

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**Xiaojuan FAN,  
Grievant,**

**v.**

**Docket No. 2024-0217-MU**

**MARSHALL UNIVERSITY,  
Respondent.**

**DECISION**

Grievant, Xiaojuan Fan, is employed by Respondent Marshall University as a full professor, but at the time she filed this grievance, Grievant was an associate professor. On September 12, 2023, Grievant filed this grievance stating, essentially, that she was denied promotion to full professor based upon a misapplication of promotion criteria and standards. For relief, Grievant seeks “promotion to full professor and honor of the \$10k pay raise initiation at FY2023-2024 upon the strong recommendation letters from the Department Committee and Chair.”

A level one conference was conducted on October 19, 2023, which ended with “no immediate resolution,” and “[t]he hearing was adjourned without specific resolution.” Grievant appealed to level two on January 18, 2024, following which Respondent filed a Motion to Dismiss on March 14, 2024, arguing that the grievance was untimely at both levels one and two. The motion was heard by Administrative Law Judge Wesley H. White on April 18, 2024. The motion was ultimately denied, and the matter proceeded to level two mediation before Judge White on August 16, 2024. An Order of Unsuccessful Mediation was entered the same day, and Grievant appealed to level three on August 19, 2024.

A level three hearing was held on December 5, 2024, before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and was self-represented. Respondent Marshall University appeared by Kelly Marcum, Assistant Director of Employee Relations, and was represented by counsel, Gretchen A. Murphy, Assistant Attorney General. This matter became mature for decision on January 15, 2025, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was denied a promotion to full professor, following which she filed a grievance alleging that Respondent misapplied promotion criteria. At the level three hearing, Grievant failed to prove that Respondent acted arbitrarily and capriciously or was clearly wrong in failing to promote her. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant began teaching physics at Respondent Marshall University in 2007.
2. On April 21, 2010, Grievant was offered a probationary tenure-track appointment as an assistant professor, beginning in the fall of the 2010-2011 academic year. Grievant accepted the offer on June 17, 2010.
3. The contract contained an addendum ("the addendum")—also signed by Grievant on June 17, 2010—which stipulated the following:

- a. Grievant's teaching load would be reduced to six contact hours per semester for the first three academic years of her contract to allow her to develop an independent research program and to publish peer-reviewed journal articles. The research was to include Grievant's students.
- b. Respondent would provide Grievant with \$100,000 in start-up funds to establish a productive research laboratory.
- c. Going forward, research must be indicated as an "area of excellence" in Grievant's applications for promotion.
- d. That excellence would be demonstrated by publishing an average of one peer-reviewed journal article per year; preparing and submitting approved grant proposals for support of an independent research program; presenting at national or international meetings; and, for promotion to full professor, achievement of national or international stature in her field of research.
- e. Promotion and tenure reviews would consider external evaluations of Grievant's scholarly performance from independent evaluators with national reputations in her areas of research.
- f. Grievant's teaching performance would be evaluated on documentation including evaluations of course materials, peer and student evaluations, quantity and quality of academic advising, peer-reviewed pedagogical publications and presentations, grants for curricular improvements, and participation in workshops dealing with instructional improvement.

g. Respondent would also consider documentation regarding Grievant's service to her department, college, and university as well as the local community.

4. The conditions of the addendum apply at every level of promotion. That is, they did not expire at the end of that initial three-year period or with Grievant's subsequent promotions.

5. Grievant was promoted to associate professor in August 2013.

6. In 2021, Grievant first applied for promotion to full professor and was denied. She did not grieve that denied promotion.

7. The Marshall University Board of Governors ("BOG") has set forth its policy and procedure for faculty promotion in Rule Number AA-6 (effective January 28, 2020). Subsection 4.4 lays out the "Requirements for the Rank of Professor." They include that the candidate hold a doctoral or other approved terminal degree in a discipline appropriate to the teaching field from an accredited college or university, have at least five complete academic years of experience in the rank of associate professor at an accredited college or university, and have demonstrated "exemplary performance" in at least two areas of responsibility (teaching and advising; research, scholarship and creative activities; and service and professional development) and "professional performance" in the third area of responsibility.

8. The College of Science ("COS"), in which Grievant teaches, has established more specific "Promotion and Tenure Guidelines," which align with the BOG's policies and procedures for promotion and tenure. Both the BOG's and the COS's policies note that "[p]romotion in rank is a reward for meritorious professional achievement."

9. Per those COS guidelines (“the guidelines”), applicants for promotion to full professor must submit a portfolio which demonstrates “a factual, documented record, from multiple sources of evidence, of sustained achievement in each of the three areas of faculty responsibility since first appointment or last promotion in rank, whichever is more recent. The required areas of faculty responsibility are: 1) teaching and advising[;] 2) research, scholarship and creative activities[;] and 3) service and professional development.”

10. An applicant must demonstrate “exemplary performance” in at least two of those three categories. The guidelines explain that “[e]xemplary performance in an area of responsibility requires notable and sustained examples of responsible university citizenship related to that area.”

11. As noted above, Grievant’s contract requires that one of those areas of “exemplary performance” must be research, scholarship, and creative activities. Grievant could choose whichever of the two remaining categories she believed she demonstrated excellence.

12. The guidelines for teaching and advising state that “[s]ustained achievement in teaching, advising and related activities is required for both tenure and promotion, and candidates are encouraged to strive for excellence in this area.” The guidelines further refer to the BOG policy, which finds:

Teaching and Advising responsibilities and duties may include, but are not limited to: command of disciplinary knowledge and methodology; effectiveness of classroom performance; advising load and effectiveness of academic advising; effectiveness in assessing student learning; rapport with students; contributions to curricular development, including development, promotion and delivery of off-campus academic programs, either through electronic means or

conventional travel to off-campus course locations; and instructional development of faculty colleagues.

13. The guidelines for research, scholarship, and creative activities state that “[a]ll faculty members are expected to remain current in their specific disciplines, and the primary mechanism for maintaining expertise is through the establishment and maintenance of an active research program.” Per the BOG policy, the faculty members have duties and responsibilities which:

may include, but are not limited to: number, quality, and importance of publications and creative productions; memberships and contributions to professional societies; professional growth and development; scholarly presentations and creative performances; and contributions to the professional development and achievement of colleagues.

The guidelines recognize that “[t]he extent to which a faculty member participates in research is dependent, in part, on the priorities of her or his department, the availability of reassigned time to devote to research projects, and the availability of funding—both internal and external—to support research.” The addendum to Grievant’s contract emphasized that research is a priority for Grievant’s employment and, in fact, allowed her time in her schedule and seed money in the first three years to get her research off the ground.

14. The guidelines for service and professional development state that “[a]ll faculty members . . . are expected to participate in service activities at the department, college, and university levels, and to engage in community service.”<sup>1</sup>

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<sup>1</sup> The guidelines, again, reference the BOG policy, but because service is not really at issue in this matter, we will forego a recitation of the policy.

15. Applicants for tenure and promotion in the COS must submit a portfolio that follows a specific format. Among other things,<sup>2</sup> the portfolio must contain the following information:

- a. Teaching and Advising: a teaching summary table which includes the re-scaled student evaluation score for each course, as well as a complete set of summary sheets for classroom evaluations in all classes taught; a summary of all new courses or programs that the applicant has developed and/or implemented; information regarding the development and/or incorporation of innovative and creative teaching and advising strategies; information regarding the development and teaching of writing-intensive or special content courses; participation in faculty development programs or workshops devoted to teaching, learning, or advising; and information regarding awards, honors, and other recognition of instructional or advising performance
- b. Research, Scholarship, and Creative Activities: a list of published work of significance, including those which are to be accepted and to be published in the future; a list of work in preparation to be published; a list of proposals, grants, and contracts; participation in institutes, workshops, and seminars; contributions to academic/professional meetings; and awards, honors, and other recognition of scholarly and creative activities

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<sup>2</sup> The portfolio requirements are quite extensive; so, we will focus on the parts that are most relevant to this particular grievance.

- c. Service and Professional Development: service on university committees, task forces, etc.; participation in other activities on behalf of the university; participation in other activities on behalf of the college; and participation in other activities on behalf of the community.

16. The contents of the portfolio must represent “the period since first appointment or last promotion in rank, whichever is most recent.” In Grievant’s case, that would be the period following her 2013 appointment to associate professor.

17. Once an applicant for promotion submits his or her portfolio to the department chair of the department in which the applicant teaches, a departmental committee reviews the portfolio and makes a recommendation—either in favor or against promotion—to the department chair.

18. The department chair then reviews the application portfolio and recommendation from the departmental committee and makes a recommendation to the dean of the College.

19. The dean then forwards the application portfolio to the COS’s promotion and tenure committee. The COS committee reviews the same and makes a recommendation to the dean.

20. The dean reviews the application portfolio and the recommendation of the departmental and COS committees and makes a recommendation to the provost.

21. The provost reviews the application portfolio and makes a recommendation to the president of the University, who has the final word on whether a promotion is granted. Both the provost and the president have the power to override the recommendations made to them.



22. Applications for promotion and tenure must also include external evaluations. The applicant submits a list of proposed external evaluators with whom he or she has or has had a personal, professional, or financial relationship. The chair of the departmental committee then adds proposed evaluators who are associated with peer institutions. A final list of external evaluators—agreed upon by both the applicant and the department—is then compiled to include “senior members of the profession and individuals of demonstrable prominence in their field.” The evaluators are provided with the applicant’s information before offering a written letter of evaluation of the applicant’s suitability for promotion or tenure. The letters are not shared with the applicant.

23. Following her promotion denial in 2022, then-COS dean, Dr. Charles Somerville, suggested that Grievant take some time to further develop her portfolio, focusing on research and publication; but Grievant re-applied for promotion in the very next cycle.

24. Upon her second application for promotion to full professor, Grievant’s department chair, Dr. Huong Nguyen, shared her concerns with Grievant about her renewed application and suggested that Grievant hold off for another year. Dr. Nguyen noted that Grievant had not published any journal articles between 2012 and 2022. She published a single article in 2022.

25. Dr. Nguyen also noted that Grievant’s student evaluation scores were not favorable and suggested that, if she moved forward, Grievant should designate service as her second category of excellence rather than teaching and advising.

26. Grievant did not heed Dr. Nguyen's advice. She moved forward with her application and designated her two categories of "exemplary performance" as "teaching/advising" and "research/scholarly activity."

27. The departmental committee reviewing Grievant's application felt strongly that they should not recommend promotion because Grievant's portfolio was "weak." Nonetheless, the committee tried to find highlights in the portfolio to support the application to avoid conflict within the department. Reluctantly, Dr. Nguyen forwarded a recommendation of promotion on to the interim dean of the COS, Brian Morgan.

28. In her letter, Dr. Nguyen noted that while Grievant's student evaluations were "mixed," "[h]er student evaluation average is on the level of the department average" and that her average had gotten better over the last seven years. Dr. Nguyen also noted that Grievant was nominated for the Hedrick Outstanding Faculty Award in October 2022. She noted that Grievant had published six papers in leading peer-reviewed journals, though she went on to note that five of those had been published between 2007 and 2012 and only one had been published since Grievant's 2013 promotion. Dr. Nguyen offered that Grievant had applied for five grants since her last promotion. She further noted that Grievant "actively participates in various department activities and events," though she indicated that Grievant's leadership in department committees was limited to the period of 2013-2016.

29. The COS promotion and tenure committee reviewed the application on February 27, 2023, and determined that Grievant should not be recommended for promotion to full professor.

30. In her March 5, 2023, memo to the interim dean, the COS committee chair, Dr. Leslie Frost, noted that a rescaled mean score from student evaluations must be greater than 3.5 (out of 4) to reach the “exemplary” level. Grievant’s rescaled score was 2.99. Further, Dr. Frost noted that Grievant had not yet developed or taught new courses and had not engaged in teaching specialty courses or writing-intensive courses. Dr. Frost gave Grievant credit for attending several teaching workshops, but she noted that Grievant did not implement the techniques and skills she learned. Dr. Frost also noted that over the course of the review period, Grievant had only recently published a single publication. She did acknowledge, though, that Grievant had submitted a second paper and was preparing a third submission. Dr. Frost also acknowledged that Grievant had been awarded several research grants and had other applications pending, but the committee only rated Grievant as “professional” in the research category. Regarding her service, Dr. Frost noted that Grievant demonstrated “a high level of involvement” and suggested Grievant focus on that as an area of “exemplary” accomplishment in the future.

31. While Grievant believes that the capstone courses and labs she taught should count as writing-intensive courses, Dr. Frost explained that recognized writing-intensive courses have to meet certain requirements which capstone courses do not meet. Moreover, professors who teach writing-intensive courses must attend specific workshops and obtain certification to teach those courses, which Grievant has not done.

32. Mr. Morgan agreed with the COS committee and informed the provost that he could not recommend the promotion of Grievant to full professor in a letter dated March 17, 2023.

33. In his review of Grievant's portfolio, Mr. Morgan highlighted key points in both the departmental committee's letter and the COS committee's memo. He noted that he was "unable to overlook the evidence indicating that communication with students needs improvement." Mr. Morgan noted that while Grievant made efforts to improve her teaching, she had only allowed herself eight months between her last two applications for promotion and had not been able to demonstrate improvement as yet. He pointed out that the weighted average of Grievant's student evaluations placed her "among the bottom-performing faculty members . . . in a college that has many talented teachers." While he acknowledged Grievant's "consistent efforts, and some success," in securing external funding for her research, the interim dean found that "simple submission of grants without successful funding is not a measure of exemplary performance." Furthermore, Mr. Morgan noted, Grievant had failed to meet the requirements of the addendum to her contract inasmuch as she had failed to publish at a reasonable level.

34. Mr. Morgan also pointed out that two of the four external letters submitted with Grievant's portfolio stated that Grievant would not be promoted at the authors' universities. In fact, one external reviewer noted, "Let me start with the end first, something that should be obvious from the outset to all: [Grievant] would not be promoted at [the evaluator's institution]."

35. Both the provost (April 24, 2023) and the president (April 27, 2023) agreed that Grievant should not be promoted to full professor.

36. In 2023, the physics and math departments merged, which, naturally, created a different departmental committee for the review of promotion applications and portfolios.

37. Likewise, a new Dean was appointed to the College of Science in 2023.
38. Grievant re-applied for promotion to full Professor in 2024 and was granted promotion.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *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 (Apr. 30, 1998); *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996). Indeed, Respondent has made clear its position that “[p]romotion in rank is a reward for meritorious professional achievement.” Nonetheless, “[p]romotion and tenure are paramount professional and economic goals of a teacher.’ *State ex. rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978).” *Finver v. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997). *See also, Rankin v. Board of Trustees/Marshall University*, Docket No. 99-BOT-421 (Jun. 13, 2000).

The review of an institution of higher learning’s promotion decision is “generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious.” *Harrison v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (April 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.” *Sui v. Johnson*, 784 F.2d 238 (4th Cir. 1984). Here, the process for awarding tenure and promotion has been carefully and thoughtfully laid out in the guidelines set forth by the College of Science. The criteria for consideration of promotion are clear and concise and rely on mostly quantifiable metrics (average rescaled score from student evaluations, the number of publications, the number of awarded grants, the number of newly-developed classes, etc.) which, to this outsider, seem more than reasonable. More importantly, they conform with the applicable policy of Respondent’s Board of Governors. Therefore, the process itself is neither arbitrary nor capricious. The question turns, then, to whether the process was applied in an arbitrary and capricious or clearly wrong fashion as it relates to Grievant’s application for promotion.

The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). 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.” *Id.* (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 his or her judgment for that of [the employer].” *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep’t of Health & Human Res.*, Docket No. 20140539-DHHR (Mar. 16, 2015).

In the instant matter, at the level three hearing, Grievant argued that Respondent misapplied the criteria for tenure and promotion in her 2023 application for promotion when it (1) took into account quantitative student course evaluation scores in assessing Grievant’s teaching ability, (2) failed to consider Grievant’s capstone and lab teaching experiences as writing-intensive courses, and (3) erroneously applied the provisions of the addendum to Grievant’s 2013 contract to her application for promotion. Regarding her first argument, Grievant takes issue with the use of student course evaluation scores in evaluating an application for promotion because the Marshall University Greenbook<sup>3</sup> and the COS promotion and tenure policy do not delineate a quantitative evaluation score as being a critical criterion for assessing teaching and advising skill. Grievant is correct that the COS guidelines presented as evidence at the hearing do not set a hard and fast quantitative student evaluation score—rescaled or otherwise—as a benchmark for “success.” The Greenbook was not entered into evidence; so, the undersigned cannot

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<sup>3</sup> The Greenbook is a faculty handbook.

say whether it addresses the matter. The testimony at the hearing, though, indicated that the benchmark for “exemplary performance” in teaching and advising is a rescaled score of 3.5 out of 4.0 (Grievant’s score was 2.99), but it is unclear how that benchmark was determined.

Regardless, Grievant is incorrect that consideration of that score was arbitrarily applied in consideration of her promotion. The COS guidelines for promotion and tenure make clear that “[q]uality instruction is critical to the mission of the College of Science.” Accordingly, all applicants for promotion are required to submit a “completed Teaching Summary Table” appended with supplemental materials to include “a *complete* [emphasis in original] set of summary sheets for classroom evaluations in all classes taught, including a complete and verbatim compilation of all written student comments from course evaluation forms.” Further, the addendum to Grievant’s contract stipulated that student evaluations would be part of the documentation used to assess Grievant’s teaching performance. Moreover, it just makes good sense that an evaluation of an applicant’s teaching skills would include the input of his or her students.

Student evaluations were only part of the equation, though. In order to show “exemplary performance” in teaching and advising, Grievant was further required to demonstrate what new courses or programs she developed; what new e-courses she developed; what student advising and mentoring projects she undertook; her service on thesis, dissertation, and comprehensive examination committees; her development or implementation of innovative and creative teaching and advising strategies; her development or implementation of writing-intensive courses; her attendance at meetings of academic societies related to teaching; her participation in faculty development



programs or workshops focused on teaching and advising; awards she received for teaching or advising; and any teacher preparation courses she taught. According to her own portfolio, Grievant only supervised four capstone projects between her last promotion in 2013 and her application for promotion in 2023. She supervised two additional students working under a scholarship and two other students on independent study projects. Grievant offered that she was nominated for the Hedrick Outstanding Faculty Award in 2022 and noted that she had two new course proposals ready to submit for review; but, otherwise, Grievant's portfolio offered no particular distinction in her teaching career in the nine years since her last promotion. Even without taking into account student evaluations, one cannot objectively say that Grievant's portfolio demonstrated "exemplary performance" in teaching and advising. Thus, the decision to deny Grievant promotion based on her teaching performance was not arbitrary or capricious.

As to Grievant's assertion that the Capstone projects and lab classes she oversees should count as writing-intensive courses, this Grievance Board is simply not qualified to substitute its opinion for the professional judgment of academic leaders of an institution of higher education. *See Sui, supra*. Even if the undersigned was of a mind to do so, it would be of no avail to Grievant. Ten-page theses and lab reports hardly seem "writing-intensive." Further, Dr. Frost explained that recognized writing-intensive courses must be approved by the University and those entrusted to teach them must undergo special training. Grievant has not met those requirements. Such particular standards for distinguishing writing-intensive courses from run-of-the-mill courses cannot be said to be arbitrary and capricious.

Finally, Grievant argues that Respondent “misapplied rules in an expired Addendum (2010-2013) to [her] promotion evaluation period (2014-2022).” That is simply not the case. The addendum did reference certain three-year periods. For one, Grievant’s teaching load would be reduced for the first three years of her contract while she focused on establishing a research lab. For another, Respondent would fund that lab over the course of those first three years. But the addendum itself did not “expire” after three years. In fact, the addendum clearly spelled out that it was setting forth the “[k]ey elements of the criteria for [Grievant’s] promotion and tenure,” including those to be considered “[p]rimarily for promotion to full professor.” Grievant was not even eligible to apply for tenure until the 2012-2013 academic year. The rank of associate professor requires at least five years of experience as an assistant professor, and the rank of full professor requires at least five years of experience as an associate professor. If the addendum was meant to expire in 2013, it would make little sense for it to address promotion opportunities that would not even be available until well after the expiration of the addendum. Again, Respondent did not act arbitrarily and capriciously, nor was it wrong, to assess Grievant’s application for promotion in light of the criteria set forth in the 2010 addendum to her contract.

Grievant pointed out repeatedly that the very next year, she was promoted to full professor using the same exact portfolio that she submitted in 2023. Therefore, she argues, the decision to deny her a promotion in 2023 was clearly arbitrary and capricious. First, her 2024 application portfolio was not made part of the record; so, it is unclear what it portrayed. Second, there was a merger of academic departments and the appointment of a new dean to the COS in the intervening year between the two applications. Those

changes necessarily mean that a new departmental committee and a new dean considered Grievant's 2024 application. As reasonable minds may differ, the consideration and ultimate approval of Grievant's 2024 application has no significance in relation to the consideration of her 2023 application. Thus, the undersigned did not and cannot consider Grievant's eventual promotion in the adjudication of this matter.

The evidence that can be considered in this matter demonstrates that Respondent did not act arbitrarily and capriciously, nor was it clearly wrong in denying Grievant a promotion to full professor in 2023. Grievant has failed to meet her burden. Accordingly, the grievance must be denied. The following Conclusions of Law support the decision reached:

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018).

2. "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

3. "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 (Apr. 30, 1998); *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996). Nonetheless, "[p]romotion and tenure are paramount professional and economic goals

of a teacher.’ *State ex. rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978).” *Finver v. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997). See also, *Rankin v. Board of Trustees/Marshall University*, Docket No. 99-BOT-421 (Jun. 13, 2000).

4. The review of an institution of higher learning’s promotion decision is “generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious.” *Harrison v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (April 11, 1995).

5. “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.” *Sui v. Johnson*, 784 F.2d 238 (4th Cir. 1984).

6. The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

7. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

8. “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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

9. “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 or her judgment for that of [the employer].” *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep’t of Health & Human Res.*, Docket No. 20140539-DHHR (Mar. 16, 2015).

10. The decisional subjective process by which promotion and tenure are awarded by Respondent Marshall University and the College of Science is both thorough and reasonable, and it is neither arbitrary nor capricious.

11. The decision to deny Grievant promotion to the rank of full professor in 2023 is fully supported by the relevant evidence before this Board, and it cannot be said to be arbitrary and capricious or clearly wrong.

12. Grievant has failed to prove by a preponderance of the evidence that Respondent acted arbitrarily or capriciously in denying her promotion in 2023.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b) (2024). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should

not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

**DATE: February 28, 2025**

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**Lara K. Bissett**  
**Administrative Law Judge**