WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VIJAY SHAH,

Grievant,

v. **Docket No. 2008-1211-WVUP**

WEST VIRGINIA UNIVERSITY-PARKERSBURG,

Respondent.

DECISION

Professor Vijah Shah ("Grievant") grieves the decision of West Virginia University-Parkersburg ("WVU-P" or "Respondent") which refused to change Grievant's "teaching and service to students" evaluation from "good" to "excellent." Grievant's February 20, 2008, statement of grievance provides that:

> Grievant received a rating of "good" in the area of *teaching and service to students* on his annual evaluation from his department Chair. Said annual evaluation rating was discriminatory, arbitrary and capricious, retaliatory, and/or clearly wrong.

(Emphasis in original). As relief "Grievant seeks to have the annual evaluation changed [;] ... for his amended evaluation ... [to] be used in the calculation of any performance-based salary increase; to be made whole; and any other relief that the hearing examiner deems appropriate." This Grievance was denied at Level One. Level Two mediation was unsuccessful. A Level Three evidentiary hearing was held on October 6, 2008, before the undersigned Administrative Law Judge ("ALJ"). Grievant appeared in-person and through his representative Christine Barr. The Respondent appeared by and through its counsel, James "Jake" Wegman, Assistant Attorney General.

This matter became mature for decision on or about November 3, 2008, the date proposed findings of fact and conclusions of law were due. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant, a professor, maintains Respondent acted in an arbitrary and capricious manner when it evaluated Grievant as "good" instead of "excellent" in the area of "teaching and service to students" on the Grievant's 2007 annual evaluation. Additionally, Grievant asserts that the Respondent acted in a discriminatory and retaliatory manner.

Respondent argues that its evaluation was reasonable and based upon the information presented by the Grievant.

The arbitrary and capricious standard is deferential in nature. The Grievant submitted very few student evaluations and the evaluations he chose to submit contained negative comments. There is no indication that the Respondent's evaluation was unreasonable. Nor is there indication that the Respondent acted in a discriminatory or retaliatory manner.

For the reasons set forth below, this grievance is denied.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant, Dr. Vijay Shah, is a tenured Professor in the Division of Business and Economics at WVU-P. Grievant has been employed by WVU-P for about 16 years, and was promoted to Professor in 2001.

2. WVU-P faculty are subject to annual evaluations and are evaluated in three

areas: (1) teaching and service to students, (2) professional growth and development and (3) service to the institution and community. These areas are evaluated using the descriptors of: “excellent,” “good,” “satisfactory” or “unsatisfactory.”

3. Grievant’s annual evaluation process is conducted as follows: (1) Division Committee (peer review) reviews/evaluates, (2) Division Chair reviews/evaluates and (3) Dean of Academic Affairs reviews/evaluates and forwards her evaluation *and* performance-based salary increase recommendation to the Campus President.

4. The purpose of the Grievant’s 2007 annual evaluation was to review his past performance and develop future goals and objectives.

5. The annual evaluation formed the basis for any annual performance-based salary increase. The descriptors used in the annual evaluation are transferred, presumably using a formula, into performance salary-based points. Annual performance-based salary increases are calculated using a point-scale system with eighteen (18) being the maximum number of points possible. These performance-based points translates into monomial salary increases for the evaluated faculty member.[1]

6. A faculty member is responsible for assuring completion of particular items in his faculty evaluation file and updating this file by the appropriate calendar deadline at which time the file is closed for the review period. Grievant timely updated his file for submission to the annual review process.

7. Grievant taught fifteen classes during the spring, summer and fall semesters of

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[1] From the record, it is unclear how the annual evaluation scale is translated into the performance-based point system. Likewise, it is unclear how the performance-based points are translated into dollar amounts.

the relevant academic year. Faculty were required to submit student evaluations for two (2) classes and Grievant submitted student evaluations for three (3) classes.

8. On January 23, 2008, the Division Committee rated Grievant's 2007 annual performance as "excellent" in "teaching and service to students," "excellent" in "professional growth and development" and "excellent" in "service to the institution and community."

9. On January 30, 2008, Jeff Holland, Chair of the Business and Economics Division at WVU-P, rated Grievant's 2007 annual performance as "good" in "teaching and service to students," "excellent" in "professional growth and development" and "excellent" in "service to the institution and community."

10. Chairman Holland's review of Grievant provided, under the area of "teaching and service to students," that "[r]eview of your annual file illustrated an active teaching and service during the academic year 2007. Your utilization of e-campus and other innovative delivery styles provides evidence of your determination to continually improve. Your student evaluations contained several negative comments and only 5 were provided for the fall 2007 semester. More student feedback is needed for future semesters. I recommend that you clarify your learning objectives so that students can better anticipate expectations and be assessed accordingly. Your contribution in this category of faculty annual review has been good."

11. Chairman Holland rated the Grievant's performance in "teaching and service to students" as "good" because Grievant submitted too few student evaluations for the courses the Grievant chose to submit. Moreover, the student evaluations submitted by the Grievant contained several negative comments which further explains why Chairman Holland "rated [Grievant] as meritorious [good] and not exceptional [excellent]" in the area

of teaching and service to students. *See* Chairman Holland Testimony, Level Three, 15:15-18:54.

12. Rhonda Richards, Executive Dean for Academic Affairs, rated Grievant as "good" in the area of "teaching and service to students," "excellent" in the area of "professional growth and development" and "excellent" in the area of "service to the institution and community."[2]

13. Fourteen (14) students in the Grievant's Spring 2007 selected class responded to the Grievant's student evaluation. Nine (9) students in the Grievant's Summer 2007 selected class responded to Grievant's student evaluation. The Grievant's Fall 2007 selected class evaluations had only five (5) evaluations of the approximately 125 students enrolled in Grievant's classes at the time the evaluations were completed.

14. Grievant had the following student comments on the student evaluations he chose to submit:

- "slow down, everything moved way too fast in this class,"
- "less topics to cover, everything was so fast,"
- "focus more energy on the tests,"
- "all kinds of problems for homework, then the tests were comprehensive,"
- "very fast,"
- "slow down,"
- " more time spent on examples,"
- "slow down when giving examples,"
- "spend more time going over examples,"
- "slow down on examples, hard to keep up some times,"
- "more questions on the test,"
- "little more review for the test,"
- "Awesome teacher,"

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[2] The Grievant's *Proposed Findings of Fact and Conclusions of Law* focus solely upon Chairman Holland's appraisal and ignores Dean Richards' appraisal. Dean Richards' rationale in appraising Grievant's "teaching and service to students" performance as "good" parallels Chairman Hollands.

- "This class needs to be a longer course than 1:15 minutes. It seemed like there was always a rush & not enough time to get a complete understanding;"
- "All the in class work, quizzes, group work, posters, extra credit all reinforced the material and made it easier to comprehend;"
- "This was an incredibly challenging course. A lot of people have problems and struggle with it, but if you do what you are supposed to it is possible to succeed. Vijay Shah was incredibly adept at explaining so we could understand;"
- "the extra credit given really helped me to understand the material better, Instructor was always willing to help in any possible way and explain a problem you had more in detail to help you completely understand;"
- "I liked the structure of Inclass [*sic*] Example → Students do prob [problem] in class → Quiz → Test. It made it until I really understood the material;"
- "Dr. Shah kept the atmosphere light and gave many clear examples;" "easy to work with, very understanding;"
- "It's over!;"
- "This instructor was very nice and understanding about problems or questions that we had during the semester;"
- "The instructor knew how to teach the material very well. If he could see that some people were not understanding, he would spend more time on the subject;" and
- "I liked extra credit opportunities."[3]

15. Overall, Grievant received seventeen (17) points out of a possible eighteen (18) for his 2007 performance-based salary increase.

Discussion

Evaluations are not disciplinary actions, and as such, Grievant has the burden of proving his case by a preponderance of the evidence. *Rutherford v. WVU-P*, Docket No. 05-HE-229 (Oct. 31, 2005)(citations omitted). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is

[3] It should be recognized that Questions 15 and 16 of the student evaluations asked students open-ended questions concerning positive and negative aspects of the Grievant's performance. Upon review of the student evaluations submitted by the Grievant, the students' *overall* appraisal of the Grievant was not uniform and several students rated the Grievant as "good" instead of "very good." Moreover, some students appraised the Grievant's performance as "poor."

more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The decision challenged by the Grievant concerns an evaluation in a particular area of review. This evaluation was used when determining the Grievant's performance-based salary increase for the particular year in question. When ascertaining the standard of review, this ALJ looks to past cases concerning evaluations and promotions. Considerable discretion is afforded 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). This deference is likewise given for faculty evaluations. 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/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997)(citations omitted). "Deference is granted to the subjective determination made by the official[s] administering the process." *Gardener v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994). The Grievance Board's review of evaluations is narrow. It 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." *Harrison v. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). Hence, the arbitrary and capricious standard applies.

"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." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citation omitted). "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)).

This ALJ is being asked to determine the narrow evaluation distinctions between "good" and "excellent." Director Holland's evaluation of "good" was not arbitrary and capricious because it was reasonable in light of the few student evaluations submitted and the negative comments on the submitted evaluations. In this matter, the Grievant avers that Chairman Holland's performance appraisal of "good" in the area of "teaching and service to students" is arbitrary and capricious. He maintains that Chairman Holland should have evaluated the Grievant's performance as "excellent."

It is the Grievant's responsibility to supply necessary and sufficient information for an evaluator to find his "teaching and service to students" to be "excellent." *See Rutherford v. WVU-P*, Docket No. 05-HE-229 (Oct. 31, 2005). The Grievant chose to provide a limited number of student evaluations. Submission of few student evaluations has a negative effect upon the validity and reliability of the evaluations submitted. Moreover, for the largest class submitted by the Grievant (14 evaluations), the majority of the students rated the Grievant as "good" *or less* as opposed to "very good." *See* Grievant's Level Three, Exhibit 4.

This tribunal has previously recognized that some negative comments on student

evaluations will not result in denying a professor tenure because his teaching and advising was not evaluated as "excellent." *Rankin v. Board of Trustees/Marshall Univ.*, Docket No. 99-BOT-421 (June 13, 2000). Unlike the Grievant, Professor Rankin had many student evaluations in his file. Indeed, in the *Rankin* grievance, the professor had twenty-five students include written comments for one class alone. In this case, the Grievant placed only twenty-eight student evaluations in his file for the 2007 evaluation.

The culmination of few evaluations and negative comments exposit the reasonableness of Director Holland's evaluation. In this grievance, the scope of review is narrow and it is not appropriate for this ALJ to substitute his judgment with Chairman Holland's professional judgment. *See Hattman v. Bd. of Directors*/West Liberty State College, Docket No. 98-BOD-439 (Apr. 30, 1999).[4] It cannot be said the performance appraisal is arbitrary and capricious.

The Grievant has advanced two ancillary arguments related to Chairman Holland's performance evaluation.[5] First, he claims that he has been discriminated against because Chairman Holland rated his "teaching and service to students" as "good." WEST VIRGINIA CODE § 6C-2-2(d) defines discrimination as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." This statute parallels the old statute concerning discrimination, WEST VIRGINIA CODE § 18-29-2(m)(2006). Under the old

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[4] For a general discussion of faculty evaluation methods *see* 2-6 EDUCATION LAW § 6.07 [b](2008).

[5] Similar to the evaluation analysis, the Grievant bears the burden of proving these claims by a preponderance of the evidence. See *Leichliter*, *supra*.

statute, to establish discrimination or favoritism, a grievant must prove:

> (a) that he has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and
> (c) that the difference in treatment was not agreed to in writing by the Grievant.

See Syl. Pt. 5, *Frymier v. Higher Educ. Policy Comm'n*, 221 W. Va. 306, 655 S.E.2d 52 (2007)(*per curiam*)(citation omitted).[6] These same elements are required for a finding of discrimination under WEST VIRGINIA CODE § 6C-2-2(d).

Secondly, the Grievant avers that Chairman Holland's appraisal of Grievant's performance as "good" in one of three areas was in retaliation for Grievant's past conduct. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant *in the grievance procedure* either for an alleged injury itself or any lawful attempt to redress it." (Emphasis added). To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity;(i.e. filing a grievance)
> (2) that he was subsequently treated in an adverse manner by WVU-P or an agent;
> (3) that the WVU-P official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

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[6] "[A] 'discrimination' claim under W.VA. CODE § 18-29-2(m)[W.VA. CODE § 6C-2-2(d)], only need establish that the adverse employment decision was neither job related nor agreed to by the employees. Section 2(m) imposes no requirement for proving that the 'discrimination' was caused by an illicit motive or was the result of discriminatory policy having a disparate impact, as would be the case under the Human Rights Act." *Bd. of Educ. v. White*, 216 W.Va. 242, 247, 606 S.E.2d 814, 819 (2004)(citation omitted).

> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the Grievant receiving a score of "good."

See Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997), *citing Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

The Grievant points to two precise events that he claims evince discriminatory and retaliatory conduct.

Grievant previously contracted to work in the Student Advising Center. In 2005, when Jeff Holland became the Director of the Student Advising Center, he did not renew Grievant's contract to work in the Advising Center. Grievant complained to the Dean of Students, who is over the Advising Center, and to the Social Justice departments at both WVU and WVU-P. At the Level Three hearing, Chairman Holland denied knowing that Grievant complained to Social Justice, but admitted that he was aware Grievant had complained of his non-renewal to the Dean.

Grievant testified that in August 2007, Chairman Holland discussed the "Summer 2007 GBUS 101 ADC class" and told Grievant that he "needed to improve his students' grades." Grievant contacted the Social Justice department and filed a complaint because he felt he was being singled-out and this incident, in addition to the Student Advising Center issue, seemed to indicate a pattern.

Chairman Holland testified that he called the meeting with Grievant "… to speak about student success in one of [Grievant's] classes." He stated that "two students had ... complained that the entire class was failing." Chairman Holland asked Grievant to "work

on an improvement plan, something that we could implement in-class that would make the students more successful."[7]

When viewing the incidents in isolation or in their totality, there is no indication that the Grievant was discriminated or retaliated against. "[T]he mere fact that a grievant disagrees with his evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator." *Hattman v. Bd. of Directors/West Liberty State College*, Docket No. 98-BOD-439 (April 30, 1999), *citing Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988). As to the discrimination claim, there is no evidence to establish the Grievant was treated differently than any other faculty member. He turned in very few student evaluations, and the evaluations he did turn in had several negative comments. He received a meritorious "good" ranking. As to the retaliation claim, there is no evidence to support a finding of retaliatory conduct. There is no indication that the Grievant filed a grievance prior to the alleged retaliatory conduct, which is required for a claim of retaliation under WEST VIRGINIA CODE § 6C-2-2(o). It is explicitly clear that Chairman Holland had a legitimate and reasonable rationale for rating Grievant "good" instead of "excellent."

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*,

[7] Dean Richards testified that Grievant was in the bottom 25th percentile of Business and Economic professors in terms of both student grades and student drop rates.

Docket No. 92-HHR-486 (May 17, 1993). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id.*

2. The standard for assessing an evaluation is the arbitrary and capacious standard. *See Lewis Rutherford v. WVU-P*, Docket No. 05-HE-229 (Oct. 31, 2005). "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." *Bradford v. Dep't of Transp.*, Docket No. 2008-0792-DOT (August 15, 2008), *citing Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985).

3. Grievant failed to prove by a preponderance of the evidence that the rating of "good" on his 2007 annual evaluation was clearly wrong or arbitrary and capricious.

4. Grievant failed to prove by a preponderance of the evidence that the Respondent discriminated or retaliated against him.

Accordingly, this grievance is hereby **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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 6, 2009

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Mark Barney
Administrative Law Judge