THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

K. SUBRAMANI,
Grievant,

v. **Docket No. 2010-1473-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

K. Subramani, Grievant, employed by West Virginia University as an Associate Professor in the Lane Department of Computer Science and Electrical Engineering, filed this grievance at level one on May 19, 2010, after his request for promotion was denied. For relief, Grievant requests promotion to the rank of Full Professor. A level one hearing was conducted before Sue Keller, Respondent's Chief Grievance Administrator, on May 27, 2010, June 28, 2010, and July 16, 2010. This grievance was denied by Ms. Keller on August 6, 2010. A level two mediation session was conducted on August 27, 2010. Appeal to level three was perfected on September 3, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on November 10, 2010, November 15, 2010, January 26, 2011, March 11, 2011, March 17, 2011, and March 18, 2011. Grievant appeared *pro se* at some of the dates, while on other dates he was assisted by Bader Giggenbach, Esquire. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on May 31, 2011.

Synopsis

Grievant asserted that his teaching performance demonstrated the required significant contributions, and that Respondent violated policy when it failed to promote him to a full professor. Grievant alleged that West Virginia University ("WVU") acted arbitrarily and capriciously when it used student evaluations to rate his teaching performance. Evidence established that Grievant's application for promotion was reviewed using the same evaluative tools and measures as all of his colleagues in the department. The Provost, through her designee, evaluated Grievant's personnel file and determined that Grievant did not demonstrate significant contributions in the area of teaching. Accordingly, Grievant's appointment at the rank of Associate Professor was continued at the Lane Department of Computer Science and Electrical Engineering. Great deference is given to administrators in matters of promotion, and this decision was neither contrary to policy nor was it arbitrary and capricious. Accordingly, this grievance is denied.

The following findings of fact are based upon the complete record of this grievance.

Findings of Fact

1. In August 2000, Grievant was hired as an Assistant Professor in the Lane Department of Computer Science and Electrical Engineering, College of Engineering and Mineral Resources ("CEMR").

2. Grievant was promoted from Assistant Professor to Associate Professor, and granted tenure, in 2006. In the award letter, dated May 15, 2006, Provost Gerald E. Lang advised Grievant that:

> [d]emonstation of improvement and effectiveness in your teaching will be necessary for consideration of your promotion to Professor and in consideration of future performance-based salary adjustments.

3. The WVU Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure state that:

> [o]rdinarily, the interval between promotions at WVU will be at least five years. Promotions after the first promotion will be based on achievement since the previous promotion.

Level One, Exhibit 4.

4. Grievant applied one year earlier than set forth in the University Guidelines when he submitted an application for promotion to full Professor during the 2009-2010 annual review process.

5. The WVU Policies and Procedures for Annual Evaluation, Promotion and Tenure ("University Guidelines") establish a multi-level evaluation process for the award of promotion. The review begins with the department committee of faculty colleagues, proceeds to the department chair, the college committee of faculty from the various departments of the college, and then to the Dean of the college. Each level makes a recommendation that the promotion be granted or denied and the faculty member may submit a written rebuttal at any or all of these levels. The fifth level of the process is a review of the applicant's file, the departmental and college recommendations, and any rebuttals, by the Provost, who has been delegated the decision-making authority of the President for matters of promotion and tenure. Level One, Exhibit 5.

6. In this matter, all four levels of review recommended that Grievant's application for promotion to full Professor be denied.

7. The 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 setting, research, and service. In the third area of endeavor, the faculty member will be expected to make reasonable contributions.

Level One, Exhibit 5.

8. Significant contributions are normally those "which meet or exceed those of faculty peers recently (normally within the immediately previous two-year period) achieving similar promotion and/or tenure who are respected for their contributions in teaching at WVU." Level One, Exhibit 5.

9. The Lane Department of Computer Science is subject to the College of Engineering and Mineral Resources "Criteria for Promotion and Tenure" which states that to qualify for promotion to the rank of Professor, a candidate must show a sustained record of significant contributions in teaching and research. Evidence of significant contributions in teaching must include documentation of effective instruction as measured by student feedback. Level One, Exhibit 4.

10. WVU's Student Evaluation of Instruction Interpretive Guide ("SEI Guide") is used to assist in the use of SEIs. The SEI Guide is merely used to provide guidance. It is not set out as a rule or policy. Level One, Exhibit 7.

11. The SEIs use some questions common for all courses, along with some questions from a bank of possible questions that are chosen by the Dean or his designee for all college courses, and some that are chosen by the individual instructor for his or her class only. The SEI Guide recommended the use of global SEI questions to evaluate

faculty members' teaching performance, because these global questions are the most reliable. Level One, Exhibit 7.

12. Three such global questions, those relating to effectiveness of the instructor, the success of the course, and the extent to which students have learned, have been considered as key questions by the Provost for a number of years.

13. Grievant's promotion request was first reviewed by the Department of Promotion and Tenure Committee. Eight of the nine committee members voted that he had made only a "reasonable" contribution in teaching since his last promotion, rather than the required "significant" contribution, and that Grievant needed to provide more evidence of sustained performance in teaching. By a vote of two in favor, and seven opposed, the Department Committee did not recommend that Grievant be promoted. Level One, Exhibit 1.

14. Grievant's promotion request was next reviewed by the Department Chair, Dr. Brian Woerner. The Chair was unable to conclude from the available data that Grievant's teaching accomplishments since his last promotion compared favorably with recently promoted colleagues within the department and the college. Level One, Exhibit 2.

15. Dr. Woerner noted that Grievant's numerical SEI scores since his last promotion were below the average of the scores on those questions for recently promoted peers; written student comments through SEIs indicate recurring issues in classroom interactions with students, even from students who praised other aspects of Grievant's teaching style; it was difficult for the Chair to determine whether the classes with the poor student evaluations were aberrations in an overall trend because Grievant had taught

significantly fewer classroom lecture courses from 2006-2009 than his recently promoted peers; the number of graduate students Grievant advised and had brought to completion of their degree was below the similar number for all recently promoted peers. Dr. Woerner concluded that Grievant had not attained a record of significant accomplishment in teaching, and did not recommend promotion.

16. Dr. Woerner advised Grievant in early 2009 that it seemed too early for him to apply for promotion. Dr. Woerner anticipates that Grievant will eventually be promoted and Dr. Woerner will support the promotion. Dr. Woerner has had many discussions with Grievant concerning his teaching performance.

17. The CEMR College Promotion and Tenure Committee next reviewed Grievant's application for promotion and recommended by a vote of four to three that Grievant not be promoted to the rank of Professor. The Committee characterized Grievant's teaching as satisfactory. Level One, Exhibit 3.

18. Grievant's promotion file was then forwarded to Gene Cilento, Dean of CEMR, who concurred with the prior levels of review and recommended that Grievant continue at the rank of Associate Professor. Dean Cilento noted in part:

> Unfortunately your cumulative record in teaching does not yet demonstrate the level of significant contributions required by the University to support promotion to Professor. Your classroom teaching needs continued improvement and graduate student mentoring to degree completion must be sustained to support a positive recommendation for promotion to the next rank. I believe you are on the right track but the College considers it premature to recommend promotion to the rank of Professor at this time.

Level One, Exhibit 4.

19. Dean Cilento indicated that the Student Evaluation of Instruction is used to evaluate teaching. The Dean conceded that the Student Evaluation of Instruction is not

a perfect instrument but they do a good job of evaluating a faculty member's teaching performance.

20. Grievant's application for promotion was then sent to the Provost's Office for a review of the personnel file and the submitted recommendations, and a subsequent decision on the application. C. B. Wilson, Associate Provost for Academic Personnel, is the Provost's designated representative for faculty promotion and tenure review, and as such he analyzed and evaluated Grievant's personnel file.

21. Associate Provost Wilson explained that the Student Evaluation of Instruction Interpretive Guide consists of recommendations, not rules or policies. Two important kinds of information are provided by the Student Evaluation of Instruction process. The information relates to the numeric scores resulting from student responses to the specific questions and written comments that students provide characterizing the class.

22. Grievant's aggregate Student Evaluation of Instruction scores were significantly below those of three individuals in his department who were considered for promotion to Professor during the period 2007-2010. Several student comments regarding Grievant included language such as "condescending," "arrogant," "degrading," "elitist," "spiteful," "conceited," "insulting," and "rude." Grievant was far below his recently promoted peers in effective advising and guidance of students and mentoring students to degree completion. Grievant's file reflects that only one Master's level student had been mentored to degree completion.

23. Based upon Associate Provost Wilson's review and analysis, Provost Michele G. Wheatly denied Grievant's request for promotion and continued him at the rank of Associate Professor based on "insufficient evidence of meeting the institutional

expectations in teaching to support a decision that he be promoted to the rank of professor." Level One, Exhibit 3.

Discussion

The Grievance Board's review of tenure and promotion decisions is narrow, and 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). "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). "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). Thus, a grievant attempting to prove wrongful denial of promotion must demonstrate by a preponderance of the evidence that the denial 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); *McMullin v. Higher Educ. Policy Comm'n/W. Va. Univ.*, Docket No. 01-HE-081 (July 31, 2001).

"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 Res.*, 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*, 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Grievant argues that the Student Evaluation of Instruction should not be used to evaluate his teaching performance. Student input gained from SEIs is a factor which has long been used to evaluate teaching at WVU. The use of SEIs is consistent with the Board of Governors Policy 2 concerning promotion, the University Guidelines, and the CEMR Guidelines. The WVU Faculty Senate has determined that the SEIs are appropriate for the evaluation of faculty teaching performance. To the extent Grievant takes issue with the evaluative process promulgated by the WVU Faculty Senate, Grievant should direct his concerns to the WVU Faculty Senate. It is beyond the scope of this Board's authority to change WVU policies. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000);

Gary and Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

Grievant also argued that the methodology of the SEIs was flawed. Grievant, a world-class data analyst, lectured during the multiple days of hearing that WVU should use a more complex statistical analysis.[1] Grievant questioned the manner in which the data was calculated, and argued that when viewed from a purely statistical aspect, his performance was actually better than those in his department who were recently promoted. Associate Provost Wilson explained that his calculations consisted of averaging the scores from the three questions asking the students to rate the effectiveness of the instructor, the quality of the course, and the amount learned. The ratings from these questions are uniformly measured because they are considered more germane in a global perspective, and more useful than the remaining questions. Dr. Wilson also noted that SEI's are not just numbers, he also reviews the comment section which provides a different perspective.

The record of this grievance demonstrates that the Provost Office consistently uses the three global SEI questions to rate a faculty member's teaching performance. The calculations of these three global SEI questions by the various levels of review appear to be easily understood, straightforward, and not easily subject to misinterpretation. It should be noted that this Board addressed a similar argument in *Shackleford v. W. Va. Bd. of Directors/Concord College*, Docket No. 96-BOD-414 (Oct. 9, 1997). Grievant argued that the use of student evaluations was not statistically valid because they are subject to

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[1]Grievant has numerous scholarly publications on the topic of algorithms.

emotional bias, are impacted by factors beyond the professor's control, are not consistent, and are not reliable. Notwithstanding an element of subjectivity, the administrative law judge determined that the use of these instruments could not be viewed as arbitrary and capricious in evaluating the application for promotion. The same can be said in the instant case. Grievant's lectures on statistical invalidity were instructive and somewhat interesting; however, Grievant failed to present evidence that Dr. Wilson distorted and misrepresented the application materials, especially the student evaluations, or that WVU's use of SEIs was arbitrary and capricious, clearly wrong, or a violation of policy.

Grievant continued to assert at level three that he was the victim of reprisal, discrimination, and harassment. 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." 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 the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251

(1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

The record established that the Grievant filed a grievance in February 2007, which was settled, and another grievance in April 2009, which was not appealed to level two. There is no dispute that Grievant participated in a protected activity, the filing of grievances, and WVU was aware of that fact. However, WVU has demonstrated legitimate, non-retaliatory reasons for the decision to deny promotion. Grievant's failure to meet performance expectations in teaching was the basis for the decision.

Turning to Grievant's claim of harassment, W. VA. CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

Grievant introduced no evidence that he suffered any repeated disturbance, irritation or annoyance that is contrary to law, policy or profession. In fact, the decision to deny promotion was a single action which does not meet the definition of harassment. Grievant did not demonstrate that he was treated in a manner that is contrary to the behavior which would reasonably be expected. Grievant failed to offer any evidence which would support the charge of harassment.

For purposes of the grievance procedure, discrimination is defined 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." W. VA. CODE § 6C-2-2(d). 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).

Grievant has failed to establish by a preponderance of the evidence that he was treated differently from any other similarly situated employee. Grievant did not identify any other professor at WVU which would point to any difference in treatment. To the contrary, the record of this case supports a finding that WVU's promotion policy was created to make certain that all professors are treated equally in their applications for promotion. The policy concerning promotion and tenure applies to all professors, and is not discriminatory.

In addition to the above findings of facts and discussion, 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. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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 of tenure and promotion decisions is narrow, and 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).

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); *See also Carpenter v. Bd. of Trustees/W. Va. Univ.*, Docket No. 93-BOD-220 (Mar. 18, 1994).

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 Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. Grievant failed to prove by a preponderance of the evidence that WVU's denial of his application for promotion was arbitrary and capricious, clearly wrong, or a violation of policy.

6. 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 the employer or an agent;

> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-

01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

8. Grievant established a *prima facie* case of reprisal; however, WVU offered legitimate, non-retaliatory reasons for its action. Grievant did not prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.

9. W. VA. CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

10. Grievant failed to prove by preponderance of the evidence that he suffered any repeated disturbance, irritation or annoyance that is contrary to law, policy or profession.

11. 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).

12. Grievant has failed to establish by a preponderance of the evidence that he was treated differently from any other similarly situated employee. Grievant did not identify any other professor at WVU which would point to any difference in treatment.

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, 2011

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Ronald L. Reece
Administrative Law Judge