THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

HARRY GINGOLD,
Grievant,

v. **Docket No. 2008-0337-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Harry Gingold, filed this matter on or about March 14, 2005, challenging the decision of then Mathematics Department Chair, Sherman D. Riemenschneider, rating the Grievant's teaching as "satisfactory" for the 2004 annual review. Grievant claims that his teaching should have been rated as "good." As a remedy, Grievant asks that "the descriptor in my annual evaluation for 2004 for the category of teaching be amended and that Professor Riemenschneider must be warned to cease his attempts at intimidation and arbitrary and capricious treatment of his faculty."[1]

This grievance was denied at level one by decision issued on February 11, 2011. Grievant appealed to level two of the grievance procedure on February 18, 2011. A level two mediation session was conducted on June 7, 2011. An Order of Unsuccessful Mediation was entered on June 22, 2011, and Grievant perfected his appeal to level three

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[1]In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

on June 30, 2011. Various hearings and conferences then occurred at level three regarding discovery issues, and final level three hearings were conducted before the undersigned Administrative Law Judge on March 14 and April 25, 2013, at the Grievance Board's Westover office location. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 29, 2013. Grievant appeared in person and by his counsel, Bader C. Giggenbach, Brewer & Giggenbach, PLLC. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General.

SYNOPSIS

Grievant seeks to have the descriptor for his 2004 annual evaluation changed, that his file be corrected, and that his compensation be adjusted accordingly. Respondent's position is that Grievant was judged on his own merits, and was not the victim of discrimination. Faculty evaluations of teaching, research and service are subjective, and the professional judgment of those at the institution who are charged with such evaluations is entitled to great deference. A Grievant seeking to have his evaluation overturned by the Grievance Board bears a substantial burden. Grievant failed to demonstrate that the ratings on his faculty evaluation were arbitrary and capricious, or the result of discrimination.

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

Findings of Fact

1. Grievant is employed by Respondent, West Virginia University ("WVU"), as a Professor of Mathematics, Eberly College of Arts and Sciences.

2. WVU Board of Governors Policy 2 provides in Section 11 that all faculty at WVU shall receive written evaluations of performance annually. Policy 2 requires that evaluation procedures be developed at the university level, and by the college level, and by the department level, if appropriate. Policy 2 specifically states that "[s]uch procedures must be multidimensional; criteria *shall include* but not be limited to peer evaluations, *student evaluations*, and evaluations by immediate supervisors." (Emphasis added.)

3. The annual review process involves an analysis of the faculty member's performance over the year. Faculty members' files close on December 31. It is the faculty member's responsibility to provide evidence in their file that they are doing their job and to provide evidence of how well they are doing their job. That information is then reviewed by the departmental committee and an independent review is done by the department chair.

4. The annual review also determines how well a faculty member is doing his or her job for the purpose of any performance-based salary program that may be available that year. The annual review helps determine the amount of a faculty member's performance-based salary increase for the subsequent year.

5. Evaluations and recommendations are to be based on both quantitative and qualitative evidence. The primary evidence to be weighed must be contained in the faculty member's evaluation file. To it are added professional judgment as to the quality of the faculty member's teaching, research, and service, as applicable.

6. WVU Policies provide, in pertinent part, that "[S]upporting documentation for the evaluation of performance in teaching might include evidence drawn from such sources as the collective judgment of students, [which could be the use of the Student Evaluation

of Instruction process or SEIs], of student advisors, and of colleagues who have visited the faculty member's classes. It might also include analyses of course content, evaluation of products related to teaching such as textbooks or videotapes, the development or use of instructional technology and computer-assisted instruction, pedagogical scholarship in publications and media of high quality, studies of success rates of students taught, or other evidence deemed appropriate and proper by the department and college.

7. WVU has developed a WVU Student Evaluation of Instruction Report of Results Interpretive Guide ("the SEI Guide"), which states that it "is intended to assist instructors in reading and understanding the Student Evaluation of Instruction Report of Results." This Guide provides guidance only. It is not a rule or policy.

8. A bank of questions is available to be placed in the Student Evaluation Forms (" SEIs") to be used for any individual course at WVU, although certain questions are to be used in all SEIs. Some questions are chosen by the instructor and some are chosen by the Dean of the College. The students may respond to each of these questions with a rating of NA, poor (1), fair (2), satisfactory (3), good (4), or excellent (5).

9. After a review and evaluation of Grievant's evaluation file, Chairperson Riemenschneider rated Grievant's teaching as "satisfactory" for the 2004 academic year.

10. Chairperson Riemenschneider based the rating on the following:

> Complete SEIs were provided for the Fall 2003 classes, and the honors evaluations were provided for Spring 2004. The comments on these evaluaton[s] were mainly positive. He did not provide SEI for Spring 2004 course in complex variables and he indicated that none would be forthcoming for the Advanced Calculus course. He also provided commentary in the file on the students and courses which indicated that the majority of students in the latter two courses were woefully unprepared. I am disappointed that there weren't complete sets of SEIs. (Exhibit 4.)

11. Chair Riemenschneider indicated that complete sets of SEIs were not required for a rating of “good” or “excellent”; however, he urged faculty for many years to submit full sets of SEIs because the Department Chair needed adequate information to properly evaluate teaching performance. Chair Riemenschneider acknowledged that he valued student comments and placed a lot of weight on them. The comments on Grievant’s student evaluations raised concerns about the Grievant with the Department Chair.

12. Likewise, Grievant acknowledged that he was aware that Chair Riemenschneider strongly recommended to faculty that they include complete sets of SEIs in their evaluation files for review. Nevertheless, Grievant did not put all his SEIs in his file for evaluation because he did not want Chair Riemenschneider to place emphasis on the SEIs. Grievant also acknowledged that even though he submitted SEIs in the past with less than fifteen classroom students, he chose not to do so for the year in question.

13. WVU has a program referred to as the “Salary Enhancement for Continued Academic Achievement,” for which all full professors are eligible. For an award amounting to a 7.5% salary increase, the professor is expected to maintain the level of productivity in teaching, research and service on which his or her promotion was based. In addition, in the immediate previous five-year period, evaluations must consist of 80% meritorious (“good” of “excellent”) ratings for the areas of teaching, research and service.

14. In order for Grievant to have received a salary enhancement for continued achievement, he needed to obtain ratings of “good” or “excellent” on 80% of chair and committee evaluations over a five-year period. Grievant received ratings of only “satisfactory” in service for 2002-2003, 2003-2004 and 2004-2005. The record established

if Grievant had achieved a rating of “good” for service for one of the stated review periods, he would have achieved the 80% threshold and would have received the salary enhancement. It is clear that Grievant’s one rating of “satisfactory” for the 2004-2005 review was not the sole reason he was denied the salary enhancement.

15. Associate Provost C.B. Wilson indicated that it was reasonable for Chair Riemenschneider to expect that evaluation files to include full sets of SEIs so it can be verified that all of the faculty teaching was at a particular level, not just the teaching performance of one class.

16. Grievant chose not to include complete sets of SEIs in his evaluation file. The department chair can only evaluate the documentation in a faculty member’s file.

17. A majority of faculty in the Mathematics Department submitted complete sets of SEIs for review in their evaluation files.

18. Chair Riemenschneider applied a uniform standard when he evaluated the faculty and based his ratings on his professional subjective judgment.

19. Grievant appealed the “satisfactory” rating for teaching to the Interim Dean of the Eberly College of Arts and Sciences, Dr. Rudolph Almasy.

20. As part of the appeal process, Dean Almasy met with Grievant, discussed the issues and reviewed all materials submitted by Grievant in rebuttal of the Chair’s rating.

21. Upon a comprehensive review of the material submitted by Grievant, Dean Almasy found as follows:

> At a university such as West Virginia University, standards of productivity are on the rise as we all work hard to increase research and teaching effectiveness for the benefit, finally, of our students. This is a message I have been articulating as interim dean, to both established faculty and new hires, and which I expect my chairs to articulate.

> I believe a departmental chair has the right to ask faculty to provide the fullest possible documentation of teaching effectiveness and to suggest that documentation be more than a minimum of one SEI which you point to. As long as everyone is receiving this message and that seems to be the case from the November 9, 2005 Riemenschneider electronic post - it does not appear that you are being singled out nor that Dr. Riemenschneider is acting capriciously.
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> Secondly, as the chair has a responsibility to ask for evidence of increased productivity, it is also the faculty member's responsibility to provide a thorough review of the work in the teaching arena for each evaluation period.
>
> As I review the material before me, I do not believe you provided evidence to substantiate the allegation of discrimination made in your written grievance, nor was there sufficient basis for me to ask that your 2004 evaluation be changed. (Exhibit 2.)

22. Associate Provost Wilson indicated that there was not enough information in the evaluation file in the context of the totality of Grievant's teaching assignments to warrant a rating that would be characterized as meritorious.

Discusion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

"[T]his Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse that would thwart the primary purpose of the evaluation process. *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-

22-168 (Aug. 31, 1999); *Kinder v. Berkeley County Bd. of Educ.,* Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.,* Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.,* Docket No. 54-86-262-1 (May 5, 1987), *aff'd* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff'd, in part*, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Rutherford v. W. Va. Univ. at Parkersburg*, Docket No. 05-HE-229 (Oct. 31, 2005).

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. *See generally Siu v. Johnson*, 784 F.2d 238 (4th Cir. 1984); *Smith v. Univ. of N. Carolina,* 632 F.2d 316 (4th Cir. 1980); *Kunda v. Muhlenberg College,* 621 F.2d 532 (3d Cir. 1980). Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. *Gruen v. Bd. of Directors*, Docket No. 95-BOD-281 (Mar. 6, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995); *Carpenter v. Bd. of Trustees*, Docket No. 93-BOT-220 (Mar. 18, 1994); *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). *See Siu, supra; Kauffman v. Shepherd College,* Docket No. BOR1-86-216-2 (Nov. 5, 1986).

This strategy generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability,

research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." *Kunda, supra*, at 548. *See also Bina v. Providence College,* 39 F.3d 21 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1406 (1995); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980). "This same discretion should be applied to the evaluation of faculty members." *Rutherford, supra.*

"The standard for assessing an evaluation is the arbitrary and capricious standard." *Id.* "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)).

Grievant filed the instant matter when the Chair of the Mathematics Department, Dr. Riemenschneider, rated his teaching as "satisfactory" for the 2004 annual review, based

on the information contained in his evaluation file. Grievant is of the opinion that his teaching should have been rated as "good." The record was clear that Grievant was aware that Dr. Riemenschneider strongly recommended faculty to include complete sets of SEIs in their evaluation files for review but that he purposefully did not put all his SEIs in his file for evaluation because he did not want the chair to place emphasis on the SEIs. Grievant conceded that even though he submitted SEIs in the past with classes of less than fifteen students, he chose not to do so for the year in question. This action on behalf of Grievant does not establish any evidence of an arbitrary and capricious act on the part of the Respondent. Grievant should have included more documentation in his evaluation file for review to justify a better teaching evaluation.[2]

Grievant argues that because his teaching was rated as "good" by the Faculty Evaluation Committee, Chair Riemenschneider's rating of "satisfactory" was arbitrary and capricious. The undersigned disagrees. While the standard is recognized as subjective, in that the evaluation is to be based on the professional judgment of the evaluator, differences of opinion between the committee and the chair are not uncommon in the higher education settings. The record established that Grievant was judged by both levels of review pursuant to the documentation in his evaluation file and on his own merits. The record also established that Chair Riemenschneider is a competent professional with over fifteen years of experience in evaluating faculty members' teaching performance.

Grievant also asserted that Chair Riemenschneider's analysis of his evaluation file

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[2]The propriety of the use of SEIs to rate a faculty member's teaching performance has previously been addressed by the undersigned, and there is no need to revisit that issue. *See, Subramani v. W. Va. Univ.*, Docket No. 2010-1473-WVU (July 22, 2011); *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 11-AA-114 (Mar. 7, 2013).

was arbitrary and capricious because Dr. Riemenschneider gave more weight to some documents than he did to others. The record is replete with evidence that Dr. Riemenschneider was competent to judge the quality of faculty members' personnel files and he did so consistently. Chair Riemenschneider's decision to rate Grievant's teaching as "satisfactory" was based on the evidence, or lack thereof, in Grievant's evaluation file and the undersigned must give that substantial deference.

Grievant was judged on his own merits, and even though the measure is subjective, he was evaluated by competent professionals who were able to make the required subjective judgment. Chair Riemenschneider, Dean Almasy, and Associate Provost Wilson all disagreed with Grievant's opinion that his teaching performance was "good" for the year in question. The record established, based on the unanimous opinions of the qualified educational professionals set out above, that Grievant did not have enough information in his evaluation file to prove that his teaching performance merited a rating of "good." The independent evaluations of Grievant's teaching were properly based on the evidence as found in Grievant's evaluation file and cannot be characterized as arbitrary and capricious.

Finally, Grievant argued he had been discriminated against. 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., 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 argues that it is unreasonable that fourteen out of fifteen tenured professors in the Math Department receive the same teaching descriptor for the Chair and Faculty Evaluation Committee, and the Grievant is the lone professor who is treated differently. In addition, it is unreasonable that other tenured professors in the Math Department fail to provide any information on courses, yet these individuals receive "good" from the Chair, particularly where the Chair asserts on the record that the entire reason he gave Grievant "satisfactory" was due to an alleged lack of complete documentation.

The undersigned is not convinced by a preponderance of the evidence that Grievant was treated differently than other similarly situated professors, and it would appear that any difference in treatment was related to the actual responsibilities of the Grievant. The lower level record demonstrated that the majority of the faculty in the Math Department submitted complete sets of SEIs for review in their evaluation files. In the event that SEI information was missing from the faculty member's file, Chair Riemenschneider noted in his comments that he could not give an "excellent" descriptor without complete documentation. This would tend to demonstrate similar treatment in that he noted the same concern to Grievant due to the lack of more complete SEI information. The undersigned cannot conclude from the statements made in the evaluation of this unidentified professor that Grievant was

treated differently by the Chair. In fact, Chair Riemenschneider applied a uniform standard when he evaluated the faculty and based his ratings on his own independent professional subjective judgment. The evidence presented to the undersigned demonstrated that most of the faculty submitted all of their SEIs for review, unlike Grievant who purposefully withheld all his SEIs except one for review. This evidence fails to meet the elements necessary to establish a claim of discrimination.

Having reviewed the entire record in this proceeding, and Grievant's many arguments and assertions, the undersigned cannot conclude that Grievant has demonstrated that Grievant's evaluators exercised their professional judgment in the evaluation of his teaching in an arbitrary and capricious manner.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. "[T]his Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse that would thwart the primary purpose of the evaluation process. *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999); *Kinder v. Berkeley County Bd. of Educ.,* Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.,* Docket No. 13-87-313-4 (Feb. 22, 1988);

Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), *aff'd* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff'd, in part*, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Rutherford v. W. Va. Univ. at Parkersburg*, Docket No. 05-HE-229 (Oct. 31, 2005).

3. "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." *Kunda, supra*, at 548. *See also Bina v. Providence College,* 39 F.3d 21 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1406 (1995); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980). "This same discretion should be applied to the evaluation of faculty members." *Rutherford, supra.*

4. "The standard for assessing an evaluation is the arbitrary and capricious standard." *Id.* "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)).

5. 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not demonstrate that he was the victim of discrimination.

7. Grievant did not demonstrate that Grievant's evaluators exercised their professional judgment in the evaluation of his teaching in an arbitrary and capricious manner.

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: August 30, 2013

Ronald L. Reece
Administrative Law Judge