 1983. He was promoted from Assistant Professor to Associate Professor, and granted tenure, in 1989.

2. Grievant submitted an application for promotion to Professor in 2006. WVU denied his request for promotion. Grievant was retained in his position as an Associate Professor.

3. The WVU Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure ("University Guidelines") state that:

> In order to be recommended for promotion, a tenured or tenure-track faculty member normally will be expected to demonstrate *significant contributions* in two of the following areas: teaching in the classroom or other settings, research, and service. In the third area of endeavor, the faculty member will be expected to make reasonable contributions. The areas of significant contribution in which each faculty member is expected to perform will be identified in the letter of appointment, or modified in a subsequent document.

(Emphasis added.) The two areas in which Grievant was required to demonstrate significant contributions were teaching and research. Grievant's Level Three Exhibit Number 3.

4. Grievant met the requirements for promotion to Professor in the areas of teaching and service. In 1997 Grievant received the Eberly College of Arts and Sciences Outstanding Teacher Award, and the WVU Foundation Outstanding Teacher Award, which is the highest teaching award at WVU.

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of the record at level three, and the parties presented all their evidence at the level three hearing.

5. Over the last ten years Grievant has focused his efforts on the development of a Web-based Enhanced Learning and Resource Network ("WE_LEARN"), which was a significant undertaking. WE_LEARN is a series of around 100,000 practice problems developed by Grievant to help students learn organic chemistry. It is an innovative learning technique, available to students at WVU on the internet, and to students at other institutions which have purchased WE_LEARN. By Grievant's calculation, he spent a minimum of 365 days in the initial development of the practice problems in WE_LEARN. Since its initial development, Grievant has continually studied the effectiveness of WE_LEARN, and researched and developed ways to improve it. He has also worked at marketing this product.

6. The University Guidelines state that "[t]he evaluation for promotion in rank provides the opportunity to assess a faculty member's growth and performance since the initial appointment or *since the last promotion*." (Emphasis added.) They further state, "[p]romotions after the first promotion *will* be based on *achievement since the previous promotion*." (Emphasis added.) Grievant's Level Three Exhibit Number 3.

7. The University Guidelines also provide, with regard to research that, "[q]uality is considered more important than mere quantity. Significant evidence of scholarly merit may be either a single work of considerable importance or a series of studies constituting a program of worthwhile research." Grievant's Level Three Exhibit Number 3.

8. The Department of Chemistry is within the Eberly College of Arts and Sciences, and is subject to that College's Guidelines for Annual Faculty Evaluation, Merit Determination, Promotion and Tenure. The Eberly College Guidelines explain what is involved in teaching and research. The Guidelines state that, "[s]upporting documentation

for the evaluation of performance in teaching . . . might also include . . . evaluation of products produced by the instructor such as textbooks or videotapes, [and] the development or use of instructional technology and computer-assisted instruction. . .." These Guidelines define research as follows:

> Research involves the creation, the discovery or synthesis of knowledge, the creation of new approaches to understanding and explaining phenomena, the development of new insights, the critical appraisal of the past, artistic creation, and the application of knowledge and expertise to address needs in society and in the profession. These activities result in products which may be evaluated and compared with those of peers at other institutions of higher learning.
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> . . . In most disciplines, refereed publications (print or electronic) of high quality are expected as evidence of scholarly productivity. An original contribution of a creative nature relevant to one or more disciplines may be as significant as the publication of a scholarly book or article. *Quality is considered more important than mere quantity.* Significant evidence of scholarly merit may be either a single work of considerable importance *or a series of studies constituting a program of worthwhile research*. Faculty members are expected to undertake and demonstrate evidence of *a continuing program* of studies, investigations, or creative works.

(Emphasis added.) Grievant's Level Three Exhibit Number 1.

9. The Eberly College Guidelines specifically define the term "significant contributions" in research as "performance in research which meets or exceeds that of peers recently achieving tenure who are respected for their contributions in research at peer research universities." Grievant's Level Three Exhibit Number 1.

10. The Eberly College Guidelines also provide that the annual review of each faculty member is to assess the faculty member's teaching, research and service as excellent, good, satisfactory, or unsatisfactory. "[A] faculty member with a preponderance of 'satisfactory' or 'unsatisfactory' ratings, particularly in an area in which a significant contribution is required for promotion and tenure, would not qualify for promotion or

tenure." The annual review assessments "should be a basis for those periodic recommendations forwarded to the Provost which relate to promotion, tenure, or negative action." Faculty members are evaluated both by the Department Promotion and Tenure Committee, and the Department Chair. Grievant's Level Three Exhibit Number 1.

11. The Department of Chemistry Guidelines For Faculty Evaluation, approved in 2003, provide, in pertinent part, that:

> Promotion to full professor is based on accomplishments while an associate professor and is not granted merely for years of service. It requires a consistent record of achievement at a level that indicates many strengths and few weaknesses. Annual evaluations should guide faculty toward that achievement.
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> To be recommended for promotion to full professor, an associate professor is normally expected to demonstrate significant contributions in research, significant contributions in teaching in the classroom or in other settings, and reasonable contributions in service. An exception occurs when prior approval has been received to change the areas requiring significant contributions, as prescribed in the University guidelines.
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> The Eberly College Guidelines state that the criteria for promotion to full professor must be different from those for promotion to associate professor. An important aspect of a Ph.D.-granting department is its research and the associated graduate program. In a chemistry department, graduate education necessarily implies an important research component. For this and other reasons, there is added emphasis placed on research for promotion to full professor in the Department of Chemistry. Research accomplishments are externally reviewed in an objective fashion by scholars of national standing.
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> Because graduate instruction is so essential in maintaining a Ph.D.-level chemistry program, promotion to full professor in the Department of Chemistry also requires one of the following since the previous promotion: either demonstrated success in teaching at least one chemistry graduate lecture course at the 600 or 700 level, or the supervision of at least one Ph.D. student to completion.

Grievant's Level Three Exhibit Number 1.

12. The Department of Chemistry Guidelines for Evaluation state with regard to research:

> Faculty in the Department of Chemistry are expected to establish and maintain an active research program in chemistry consistent with the terms of their letter of appointment. An active research program is one that regularly reports scientific results in refereed journals. Other evidence of an active research *may include*, but is not limited to: *actively pursuing, and ultimately obtaining, adequate financial support to carry out research*; developing research projects for students and postdocs that result in publications; being invited to give external talks about one's current research; presenting research results in scientific conferences; receiving professional recognition for recent scientific accomplishments; and receiving citations in the scientific literature. Faculty should document their own efforts and successes to the extent possible on the annual productivity reports and in the personnel file.

Grievant's Level Three Exhibit Number 1 (emphasis added).

13. Grievant's annual faculty evaluation for 2001 states that Grievant:

> has declared his research area to be Chemical Education, and that area has been validated by the acceptance of the program of study of his M.S. student by the Graduate Studies Committee and the chemistry faculty. The issue to decide in this evaluation is what part of Dr. Penn's activities is considered to be research and what part is considered to be teaching, especially with respect to the WE_LEARN software development. The development and implementation of the WE_LEARN software has required an enormous amount of work and has undergone systematic evaluation by Dr. Penn and his co-workers (including many undergraduates) in order to improve it. This work is considered to be part of the teaching mission. The research component must be a hypothesis-driven evaluation of the WE_LEARN software as presented at professional meetings and at other institutions, as published in peer-reviewed journals, and as funded by grants.

Grievant's Level Three Exhibit Number 2B.

14. The University Guidelines provide a multi-level evaluation process for the award of promotion, beginning with the Department Promotion and Tenure Committee, and the Department Chair, and concluding with the Provost, who has been delegated the

decision-making authority of the President for matters of promotion and tenure. The faculty member may include written rebuttals in the promotion file throughout this process.

15. When a faculty member must demonstrate significant contributions in the area of research, the promotion file must also include evaluations of the quality of the faculty member's research from peers external to WVU. These evaluations are to be considered as a factor by those reviewing the promotion request. The external reviewers may also be asked to evaluate the faculty member's teaching. The external reviewers are selected with input from the faculty member. Five individuals were selected to review Grievant's record and evaluate whether his work was of such quality that he should be promoted. Three of the five reviewers believed Grievant qualified for promotion, while one did not. The fifth reviewer did not offer an opinion on the subject. The reviewers offered a positive assessment of WE_LEARN and its impact on chemistry education.[3]

16. Grievant's promotion request was first reviewed by the five member Chemistry Department Promotion and Tenure Committee. This Committee was unanimous in its conclusion that Grievant had not made a significant contribution in research, due to the low number of publications in recent years, the lack of external funding, and the absence of a sustained effort to secure external funding. This Committee did not support Grievant's request for promotion.

17. Grievant's promotion request was next reviewed by Chemistry Department Chair Harry Finklea, who endorsed Grievant's promotion. This endorsement was based upon Grievant's entire record since his last promotion, the comments of the outside

[3] The record does not include the complete text of these reviews. Only excerpts of the reviews are included in the various documents which are part of the record.

evaluators, and a comparison of the record of two others who had been recently promoted to Professor in the Department. Chair Finklea concluded that Grievant's grant funding record since his last promotion was roughly the same as that of Professor Jaffe, who had been recently promoted to Professor. Chair Finklea changed his stance on WE_LEARN after reviewing the comments of the outside evaluators, and the entire promotion application, and considered it in the research category rather than teaching.

18. Grievant's promotion request was next evaluated by the six member Eberly College Natural and Mathematical Faculty Evaluation Committee. This Committee concluded that Grievant had made significant contributions in teaching, research, and service, and unanimously (with the Chair abstaining) recommended that he be promoted to the rank of Professor.

19. Grievant's promotion file was then forwarded to Mary Ellen Mazey, Dean of the Eberly College of Arts and Sciences. Dean Mazey concluded that Grievant's "research does not meet the standards for promotion to the rank of professor. His research records lacks [sic] a sufficient number of publications in recent years and shows no attempts and, therefore, no success at external funding." Grievant's Level Three Exhibit Number 11. Dean Mazey did not consider Grievant's development of WE_LEARN as research. Her expressed reasoning for this was that Grievant had consistently, over a period of many years, been told that the development of WE_LEARN would not be considered research, and she questioned Dr. Finklea's authority to reverse his stance on this without approval by the Dean and/or the Provost. Dean Mazey did not specifically address whether Dr. Finklea's view of WE_LEARN as research was either persuasive or correct.

20. Grievant's promotion file then went to Gerald E. Lang, Provost and Vice President for Academic Affairs and Research, for the final determination on Grievant's request.

21. Grievant's promotion file was reviewed by the University Promotion and Tenure Advisory Panel for procedural errors. This Panel concluded that "all published procedures and criteria were followed in making the recommendations regarding the requested promotion to the rank of Professor."

22. Cecil B. Wilson, Associate Provost for Academic Personnel, reviewed Grievant's promotion file, and met with Provost Lang. Associate Provost Wilson drafted Provost Lang's decision denying the request for promotion. The decision states that Provost Lang determined that there was "insufficient evidence of meeting the institutional expectations in research to support a decision that you be promoted to Professor." Grievant's Level Three Exhibit Number 14. Provost Lang declined to consider Grievant's development of WE_LEARN in the category of research, and noted that Grievant did not have a "continuing program of studies," as evidenced by the fact that Grievant had few publications over the last six years, and had not applied for or received any grant funding for many years.

23. Neither Associate Provost Wilson nor Provost Lang considered Grievant's entire publication record or grant record since his last promotion in 1989. They took into consideration only his work over the last six years, concluding that one publication in 2000, and two publications in 2006, with no publications for a period of five years, did not constitute a continuing program of studies. Provost Lang's decision does not address Grievant's extensive work over a period of many years developing, researching, and

refining WE_LEARN, nor does it address the number of invited lectures or other presentations Grievant has given.

24. The University Guidelines do not state that *only* the faculty member's work over the last six years will be taken into consideration in the promotion review. The view that an emphasis would be placed on the last six years originated with Associate Provost Wilson, as a result of some issues that had developed. This view has not been reduced to writing, and the University Guidelines have not been amended to reflect this position or to explain the apparent conflict between this view, and the written guideline that the entire record will be considered.

25. Since his last promotion to associate professor in 1989, Grievant published 32 articles in refereed journals in the areas of physical organic chemistry and related fields, microscale technology, and chemical education, and gave 21 invited lectures. Over the last six years, Grievant has published 3 articles in refereed journals, given 7 invited lectures, nationally and internationally, and made 20 presentations in professional forums.

26. Since his last promotion, Grievant received grant funding of $25,000 from WVU/DOE-METC Cooperative Agreement, $25,000 from Ace Glass, Inc., $12,700 from Blue Ocean Associates, and internal grants of $22,605. The last of the external grants was awarded in 1993. In addition, Grievant received a grant of $209,542 from the Consortium for Fossil Fuel Liquefaction Science from April 1988 to April 1993, which was apparently awarded before his last promotion.

27. Grievant received a rating of good on each of his annual evaluations since 2000 from both the Department Committee and the Department Chair, except that in 2002,

he received a rating of satisfactory in research, and in 2005, the Department Committee rated his research as excellent.

28. Grievant set up a company to market and sell WE_LEARN, Horizon Learning Solutions, LLC. In 2004, that company entered into an Exclusive License Agreement with the WVU Research Corporation, a corporation acting for and in behalf of WVU. The Research Corporation receives a royalty from the sale of WE_LEARN by Horizon Learning Solutions, LLC. WE_LEARN has brought in revenues to the Research Corporation, and will continue to do so. Revenues from the sale of WE_LEARN have been used to pay Grievant's expenses when he has made presentations off-campus.

29. WE_LEARN bears similarities to a textbook, or a supplementary textbook for a course, but is unique.

30. In developing WE_LEARN, Grievant had to conduct research, "using recently developed cheminformatics methods, to apply these cheminformatics methods to the area of chemical education to allow the computer to properly evaluate student-drawn structures for correctness. This research was successful in our system, resulting in several contributed presentations and an invited presentation." Grievant's Level Three Exhibit Number 1.

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).

"The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." *Cohen v. W. Va. Univ.,* Docket No. BOR1-247-2 (July 7, 1987). *See Siu v. Johnson,* 748 F. 2d 238 (4th Cir. 1984)(Tenure review is "a subjective, evaluative decisional process by academic professionals." The standard of review is whether the decision is "manifestly arbitrary and capricious.") *See also Carpenter v. Bd. of Trustees/W. Va. Univ.*, Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." *Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995); *Gardener v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, the review of an institution of higher learning promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." *Harrison, supra*; *Nelson v. Bd. of Trustees/W. Va. Univ*., Docket No. 99-BOT-514 (June 22, 2001); *Baroni v. Bd. of Directors/Fairmont State College,* Docket No. 92-BOD-271 (Feb. 11, 1993).

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).

Further, "[t]he undersigned 'is limited to considering the record before the decision-maker at the time of the decision. An applicant is responsible for informing the decision-maker of [his] qualifications for promotion. If [he] does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a promotion grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it.' *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citations omitted). *See also, Castiglia v. Bd. of Trustees*, Docket No. 97-BOT-360 (May 27, 1998)." *Brozik v. Bd. of Trustees,* Docket No. 98-BOT-142 (Nov. 30, 1998).

Grievant argued that WE_LEARN fell squarely within the language used in WVU's promotion and tenure guidelines to define research, and asserted that his colleagues did not give his work the credit it was due because of their bias against the field of chemical

education (as opposed to traditional chemical research). While Grievant makes an excellent argument, this is a matter about which there were differing views at WVU. Further, Grievant's 2001 evaluation specifically addressed the issue of whether WE_LEARN should be considered in the teaching category or the research category, and concluded, in writing, that it "is considered part of the teaching mission. The research component must be a hypothesis-driven evaluation of the WE_LEARN software as presented at professional meetings and at other institutions, as published in peer-reviewed journals, and as funded by grants." Accordingly, it cannot be said that the decision that Grievant's substantial efforts to develop the WE_LEARN software program would not be considered research was arbitrary and capricious. Having said this, it is important to point out that the annual evaluation did identify a research component to WE_LEARN, and that Grievant has been pursuing this research component. It does not appear, however, that this was given much consideration by Provost Lang.

Grievant also argued that WVU did not follow the established procedures for evaluating his promotion application. Grievant has demonstrated that Provost Lang did not follow the procedure established at WVU in his evaluation of Grievant's record. WVU has detailed written guidelines to be followed in determining whether a faculty member should be promoted. In addition, the Eberly College of Arts and Sciences has written guidelines, and the Department of Chemistry has written guidelines. None of these guidelines state that only the most recent six years of work will be considered in the promotion decision. The University Guidelines clearly state that "[p]romotions after the first promotion *will* be based on *achievement since the previous promotion*." (Emphasis added.) "'[P]romotion is reviewed from the last promotion. Further, promotion is a continuing process, and the

standards for advancement to the higher levels are more stringent [than the standards for tenure].' *Baker, supra.*" *Brozik, supra.* It is well established that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't of Transp., Div. of Highways*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Parsons v. Dep't of Transp*., Docket No. 97-DOH-289 (Oct. 30, 1997). In this case, WVU has disregarded its extensive written promotion procedures, which state that the faculty member's record since his last promotion will be considered, in favor of the unwritten, apparently recently developed rule, that only the last six years will be considered. While it is certainly reasonable to look at the faculty member's recent progression in the evaluation of whether he has demonstrated "evidence of a continuing program of studies, investigations, or creative works," as Provost Lang did, this does not mean that the remainder of his record can be totally disregarded, as was the case here.

Associate Provost Wilson also testified about the need to bring in external competitive grant funding, which is noted in Provost Lang's decision, and stated that this is a requirement in the Department of Chemistry, or at least that greater value is placed on grant funding. The undersigned was unable to find such a requirement *anywhere* in any of the applicable guidelines. The Department of Chemistry Guidelines state:

> Other evidence of an active research *may include*, but is not limited to: *actively pursuing, and ultimately obtaining, adequate financial support to carry out research*; developing research projects for students and postdocs that result in publications; being invited to give external talks about one's current research; presenting research results in scientific conferences; receiving professional recognition for recent scientific accomplishments; and receiving citations in the scientific literature.

(Emphasis added.) This does not say that a faculty member must obtain grant funding at all, let alone competitive grant funding. It says that obtaining adequate financial support to carry out research, as well as things such as being invited to give external talks about one's research, *which has occurred with Grievant*, is considered evidence of an active research program. In fact, Grievant has brought in financial support through the sale of WE_LEARN. While competitive grant funding may well be one indication of whether a research program is making a significant contribution, the lack of such funding does not prove the opposite. Grievant was not required to apply for or obtain competitive grants.

Respondent also placed too much emphasis on the number of publications. While the number of publications in refereed journals may well be an indicator of the success of a research program, the applicable University Guidelines clearly state that "[q]uality is considered *more important* than mere quantity. Significant evidence of scholarly merit may be either a *single work of considerable importance or a series of studies constituting a program of worthwhile research.*" (Emphasis added.) Since the initial development of WE_LEARN, which even Associate Provost Wilson acknowledged was a significant product in teaching, Grievant has been engaged in the evaluation of WE_LEARN, and has given a number of invited lectures and other presentations on WE_LEARN, nationally and internationally. The record does not reflect that Provost Lang considered the quality of this research program, or the invited lectures, which, according to the Chemistry Department Guidelines are also evidence of an active research program. To the contrary, Provost Lang's letter states, "you have not met the quantitative expectations in publication and grant acquisition *set by your own department.*" (Emphasis added.) It should be pointed out that the record does not reflect that the Chemistry Department has set any such

"quantitative expectations." Further, Chair Finklea pointed out that the external reviewers, who were familiar with the area of chemical education, had noted that the typical publication rate in chemical education was one publication every other year, because the process of acquiring data was lengthy. This was not a consideration by Provost Lang.

Finally, Provost Lang did not compare Grievant's record to that of other individual faculty members recently promoted in the Chemistry Department. He compared Grievant's publication and recent grant record to the *average* number of publications and grants for all faculty recently promoted in the Chemistry Department. This is not a valid comparison. As Chair Finklea pointed out, one Chemistry Department faculty member who was promoted had an abnormally high number of publications, which skewed the average. Even if this were not the case, obviously, some faculty members who have been promoted would have had publication and grant numbers below the average. The question is whether Grievant's record compared to that of individual faculty members recently promoted, which is the comparison Chair Finklea made. Respondent did not dispute Chair Finklea's conclusion that Grievant's publication and grant record was comparable to that of two other faculty members who were recently promoted.

The undersigned concludes that the Provost's review of Grievant's request for promotion did not include a proper consideration of all of the factors set forth in the University Guidelines, and was therefore, arbitrary and capricious.

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. The Grievance Board's review in cases involving the denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process." *Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995).

3. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." *Cohen v. W. Va. Univ.*, Docket No. BOR1-247-2 (July 7, 1987). *See Siu v. Johnson*, 748 Fed. 2d 238 (4th Cir. 1984). *See also Carpenter v. Bd. of Trustees/W. Va. Univ.*, Docket No. 93-BOD-220 (Mar. 18, 1994).

4. 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. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “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].” *Trimboli v. Dep't of*

Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

5. Grievant did not demonstrate that the decision to consider Grievant's extensive work on the development of the WE_LEARN software program in the teaching category, rather than research, was arbitrary and capricious.

6. Grievant demonstrated that WVU did not follow its written guidelines on promotion when Provost Lang did not consider Grievant's entire record since his last promotion; improperly compared Grievant's record to the average production of faculty recently promoted in Grievant's department, rather than to that of individual faculty members; failed to consider financial support obtained by Grievant other than competitive grant funding; and failed to give consideration to the quality of Grievant's work.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART.** Respondent is **ORDERED** to reevaluate Grievant's application for promotion to Professor, and to consider his entire record since his last promotion, and all other factors set forth in the applicable written promotion and tenure guidelines, in making the determination as to whether Grievant has demonstrated significant contributions in research.

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).

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BRENDA L. GOULD
Administrative Law Judge

Date: May 13, 2009