WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM PRICE,
Grievant,

v. **Docket No. 2008-1578-MU**

MARSHALL UNIVERSITY,
Respondent.

D E C I S I O N

Grievant, William Price, filed this grievance against Marshall University ("Marshall"), Respondent on May 9, 2008, protesting his employer's failure to promote him to full professor in the Chemistry Department at Marshall, contending that he and his promotion application were not appropriately evaluated pursuant to proper applicable promotion criteria and tenure policy. Grievant's statement of grievance provides:

> **Statement of Grievance:** On or about April 30, 2008, Grievant received notification that he was denied promotion to full Professor. Said denial was discriminatory, arbitrary and capricious, and/or clearly wrong.
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> **Relief Sought**: Grievant desires to be awarded promotion to full professor with all applicable benefits and compensation retroactive to the applicable promotion period; to be made whole; and any other relief that the grievance examiner deems appropriate.

A grievance conference was held at level one on June 3, 2008, and the grievance was denied at that level on July 8, 2008. Grievant appealed to level two on July 10, 2008, and a mediation session was held on October 29, 2008. Grievant appealed to level three on October 31, 2008. After several continuances for good cause, a level three hearing was held before the undersigned Administrative Law Judge on November 13, 2009 with a second day of hearing held on December 16, 2009, in the Grievance Board's Charleston office. Grievant appeared in person and with the representation of Steve Angel, AFT-West

Virginia/AFL-CIO. Respondent was represented by counsel, Jendonnae L. Houdyschell, Senior Assistant Attorney General.

This matter became mature for decision subsequent to the February 12, 2010, deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals. Further, the parties submitted "Points of Clarification and Objections to Proposed Findings of Fact and Conclusions of Law" documents.

Synopsis

Grievant contends Marshall University's promotion and tenure policy was violated in the evaluation of his promotion application. Grievant avers that certain individuals involved in the evaluation process acted in an arbitrary and capricious manner holding him to a higher standard for promotion than similarly situated candidates.

The record demonstrates that the officials administering the process followed and abided by Marshall University *Greenbook*, the College of Science Promotion & Tenure Guidelines and the Department of Chemistry Promotion & Tenure Guidelines in evaluating Grievant's application. Grievant failed to demonstrate that he and his application had been evaluated in an arbitrary or capricious manner. This grievance is DENIED.

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

Findings of Fact

1. Grievant is an Associate Professor employed by Marshall University. In 2008, Grievant had 10.5 years of service at Marshall with 5.5 years in his then current rank.

2. Grievant submitted an application[1] to be considered for promotion as a full professor in the Chemistry Department at Marshall University on or about January 15, 2008.

3. In order to obtain the rank of full professor at Marshall University, a candidate is to demonstrate effectiveness in all major areas of responsibilities. The major areas of responsibilities are "teaching/advising," "research/scholarly activity" and "service to the university/community." Further, the candidate must demonstrate excellence in two or more of the major areas of responsibility. Marshall University Board of Governors Policy AA-26, 2.7.3. (MUBOG Policy) (Gr. Exh. 3, pg 58).

4. The *Greenbook*,[2] the College of Science Personnel Guidelines and the Department of Chemistry Personnel Guidelines of Marshall University establish the criteria applicable for promotion of Grievant.

5. The review procedure is a multi-step process, and each level makes an independent review of the candidate's portfolio, and ultimately a recommendation to the

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[1] The application for promotion and tenure was sometimes referred to as the "portfolio", "promotion packet", "packet" or "notebook" by various witnesses. However, in this decision it will be most often referred to as the application. The terms should be interpreted as synonymous throughout this decision.

[2] The *Greenbook* is the Marshall University faculty handbook. In this case, Grievant was evaluated under the August 2007 *Greenbook* requirements.

President of the University, who makes the final determination. The procedural evaluation process in list form relevant to the instant case is:

(1) Promotion and Tenure Committee for the Department of Chemistry
(2) Chemistry Department Chairman (Dr. Michael Castellani)
(3) College of Science Personnel Commitee
(4) Dean of the College of Science (Dr. Andrew Rogerson)
(5) Provost (Dr. Sarah Denman)
(6) University President Stephen J. Kopp

6. A candidate for promotion will submit an application by the established departmental deadline to the department chairperson who will forward it to the department promotion committee. If the candidate holds graduate or associate graduate faculty status, the chairperson will apprise the graduate dean of the application, giving him or her the opportunity to provide to the departmental committee any information that he or she feels may have bearing on the promotion. The committee will prepare a written recommendation with respect to the qualifications of the candidate for promotion and submit it with the candidate's application to the department chairperson. MUBOG Policy AA-26, 2.9.3.

7. Grievant in his application claimed exemplary performance in "Teaching/Advising" and "Service to the University/Community". Grievant did not identify "Research/Scholarly Activity" as a designated area of excellence.

8. Grievant's Application was initially reviewed by the Promotion and Tenure Committee for the Department of Chemistry (Dept. P&T Committee). Members of the Dept. P&T Committee were senior (full) Professors.[3]

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[3] The members of the Department of Chemistry Tenure & Promotion Committee were Dr. Daniel Babb, Dr. Lawrence Schmitz, Dr. John Hubbard, Dr. John Larson and Dr. Gary Anderson. Dr. Michael Norton served as Chair.

9. The Dept. P&T Committee elected not to support Grievant's application for promotion to full Professor. This decision was communicated by a memorandum dated February 7, 2008. (L-III Gr. Exh. 1).[4]

10. The Dept. P&T Committee's memorandum among other information stated that Grievant's complimentary portfolio of sustained national, community and departmental service was not what they expected in order for Grievant to receive an excellent rating.

11. After review by a departmental promotion and tenure committee, the next level of review of an applicant's promotion packet is a review by the department chairperson. The department chairperson for the Chemistry Department is Dr. Michael Castellani.

12. Grievant's application was reviewed by Dr. Michael Castellani, Chairman, Department of Chemistry. By memorandum dated February 14, 2008, Dr. Castellani advised Dr. Andrew Rogerson, Dean, College of Science, that he did not recommend Grievant for promotion.

13. Grievant's Application was then reviewed by the Personnel Committee for the College of Science[5] (College P&T Committee). Each member of the Committee individually reviewed Grievant's application.

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[4] Gr. Exh. 1 is a collection of several documents, a three ring binder approximately two and half inches thick.

[5] The members of the College of Science Personnel Committee were Dr. Richard Bady, Dr. David Cusick, Dr. John Hubbard, and Dr. Menashi Cohenford. Drs. Dewey D. Sanderson & Jagan Valluri were the co-chairs of the committee.

14. The College P&T Committee met on February 27, 2008, to discuss Grievant's Application for promotion to the rank of Professor of Chemistry. After discussion, the committee voted by secret ballot. The result was 6 to 0 to recommend denial of promotion.

15. By letter dated March 7, 2008, the College P&T Committee did not recommend Grievant for promotion. (March 7, 2008, letter to Dr. Andrew Rogerson, Gr. Exh.1).

16. Grievant's application was then reviewed by Dr. Andrew Rogerson, Dean of the College of Science, who by letter dated March 21, 2008, advised Dr. Sarah Denman, Provost, that he supported the College Personnel Committee's decision not to recommend Grievant for Promotion and Tenure. (Gr. Exh. 1).

17. Grievant's application was reviewed by the Provost, Dr. Sarah Denman, who concurred with the recommendations of all the prior reviewers and did not recommend Grievant for promotion.

18. Finally, President Stephen J. Kopp notified Grievant by letter dated April 29, 2008 as follows:

> I regret to inform you that I cannot grant your request for promotion. I concur with the recommendations of the department, chairperson, college promotion and tenure committee, the dean and the provost that you do not meet all the criteria as set forth in *The Greenbook*.

(L-III Gr. Exh.1 - April 29, 2008, letter to Dr. William Price)

Discussion

Grievant, an associate professor, alleges that applicable Marshall University's promotion and tenure policy was violated in Respondent's failure to promote him to full professor in the Chemistry Department. Grievant contends that he was held to a higher standard than previous applicants for promotion to full professor. Grievant avers that his lack of collegiality and personal differences with the department chairman and certain members of the Chemistry Department were used against him during the promotion process.[6] This Grievance Board's review of an institution of higher learning promotion decisions 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. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). "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." *Siu v. Johnson*, 748 F. 2d 238 (4th Cir. 1984); *See also Carpenter v. Bd. of Trustees/W. Va. Univ*., Docket No. 93-BOD-220 (Mar. 18, 1994); *Graf v. BOT/West Virginia University,* Docket No. 99-BOT-051 (July 8, 1999). "Deference is granted to the subjective determination made by the official[s] administering the process." *Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, a grievant attempting to prove wrongful denial of promotion must

[6] Further, Grievant contends neither the Department of Chemistry nor the College of Science at Marshall University have a quantitative policy (eg., how many peer reviewed research articles that an applicant should have in order to be judged as professional in research and creative activities).

demonstrate the action was arbitrary and capricious, clearly wrong, or a violation of college policy. *See Kilburn v. Bd. of Directors/W. Va. State College*, Docket No. 94-BOD-104 (Dec. 29, 1995).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982))*. " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra. See also McMullin v. Higher Education Interim Governing Board/West Virginia University*, Docket No. 01-HE-081 (July 31, 2001).

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public

Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

"In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service." *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (April 30, 1998); *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996). Rather, a promotion is based upon excellence in teaching, research, and service to the institution and/or community. *Greenbook*, MUBOG Policy AA-26 (Gr. Exh. 3 and W. Va. C.S.R. § 133-9). Relevant to the instant case, the *Greenbook*, the College of Science Personnel Guidelines and the Department of Chemistry Personnel Guidelines establish the criteria applicable for promotion. Grievant bears the burden of proving by a preponderance of the evidence that Marshall erred in the application of policies and that the decision not to promote him to full professor was an abuse of discretion, or arbitrary and capricious. See *Baroni v. Bd. of Directors/Fairmont State College*, Docket No. 92-BOD-271 (Feb. 11, 1993); *Harrison, supra.; McMullin v. Higher Education Interim Governing Board/West Virginia University*, Docket No. 01-HE-081 (July 31, 2001). For the reasons discussed

below, the undersigned concludes Grievant has failed to meet his burden of proof. The evidence presented does not confirm the argument that the officials reviewing Grievant's application acted in an arbitrary or capricious manner or that Respondent's decision was clearly wrong.

The three page memorandum dated February 7, 2008, by the Department of Chemistry, Promotion and Tenure Committee outlined a number of reasons why the Dept. P&T Committee could not support Grievant's application for Promotion. (L-III Gr. Exh. 1). Specifically it noted, among other things, that:

1. **Service:** The application did not evidence the "sustained national, community and departmental service expected for a rating of excellent.
2. **Research:** The application failed to show the "activity required to build a sustainable, productive and focused research program. . . . Many aspects of this component fall below the expectations held by the faculty for professional performance."

Grievant disagrees with the Dept. P&T Committee's assessment. In rebuttal, Grievant presented the testimony of Dr. Lawrence Schmitz, who served on the Committee. It is noted that Dr. Schmitz's personal opinion regarding Grievant differed somewhat from others, nevertheless he acknowledges that there were "legitimate points of contention" noted by the Committee. It was not established that Dr. Schmitz objected to the final memorandum presented by the Dept. P&T Committee. Further, Dr. Schmitz's testimony *in toto* did not provide or inferred that he believed the Committee acted in an arbitrary or capricious manner. It is established that the Dept. P&T Committee had legitimate points of contention for not recommending Grievant for further promotion.[7]

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[7] Although Grievant objected to many of the things expressed in the P&T Committee opinion letter, Grievant failed to show that the committee had evaluated his application in an arbitrary or capricious manner.

Subsequent to the Dept. P&T Committee determination, the Chairman of the Department of Chemistry, Dr. Michael Castellani, independently, in review of Grievant's application did not recommend Grievant for promotion. (Memorandum dated Feb. 14, 2008). Dr. Castellani provided a detailed explanation of his review of Grievant's application. He noted that Grievant was excellent in teaching, but that he was lacking in the areas of Service and Research.

Testimony of record indicates that officials of Respondent and Grievant do not agree as to the weight that should be attributed to certain elements of Grievant's application. A point of contention is Grievant's peer reviewed research articles. Grievant is of the opinion he is being improperly evaluated. Respondent, in part, asserted that Grievant's two peer reviewed research articles were for the most part completed before the period under consideration or were previously accredited for consideration for his initial promotion to associate professor. Dr. Castellani stated that the two peer reviewed research articles submitted by Grievant in his current promotion packet should not be considered because Grievant was given credit for these articles when he was promoted to Associate Professor. Grievant's argument regarding this point of contention was not persuasive. Grievant's contention that his lack of collegiality and personal differences with the department chairman and certain members of the Chemistry Department were used against him during the promotion process was not demonstrated by the evidence presented. Grievant did not establish that Chairman Castellani or the Dept. P&T Committee's evaluation was an abuse of discretion, or arbitrary and capricious.[8]

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[8]A candidate for promotion will submit an application by the established departmental deadline to the department chairperson who will forward it to the department promotion committee. If the candidate holds graduate or associate graduate faculty status,

Grievant's testimony and evidence established that he would have evaluated his packet differently than other reviewers. However, that is not the standard which this Grievance Board uses to overturn the professional judgement of those presumed to possess a special competency in making promotion and tenure determination. The record demonstrates that the officials administering the process attempted to diligently follow and abide by the *Greenbook*, the Department of Chemistry Promotion & Tenure Guidelines and the College of Science Promotion & Tenure Guidelines in evaluating Grievant's application.

It is clear that Grievant is an individual with great potential for intellectual productivity. Evidence of record indicates that Respondent does not dispute that Grievant is exemplary in the area of teaching and achieves the standard of excellence in that area of review. However, his peers are not convinced that he has demonstrated a significant and sustained level of accomplishment in certain other areas to warrant full professorship, at this time. Department Chair Castellani opined that the brief time since Grievant's last promotion undoubtedly contributed to the inadequacies in his research portfolio. See Memorandum dated February 14, 2008, from Dr. Michael Castellani to Dr. Andrew Rogerson (L-III Gr. Exh. 1). Specifically, Dr. Castellani provided in his review memorandum that:

> Only one other faculty member in this Department has recently moved from Associate Professor to Professor in so brief a time. Dr. Price's performance is not comparable. Finally, his track record is not consistent with either historical or evolving expectations for promotion to the rank of Professor.

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the chairperson will apprise the graduate dean of the application, giving him or her the opportunity to provide to the departmental committee any information that he or she feels may have bearing on the promotion. No items may be added or deleted from the application after this point. The committee will prepare a written recommendation with respect to the qualifications of the candidate for promotion and submit such with the candidate's application to the department chairperson. *Marshall University Board of Governors Policy* AA-26, 2.9.3.

In accordance with *Greenbook* criteria, Grievant's application was forwarded to the College Personnel Committee, which did not recommend Grievant for promotion. (March 7, 2008 Letter, Gr. Exh.1). Again the College Personnel Committee concurred with the prior reviewers that Grievant has established exemplary performance in teaching; however, in reviewing the file they found insufficient evidence to establish that Grievant has established exemplary performance in service and professional performance in research.

Grievant, in opposition to negative conclusions reached regarding his level of service, highlighted numerous examples of service to both the university and the professional community. Grievant contends adequate recognition was not attributed to various time-intensive service commitments performed. Further, Grievant noted he has substantially expanded his service role to the university since his previous promotion. While Grievant was quick to note the Department of Chemistry and the College of Science at Marshall University lack quantitative policy regarding how many peer reviewed research articles an applicant should have to be judged as professional in research and creative activities, he was elated to specify the sizable number of service activities. The undersigned is not convinced that the number of service commitments is the discerning factor nor is he persuaded that all of the various reviewers discounted Grievant's commitment. It is more likely than not that the various evaluators just don't reach the same conclusion as Grievant with regard to what amount of quality service to the university and community is expected of a candidate for full professorship at Marshall University.

The College Personnel Committee forwarded its recommendation not to grant promotion to Dr. Andrew Rogerson, Dean of the College of Science. Dean Rogerson then

conducted a fourth evaluation of Grievant's portfolio. Dean Rogerson in his March 21, 2008, letter to the Provost stated, in part:

> The Department and College expect a Professor to show a sustained track record of excellence in two areas and professional performance in a third area (i.e. research, teaching and service.) Promotion from Associate to full Professor requires demonstration of sustained progress in intervening years. For promotion, the faculty member should be clearly recognized as 'professorial' by his/her colleagues and by independent academicians at peer institutions. Evidence of sustained development is key – as highlighted in comments by Department Chair, the P/T committees and the external reviewers.

Dean Rogerson concurred with the prior reviewers' findings that Grievant's performance falls short of excellence in both service and research. He did not recommend Grievant for promotion to Dr. Sarah Denman, Provost.

Provost Denman testified that she reviewed the file and that her review was primarily procedural. However, she likewise did not find sufficient evidence for promotion. (April 11, 2008, letter to Dr. William Price). Finally, President Stephen Kopp reviewed the file and notified Grievant that he had been denied promotion.

Ultimately, Grievant's application was reviewed and found lacking at all six (6) levels of the evaluation process. Grievant did not establish he and his bid for full professorship were not properly evaluated pursuant to relevant and applicable promotion criteria and tenure policies.

Based upon the professional judgment of the officials reviewing Grievant's application, it was determined that Grievant had failed to meet the standard of "exemplary" required for promotion. "Deference is granted to the subjective determination made by the official[s] administering the process." *Harrison*, supra*; Gardener*, supra. Grievant did not establish that the decision to deny him full professorship at this juncture was unreasonable,

arbitrary, capricious, or contrary to established policy or procedure. In fact, the evidence, when viewed as a whole, demonstrates that all of the individuals reviewing Grievant's application did so carefully and in conformance with the appropriate guidelines. The evidence presented does not confirm the argument that the officials reviewing Grievant's application acted in an arbitrary or capricious manner or that their decision was clearly wrong. At best, Grievant's evidence established that he would have evaluated his packet differently than the reviewers. This is not sufficient to overturn the determination of the professional judgement of those presumed to possess a special competency in making the evaluation.

Conclusions of Law

1. A grievant attempting to prove wrongful denial of promotion and tenure must prove, by a preponderance of the evidence, that the action was arbitrary and capricious, clearly wrong, or a violation of college policy. *See Kilburn v. Bd. of Directors/W. Va. State College*, Docket No. 94-BOD-104 (Dec. 29, 1995); *Baroni v. Bd. of Directors/Fairmont State College*, Docket No. 92-BOD-271 (Feb. 11, 1993). As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

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." *Miller v. Bd. of Trustees/ W. Va. Univ.* Docket No. 01-BOT-037 (June 30, 2001); *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." *Siu v. Johnson*, 748 F. 2d 238 (4th Cir. 1984); *Nelson v. Bd. of Trustees/W. Va. Univ.*, Docket No. 99-BOT-514 (June 19, 2001).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997).

5. Grievant has not met his burden of proof and demonstrated Respondent's decision to deny his promotion was an abuse of discretion, or a violation of applicable College guidelines and policy.

6. Grievant has not proven that the decision to deny his application for promotion to full professor was arbitrary or capricious and clearly wrong.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The 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: July 22, 2010

Landon R. Brown
Administrative Law Judge