WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE WATSON, ET AL.,
Grievant,

v. **Docket No. 2008-1789-CONS**

MARSHALL UNIVERSITY,
Respondent.

D E C I S I O N

The Grievants,[1] filed this grievance against Marshall University, Respondent on or about May 30, 2008, protesting the denial of salary increases; alleging that the failure to grant such salary increases "was arbitrary and capricious, discriminatory, and in violation of laws, policies, and/or past practice and procedures." This grievance, while a wholly separate and distinct grievance, stems from the events, agreement and ultimate denial of salary increases to various faculty that transpired subsequent to a grievance filed August 3, 2007.[2] Pursuant to the May 30, 2008 grievance form, the Grievants seek their requested salary increases to be awarded, with any and all applicable back pay, to be made whole, and any other relief deemed appropriate.

In accordance with West Virginia Code 6C-2-1 et seq., a level one hearing was held on August 27, 2008, and the grievance was denied at that level on September 5, 2008.

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[1]The seven Grievants of the instant consolidated grievance are Dr. George Watson, Dr. Melinda Backus, Dr. Paula Lucas, Dr. Ruth Ann Murphy, Dr. James Sottile, Dr. Steven Banks and Dr. Thelma Isaacs.

[2]Previously, Grievants had filed a grievance on August 3, 2007, on the basis that Marshall University was in violation of the *Greenbook*, Marshall University's Faculty Handbook, in that Marshall hired a new faculty member at a rank/salary above that which a newcomer would normally be entitled without the department chairperson's recommendation.

Grievants appealed to level two on September 9, 2008, and a mediation session was held on November 14, 2008. An Order of Unsuccessful Mediation was entered on November 17, 2008, and Grievants appealed to level three. A level three hearing was held on April 2, 2009, in the Grievance Board's Charleston office. Grievants were represented by Christine Barr, Staff Representative AFT-West Virginia/AFL-CIO, and Respondent was represented by counsel, Jendonnae L. Houdyschell, Senior Assistant Attorney General. This case became mature for decision on May 1, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.[3]

Procedural History

Marshall University policy allows individuals to be hired at salary levels above that of existing employees. However, Marshall University's Faculty Handbook (usually referenced to as the *Greenbook*) states that this action is to be taken in consultation with the other members of the department (see Section 2.2 and 2.3). A new hire was employed in the summer of 2007 to fill a vacant position starting in the Fall term, 2007. Her salary was set at a level above the salary of existing faculty members in the department. Grievants contend that they were not consulted. Further, the *Greenbook* states that if an individual is hired at a salary level above other presently employed staff the latter will be

[3] Notwithstanding the proposals submitted by the parties, during the litigation of this grievance, there were in excess of 31 exhibits entered. Most exhibits consisted of multiple documents and were several pages long. The exhibits constituted a two inch thick notebook.

considered for comparable compensation. In 2007, a grievance was initiated.[4] The parties reached a settlement.[5] As a result, the parties agreed that the credentials of the Grievants would be reviewed by the appropriate institutional authorities for consideration of salary adjustment. This was accomplished, resulting in a finding by the Faculty Personnel Committee that the Grievants should receive a salary adjustment. This recommendation was forwarded to the University President for action, and was subsequently denied by President Kopp. Thereafter, on May 30, 2008, the instant grievance was initiated.

Synopsis

Grievants are employees of Marshall University as faculty members in the School of Education. After entering into a settlement agreement with Respondent regarding an alleged violation of *Greenbook* policy, prefaced on a 2007 hiring, the Grievants commenced a process which they, in good faith, believed would result in an increase in their individual salaries. Along with their request for salary adjustment, the Grievants submitted their individual curriculum vitae for evaluation and comparison with the new hire in terms of qualifications. The Faculty Personnel Committee unanimously supported the requests of their fellow faculty members for salary increases. However, the President of Marshall University, who makes the ultimate decision as to whether salary increases are granted, determined that he was not able to concur with the committee's decision and denied the Grievants a raise.

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[4] *George Watson, et al. v. Marshall University*, filed on August 3, 2007.

[5]On or about September 13, 2007, the grievance filed on August 3, 2007, was resolved at the Level I hearing, in that it was agreed, among other things, "that the policy as stated in the *Greenbook*, p.30, Section 2.3 would be followed. . . [and] that the members of the department would be compared to the new person hired in terms of qualifications."

Grievants contend that the denial of their salary increases is arbitrary and capricious, discriminatory, and in violation of applicable procedures. Respondent maintains that Grievants are not similarly situated to the new hire, and there is no violation of any policy, and/or past practice and procedure. It is established that the evaluation and comparison process as utilized by Respondent was faulty. The totality and severity of the flaws in the review process utilized by both the Faculty Personnel Committee and President Kopp rendered the process arbitrary and capricious. As relief, Respondent is ordered to conduct an equitable evaluation to seriously consider the amount of comparable compensation the instant Grievants may or may not be entitled. This grievance is granted in part, and denied in part.

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

Findings of Fact

1. Grievants George Watson, Steve Banks, Melinda Backus, Thelma Isaacs, Paula Lucas, Ruth Ann Murphy, and James Sottile are employed as faculty in the School of Education (SOE) in the College of Education and Human Services (COEHS) at Marshall University.

2. Marshall University's Faculty Handbook generally referenced as the "*Greenbook*" delineates, among other crucial information, the guidelines, policy, and procedure for the employment of new faculty. When new faculty members are brought in at salary levels above current department members, policy provides that existing members of the department be considered for comparable salary. (Section 6.3, Gr. Exh. 3).

3. Grievants[6] were all included in a previous grievance which was styled *George Watson, et al. v. Marshall University,* and filed on August 3, 2007, after Respondent hired a new faculty member, Tina Cartwright, as an Assistant Professor in the SOE. (Watson 2007 Grievance).

4. Dr. Tina Cartwright was hired on or about June 12, 2007 at a salary of $50,000.

5. Generally, the basis of the Watson 2007 Grievance alleged that Marshall University violated the *Greenbook* by hiring a new faculty member at a rank/salary above that to which a newcomer would be normally entitled without the department chairperson's recommendation. (Gr. Exh. 24).

6. The *Greenbook*, Section 2 and Section 6,[7] "Determining Starting Salaries and Rank of Incoming Members of the Faculty," in pertinent part, states as follows:

> Should new faculty members be employed at salaries higher than those being paid to current members of the staff who hold positions with *comparable responsibilities and who have equivalent training, experience and competence*, the latter will be considered for comparable compensation. The competence is to be determined by the chairperson of the department in consultation with other members of the department with equal or higher rank. (Emphasis added).

7. Grievants and Marshall University resolved the Watson 2007 grievance at a Level One grievance conference on September 13, 2007. It was agreed, among other things, "that the policy as stated in the *Greenbook*, Section 2.3 would be followed. . . [and]

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[6]Grievants on the August 3, 2007, grievance were Dr. George Watson, Dr. Melinda Backus, Dr. Thelma Isaacs, Dr. Paula Lucas, Dr. Ruth Ann Murphy and Dr. James Sottile.

[7] It is undisputed that the "Determining Starting Salaries and Rank of Incoming Members of the Faculty" portions of Greenbook Sections 2 and 6 are identical.

that the members of the department would be compared to the new person hired in terms of qualifications." (Gr. Exh. 25).

8. Respondent has a process for addressing salary inequities. Salary inequities are addressed through a process that involves review by a Faculty Senate standing committee. (Gr. Exh. 25).

9. On or about September 25-28, 2007, the Grievants and Dr. Steven Banks, submitted their requests for salary increases to their chair, Dr. Carl Johnson, as per the resolution of the aforementioned grievance. (Gr. Exhs. 7, 16, 19, 20, 21, 22, & 23).

10. Dr. Carl Johnson, Chair, School of Education, responded to all these requests in a like manner, in that he stated he could not grant the requested salary increase, but that he supported the same. (Gr. Exh. 8).

11. Similarly, Dr. Rosalyn Templeton, Executive Dean, College of Education and Health Services, responded to all the requests that she could not grant the request, but that she would forward the request to Dr. Sarah Denman, Provost and Senior Vice President of Academic Affairs to support a review for salary compensation. (Gr. Exh. 9).

12. Dr. Denman, in accordance with the grievance resolution and policy, contacted Dr. Camilla Brammer, Faculty Personnel Committee Chair.

13. The Faculty Personnel Committee (FPC) consisted of seven or eight faculty members, one from each college.[8] Dr. Camilla Brammer was the Chair of the Committee, but removed herself from the actual review of the Grievants' salary request, as per procedure, so the remaining Committee members conducted the review.

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[8] The following colleges are at Marshall University: Lewis College of Business, College of Education and Human Services, College of Fine Arts, College of Information Technology and Engineers, College of Liberal Arts, College of Health Professions, College of Science, and the Graduate College.

14. Dr. Brammer placed Dr. Charles "Chuck" G. Bailey in charge of the sub-committee for the salary review. Dr. Brammer was not part of the review of the materials nor part of the Committee's actual deliberations.

15. The Faculty Personnel Committee did not have formal guidelines as to how the review should be conducted. Specifically, the FPC did not review Dr. Cartwright's contract and assumed it was like the standard contract signed by other faculty.

16. The FPC members consulted the job opening advertisement for the position in which Dr. Cartwright was hired, and extensively reviewed the materials, including Grievants' requests for salary review, Grievants' vitae, and Dr. Cartwright's vita to compare qualifications.

17. Among other information, the FPC in an April 18, 2008 memorandum provided that:

> After extensive review of all of the material supplied to the Faculty Personnel Committee, the committee members could not find a significant difference in the skill set provided to the College of Education and Human Services by the hiring of Dr. Tina Cartwright and the skill sets of the complainants.

18. The Faculty Personnel Committee unanimously supported the requests of Grievants for salary increases. In the memorandum dated April 18, 2008, to Dr. Sarah Denman,[9] Provost and Senior Vice President for Academic Affairs, from Dr. Cam Brammer, Chair, Faculty Personnel Committee, and Dr. Charles G. Bailey, Member, Faculty Personnel Committee, it was conveyed that the FPC voted unanimously to support

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[9] Dr. Sarah Denman was the Provost at the time Grievants submitted their requests for salary increases, but was not employed by Respondent at the time of this grievance filing.

the requests for salary increases for the seven complainants – Dr. Melinda Backus, Dr. Steven Banks, Dr. Thelma Isaacs, Dr. Paula Lucas, Dr. Ruth Ann Murphy, Dr. James Sottile, and Dr. George Watson. (Gr. Exh. 5).

19. The FPC recommended that each department member have his/her salary increased in amounts ranging from $2800 to $7000 per year.

20. This recommendation was forwarded to the President of Marshall University for action.

21. Ultimately, it is the decision of the President of Marshall University whether salary increases are granted.

22. By letter dated May 12, 2008, Dr. Stephen J. Kopp, President of Marshall University, provided that he was not able to concur with the Committee's decision and denied the raises. (Gr. Exh. 6).

23. Pursuant to the May 12, 2008 letter, President Kopp's stated justification for his decision provided that the aggrieved faculty did not meet the required qualifications contained in the position description. Moreover, President Kopp indicated that the qualifications included the "ability to teach science undergraduate and graduate courses in Science Education and other related courses as needed," and that this criterion was the most important factor related to the hiring and salary determination of Dr. Cartwright. (Gr. Exh. 6)

24. The March 16, 2007 Recruiting Bulletin for the position in which Dr. Tina Cartwright was hired, Search No. 11776 Assistant Professor, School of Education, listed the following qualifications:

a. Doctorate required, ABD considered;
b. Three years of successful US public school teaching experience in science education highly desirable;
c. Evidence of excellence in teaching should be shown; and
d. Scholarship, and commitment to research and service are also required;
e. Evidence should be given of excellence in the ability to collaborate with K-12 public school science programs;
f. Ability to conduct scholarly activities; and
g. Experience in publishing or presenting [refereed] research for program needs should be shown. (Gr. Exh. 4)

25. The March 16, 2007 Recruiting Bulletin for Search No. 11776 listed "teach science undergraduate and graduate courses in Science Education and other related courses as needed" as a duty. Neither, the Recruiting Bulletin nor the position description, listed said duty as a qualification for the position.

26. Nowhere in the applicable *Greenbook* policy are the terms "qualifications" or "responsibilities" used or defined. *See Greenbook* §§ 2 & 6, *Determining Starting Salaries and Rank of Incoming Members of the Faculty*.[10]

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *Holly v. Logan County Bd. of*

[10] There is a difference between "qualifications" and "duties" (responsibilities). Generally speaking, a "qualification" is what entitles you to have or earn or be bestowed a position (*ability that suits a person to a specific position or task*, American Heritage Dictionary (2nd college ed. 1991)). A "duty" pertains to what you are required to do as part of the position/job (an act or course of actions that is required of one's position, American Heritage Dictionary (2nd college ed. 1991)). The terms, qualifications and duties are not synonymous.

Educ., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievants purport that the issue of this grievance is whether they were worthy of salary increases based on a comparison of qualifications. Further, Grievants, through their representative, argue that Respondent erred when President Kopp considered Dr. Cartwright's duties rather than her qualifications when comparing Grievants to Dr. Cartwright. Grievants' position / written argument, in addition to essentially restating the 2007 Watson grievance,[11] provides that:

> [T]he Committee charged with evaluating the Grievants for comparable salaries unanimously voted to support the Grievants' requests for salary increases. Grievants have justified the amount of their requested increases through computations which took into consideration potential increases for salary increases related to future promotions in rank. * * * Moreover, President Kopp erred in denying their salary increases because of a duty listed on a job posting, and that when properly compared to Dr. Cartwright,

[11] Although there was a significant amount of testimony at both the Level I and the Level III hearings concerning Dr. Cartwright's hire, Respondent's alleged failure to follow the *Greenbook* and the alleged salary inequities created concerning the same, it must be recognized that these issues were resolved with the settlement of the prior grievance and are not at issue in the instant grievance. The 2007 *Watson* Grievance, while factually connected, is a separate distinct grievance from the instant matter.

> Grievants all possess equal or better qualifications. * * * The [Grievants] are similarly-situated, and that they are entitled to their requested salary increases.

See Grievants' Proposed Findings of Fact and Conclusions of Law.

Marshall University has provisions for hiring new faculty at higher salaries and addressing the pay discrepancies that occur when new faculty members are employed at higher rates than a newcomer would normally be entitled. Marshall University's Faculty Handbook, the "*Greenbook,"* addresses the issue in both Section 2 and Section 6 under "Determining Starting Salaries and Rank of Incoming Members of the Faculty." Further, the *Greenbook* sets out procedures and guidelines to address certain salary inequities that may arise.

The criteria to be reviewed in this case as set forth in the *Greenbook*, the Level I agreement by the parties in the previously filed grievance, and as outlined by the Faculty Personnel Committees' recommendation was the following:

> Should new faculty members be employed at salaries higher than those being paid to current members of the staff who hold positions with comparable responsibilities and who have equivalent training, experience and competence, the latter will be considered for comparable compensation. The competence is to be determined by the chairperson of the department in consultation with other members of the department with equal or higher rank.

"All parties agreed that the members of the department [Grievants] would be compared to the new person hired in terms of qualifications." *Watson 2007 Grievance Resolution.* The question is whether the May 2008 determination not to grant Grievants an increase in their individual salaries was proper. Or was it arbitrary, capricious and/or discriminatory, as executed by Respondent in the facts of this case?

Respondent maintains that the identified parties are not similarly situated. Further, to the extent the Grievants and Dr. Cartwright are similarly-situated, their differences are related to actual job responsibilities.[12] Dr. Cartwright is expected to achieve higher standards to justify her attaining a promotion and tenure, thereby making it more difficult.

In the case of *West Virginia University Board of Regents v. Decker et. al.*, 191 W.Va. 567, 447 S.E.3d 259 (1994), where a professor filed a complaint with the West Virginia Human Rights Commission alleging age discrimination due to the fact that younger faculty were routinely hired at salaries above his, the West Virginia Supreme Court recognized the following:

> The record reveals that Dr. Decker has tenure. That is something for which every young professor yearns, and achieving such a position removes a substantial part of the job-related stress. A young faculty member who must reasonably expect *not* to receive tenure after several probationary years, because increasingly universities are reluctant to award such status, must be compensated with short-term cash for what he or she fails to receive in long-term job security. . . .

Id. at 576, 447 S.E. 2d at 268. (Emphasis in original).

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[12]Respondent argues that Dr. Cartwright is unique from Grievants, in that, she is not tenured; has not been promoted; is listed in a different discipline; holds a doctorate in science and has an addendum to her contract. This addendum places higher expectations on her than was placed upon Grievants. Specifically, the addendum to her contract requires the following:

- Build and update the science education program
- Collaborate with the STEM Academy Project
- Create continued linkages with other agencies including state, federal, national, and international levels
- Conduct consulting activities in the area of science education and other areas of expertise
- Continue to seek grant funding to support linkages with community, state, and national organizations and universities (Resp. Exh.4).

Because of these requirements and the stipulation in her contract that she attain her teaching certification, the bar for attaining promotion and tenure for Dr. Cartwright is higher. See *Price v. Marshall*, Docket No. 014-HE-369 (May 19, 2005).

In *Price v. Marshall*, Docket No. 014-HE-369 (May 19, 2005), Grievants also alleged that the *Greenbook* had not been followed when hiring new faculty members, and contended that Respondent engaged in discrimination when they did not receive the same level of compensation as the new hires. In that case before this Grievance Board, the Grievants failed to establish that the *Greenbook* had been violated. Further and more significantly, because the new hires had addenda to their contracts which gave them different responsibilities and requirements for tenure, the Grievants could not establish that they were "similarly situated" to the new hires or that they have the same "actual job responsibilities" for any claims of discrimination.

In this case, President Kopp reviewed the Faculty Personnel Committee's recommendation and discussed the situation with Provost, Dr. Sarah Denman. Based upon his analysis, President Kopp determined that Grievants did not have comparable responsibilities in that their job duties were not similarly situated. Specifically, he did not believe that Grievants met the required qualifications and that the Faculty Personnel Committee failed to conduct a meaningful inquiry into this matter.[13] (Gr. Exh. 6). Respondent highlights that Dr. Cartwright had different responsibilities placed upon her by the addendum to her contract. In fact, Dr. Kopp's determination is consistent with the precedent set by the Grievance Board in *Price v. Marshall*, Docket No. 014-HE-369 (May 19, 2005). The undersigned agrees in part with President Kopp's analysis but also notes

[13] Testimony adduced at Level 3 makes it clear that the Faculty Personnel Committee only reviewed the respective individuals "qualifications" and did not give consideration to these individuals "comparable responsibilities" as required by policy.

inequitable comparison by the President.[14] Further, Respondent's counsel correctly and emphatically pointed out, there is no requirement that the faculty be given comparable compensation, only that it would be considered. (L-1 Tr. p. 10).

Respondent's ultimate determination is not clearly wrong, nor unprecedented. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants have not established the necessary elements to demonstrate discrimination in the facts of this case. Respondent established that to the extent the Grievants and Dr. Cartwright are similarly-situated, there exist differences related to actual job responsibilities. Respondent, through its various agents, arguably did what the letter of the agreement specified. NOT what Grievants anticipated or believed they were entitled;

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[14] President Kopp's evaluation is also faulty. President Kopp justified his decision by alleging that the aggrieved faculty did not meet the required qualifications contained in the position description. Moreover, President Kopp indicated that qualifications included the "ability to teach science undergraduate and graduate courses in Science Education and other related courses as needed", and that this criterion was the most important factor related to the hiring and salary determination of Dr. Cartwright. (Gr. Exh. 6). The Recruiting Bulletin listed "teach science undergraduate and graduate courses in Science Education and other related courses as needed" as a duty and not a qualification on the job posting. (Gr. Exh. 4). Qualifications and responsibilities are not synonymous terms.

but what had, technically, been agreed to by the parties. Dr. Charles G. Bailey testified that the committee "compared vitae of [Grievants] against the applicant who received the job" to determine "whether their qualifications, the ability to meet the job to which [Dr. Cartwright] received, were equal, or exceeded hers, or were inferior to hers." Additionally, Dr. Bailey testified that there is a "difference between qualifications and duties because duties change. Duties can change over time and morph into other things, and some duties can be dismissed and others picked up."

While the undersigned is not convinced that Respondent did not manipulate and mislead Grievants; the Grievants have failed to prove that Respondent acted in a discriminatory manner. It could be interpreted that Respondent deluded the Grievants within the terms of the agreement.[15] Nevertheless, the undersigned's ability to overturn Respondent's decision to not grant Grievants an increase in salary is limited.

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.*

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[15] Grievants felt Respondent would be bound by the comparison, to grant them a salary increase, but that was not specified in the agreement.

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

Nevertheless, the process for salary review in comparing the Grievants' qualifications to the qualifications of Dr. Cartwright and making a recommendation on comparable salary for each of the Grievants utilized, in the facts of this case, were faulty. **It is clear that neither the FPC nor President Kopp, are without contributory misfeasance. Both failed to follow appropriate review procedure and/or equitably evaluate pertinent factors.** This is relevant. The *Greenbook* provides for current faculty members who hold positions with comparable responsibilities and who have equivalent training, experience and competence to be considered for comparable compensation. The Watson 2007 Grievance Resolution provided that policy as stated in the *Greenbook* would be followed, that Grievants would be considered for comparable salary, and that Grievants would be compared to Dr. Cartwright in terms of qualifications. The FPC in their letter to Dr. Denman cites *Greenbook* policy in reviewing faculty salaries, yet it is clear from the testimony adduced at Level 3 that the Committee only reviewed the respective individuals "qualifications" and did not give consideration to these individuals "comparable responsibilities" as required by policy. President Kopp's analysis of the issue(s), facts and overall situation included an unduly comparable salary based on duties or responsibilities listed on the job posting (not qualifications). It is not established that President Kopp's review and analysis is any more procedurally correct than the FPC recommendation.

President Kopp, in determining not to award Grievants an increase in salary, included factors that were not necessarily intended to be considered, minimized important aspects of the problem (Watson Agreement), and explained his decision in a manner contrary to applicable agency (*Greenbook*) procedure. While his ultimate determination may be reasonable, the methodology used to reach his conclusion was arbitrary. It is established that the evaluation and comparison process utilized was faulty.

The totality and severity of the errors in the review process utilized by both the Faculty Personnel Committee and President Kopp rendered the process arbitrary and capricious. See *Forsythe v. Div. of Pers.,* Docket No. 2009-0144-DOA (May 20, 2009). Without due consideration of relevant factors and in disregard of the totality of the circumstances, Respondent through its various agents failed to properly determine if the instant Grievants are entitled to an increase in their respective, individual salaries. Symbolical comparison is not true evaluation. It is the finding of the undersigned that Respondent failed to equitably compare the Grievants' qualifications to the qualifications of Dr. Cartwright and make a well-balanced determination regarding comparable salaries for each of the Grievants in accordance with the Watson 2007 Grievance Resolution and applicable *Greenbook* policy.

In addition to the foregoing findings of fact and discussion, the above is supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance

Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she 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 employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. "It is an unfortunate occurrence in all areas of state government that new employees are frequently hired with higher salaries than incumbents. This usually does not demonstrate discrimination, and does not do so in this instance." *Price v. Marshall*, Docket No. 014-HE-369 (May 19, 2005).

4. Grievants have failed to demonstrate that they have been discriminated against by Marshall University.

5. 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).

6. It has been established that applicable Marshall University policies (*Greenbook*, Marshall University's Faculty Handbook) were not properly followed in reaching the determination that Grievants would not receive an increase in salary.

7. The process for salary review in comparing the Grievants' qualifications to the qualifications of Dr. Cartwright and making a recommendation on comparable salary for each of the Grievants utilized in the facts of this case were faulty. The totality and severity of the errors in the review process utilized by Respondent's agents rendered the process arbitrary and capricious. See *Forsythe v. Div. of Pers.,* Docket No. 2009-0144-DOA (May 20, 2009).

Accordingly, this grievance is **GRANTED, IN PART**. This grievance is hereby **REMANDED** to Marshall University to the extent Respondent is **ORDERED** to conduct an equitable evaluation and to do so in compliance with the 2007 Watson Settlement Agreement terms, Marshall *Greenbook* provisions and the ruling in this decision, to seriously consider the amount of comparable compensation the instant Grievants may or may not be entitled. All other relief is **DENIED.** Further, it is ordered that the salary review process of comparing the Grievants' qualifications to the qualifications of Dr. Cartwright and making a recommendation on comparable salary for each of the Grievants shall commence within twenty calendar days of the date of this decision.

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 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: September 9, 2009

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Landon R. Brown
Administrative Law Judge