

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RADHEY SHARMA,

Grievant,

v.

Docket No. 2024-0389-WVU

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Radhey Sharma, was employed as a tenured professor by Respondent, West Virginia University (WVU), in the Department of Civil and Environmental Engineering (CEE) at WVU's Statler College of Engineering and Mineral Resources (CEMR), between 2009 and 2024. On October 31, 2023, WVU dismissed Grievant through a "reduction in force" (RIF), effective May 9, 2024.

On November 3, 2023, Grievant filed this grievance claiming his RIF was arbitrary and capricious. Grievant alleges WVU violated RIF protocol in its lack of financial need, in not considering his "seniority" and "knowledge & qualifications," and in not fully accounting for his "performance." Grievant further claims WVU violated his constitutional tenure rights. As relief, Grievant seeks reinstatement with backpay and benefits.

A level one conference was held on November 29, 2023. A level one denial was issued on January 3, 2024. Grievant appealed to level two on January 19, 2024, and to level three on March 25, 2024. A level three hearing was held before the undersigned on June 18, June 25, and August 29, 2024. Grievant appeared in person and was represented by Drew Capuder, Esq. Respondent appeared by Tracy Morris, Associate Provost; Christopher Staples, Executive Director of Academic Personnel; and Carol Marunich, Deputy General Counsel; and was represented by Samuel Spatafore,

Assistant Attorney General. This matter matured for decision on September 30, 2024. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was a tenured CEE professor of 14 years when dismissed via RIF. WVU's Rule 4.7 required WVU to "give consideration" to the RIF factors of "performance," "knowledge & qualifications," and "seniority" "as part of a holistic assessment." Grievant claims WVU failed to consider each RIF factor as part of a holistic assessment and violated his constitutional tenure rights by using only 3 years of evaluations to RIF him instead of recently hired non-tenured faculty. While tenure may confer constitutional rights, Rule 4.7 does not mandate its consideration. Even if Rule 4.7 is unconstitutional, the Grievance Board cannot order that it be changed. Yet, Rule 4.7 does require that WVU consider Grievant's "seniority." Grievant proved that WVU failed to consider his "seniority." Accordingly, the grievance is **GRANTED, IN PART**, and **DENIED, IN PART**.

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 was employed by Respondent, West Virginia University (WVU), as a tenured full professor in the Department of Civil and Environmental Engineering (CEE) at the Statler College of Engineering and Mineral Resources (CEMR) between 2009 and 2024, when dismissed from this position as part of a "reduction in force" (RIF).

2. Grievant specializes in environmental engineering and was one of two CEE professors with a subspecialty in geotechnical engineering.

3. Grievant eventually also held a concurrent position as an adjunct professor in WVU's medical school as part of the BRAIN program with Dr. Pete Konrad. The BRAIN program used Grievant's role with CEMR to generate solutions for medical needs through engineering technology.

4. Some of Grievant's accolades include serving as CEE's Chair for 7 years, receiving the Telford Gold Medal (Institution of Civil Engineers' highest award), serving on the Governor's Team investigating New Orleans' levees after Hurricane Katrina, and serving on many important committees at WVU.

5. Before joining WVU, Grievant held the Roy Paul Distinguished Professorship at Louisiana State University and was tenured. If the position at WVU had not been a tenured full professorship, Grievant would not have accepted.

6. Between 2018 and 2022, there was a decline in CEE's enrollment. Yet, in that period, CEE hired 4 new faculty, including 2 in the fall of 2022.

7. Over several years prior to the RIF announcement, WVU had already attempted to streamline operations and maximize efficiencies by eliminating over 500 non-academic positions, launching a Voluntary Separation Incentive Plan in 2019, and offering lump-sum incentive payments to eligible faculty and staff to leave WVU.

8. In spring 2023, WVU announced projected deficits of \$45 million for FY 2024 and \$75 million by FY 2029. Expenditure of State funds was significantly reduced. A Work-Time Reduction program was implemented whereby faculty and staff could voluntarily reduce their time. WVU informed many non-classified staff and non-tenure track faculty that their annual contracts would not be renewed.

9. During summer 2023, WVU engaged in an academic transformation and undertook a review of its academic and support units for academic restructuring. Recommendations were developed to facilitate changes to curriculum.

10. WVU identified programs and departments for formal review and announced initial recommendations on July 10, 2023. Appeal hearings of the program reviews occurred between August 21 and September 5, 2023.

11. On September 15, 2023, WVU's Board of Governors (BOG) approved recommendations involving program reductions and eliminations, effective May 9, 2024. WVU's BOG mandated a RIF of 146 WVU faculty positions. Before effectuating the RIF, faculty in units subject to RIF were given the opportunity to voluntarily resign or retire. The number of WVU faculty designated for RIF was reduced to 76 after 70 faculty voluntarily departed.

12. WVU BOG Rule 4.7 is the controlling policy for RIF of tenured faculty and tenure-track faculty.

13. Rule 4.7, Sec. 2.1, outlines justification for RIF as follows: "A Faculty RIF may occur in response to institutional reorganization as a result of a Program Reduction or Program Discontinuation, and/or a Financial Exigency."

14. "'Financial Exigency' means a situation that curtails operations requiring immediate steps by the University to remedy, which may include, but is not limited to, budget reductions, loss of funding, or an emergency." (Rule 4.7, Sec. 6.5).

15. "University plans for responding to a Financial Exigency shall be developed through a collaborative process initiated by the President, in consultation with the Provost

and other appropriate members of the University community, including representatives of administration and faculty.” (Rule 4.7, Sec. 3.4.1).

16. WVU justified the RIF as a “response to institutional reorganization as a result of a Program Reduction or Program Discontinuation” rather than due to “Financial Exigency.” WVU’s President never declared a “Financial Exigency.” Nevertheless, WVU pointed to budgetary issues and reasoned that CEE’s operating costs were substantially more than CEE’s revenue.

17. WVU’s BOG mandated a reduction of CEE’s full-time faculty from 18 to 14. Of the 18 faculty, 13 were tenured and 5 were non-tenured. Two of the latter were recent hires made within a year of the RIF process and had not begun classroom teaching.

18. Rule 4.7, Sec. 3.1, allows for RIF of tenured faculty. Rule 4.7, Sec. 3.2, sets forth the following factors to RIF tenured faculty and tenure-track faculty when a department is reduced but not eliminated:

In situations where a RIF results in the elimination of some, but not all of the Faculty positions within the Unit, the Provost and Dean shall evaluate the skills and qualifications of the individual Faculty Members potentially subject to the Faculty RIF. In making the determinations on who will be selected to remain, the Provost and Dean shall give consideration to the following factors as part of a holistic assessment:

3.2.1 *Performance*: each Faculty Member’s documented performance history as demonstrated in performance evaluations of record including, but not limited to, annual performance evaluations, and disciplinary history.

3.2.2 *Knowledge and qualifications*: specific duties and responsibilities of each position, and the Faculty Members’ knowledge and skills; and

3.2.3 *Seniority*: the length of service as defined by the rules established for the calculation of years of service outlined in WVU BOG Tal. & Cutl. R. 3.7 – Annual Increment.

19. Rule 4.7 does not specify any algorithm, weighting, or application of the outlined criteria.

20. “Performance” for each faculty member is documented within digital measures (DM) through WVU’s evaluation process. Annual evaluation ratings are assessments of a faculty member’s performance of their assigned workload in teaching, research, and service. However, annual evaluations do not account for differences in workloads between faculty members in the same department.

21. The “performance” factor is not limited to annual evaluations. Nor is WVU required to use criteria beyond annual evaluations. WVU decided that reliance on annual evaluation ratings would be the most systemic and objective analysis of “performance” for the RIF process.

22. WVU determined that Rule 4.7 does not mandate the number of years for consideration of “performance” or annual evaluations in the RIF process. As such, WVU decided that it would limit its use of annual evaluations to a three-year period between 2020 to 2022 and that this would be consistent with the calculation of “performance” trajectories across WVU. WVU calculated “performance” ratings for each faculty member using up to three annual evaluations which encompassed Department Faculty Committee (FEC) and Chair ratings across the areas of teaching, research, and service. The possible ratings were Excellent, Good, Satisfactory, and Unsatisfactory. Each awarded rating was converted to a 4-point scale (Excellent=4, Good=3, Satisfactory=2, Unsatisfactory=1) and an average was calculated for each faculty member’s review period.

23. Each faculty member's final "performance" average rating was placed on a list in descending order of the highest score, but name and salary were not identified. WVU ranked the 18 CEE faculty solely in accordance with their "performance" scores. The faculty with the four lowest "performance" scores were put in the RIF category.

24. "Seniority" was only applied to rank faculty that had the exact same "performance" score to the hundredths point. There were 2 groups with tied "performance" scores and each group had 2 faculty members, with one group scoring 3.11 and the other 3.56. The "performance" scores of these 4 faculty members were all high enough to place them in the category of retained CEE faculty. WVU considered the "seniority" factor only for these 4 CEE faculty and as a tiebreaker in case WVU had to choose to RIF one of them. In the end, this tiebreaker turned out to be unnecessary, as these 4 faculty were retained. A different set of 4 faculty were at the bottom of the list and marked in the RIF category. The names of CEE faculty on the list were then revealed. Grievant ranked last at the bottom of the list with a score of 1.94.

25. "Seniority" as defined in Rule 4.7 does not mention tenure. Nor does WVU interpret "seniority" to include tenure. WVU defined "seniority" as "years of service."

26. WVU never considered Grievant's "seniority" or tenure in the RIF process.

27. Tenure-track faculty start as non-tenured assistant professors for their first 5 years. WVU's Promotion and Tenure Guidelines (P&T Guidelines) require promotion to tenure as an associate professor in 6 years. Year 6 is typically the critical terminal year. Failure of tenure-track faculty to obtain tenure by year 6 results in termination. Promotion to full tenure, or full professor, takes an additional 5 years after attaining associate

professor. Annual evaluations have various implications depending on where a faculty member is on the path towards tenure or the next promotion.

28. Unlike tenured faculty, tenure-track faculty are at-will employees with annual contracts that WVU can choose not to renew. Unlike with tenured faculty, WVU does not need cause to not renew tenure-track faculty.

29. Back in 2022, Grievant had filed a grievance that resulted in a settlement agreement with WVU. The settlement entailed changing Grievant's annual evaluation, but WVU apparently never changed it and Grievant did not take further legal action to enforce the agreement.

30. Faculty members can submit rebuttals to annual evaluations in DM. WVU only considered a rebuttal if the rebuttal to an annual evaluation changed the rating. In which case the revised rating became the official rating used in calculating a "performance" average. WVU ignored Grievant's rebuttals for the years considered.

31. WVU's P&T Guidelines state that a "rebuttal" applies only in cases when a recommendation for tenure, promotion, or termination of appointment has been made. This contrasts with a "response" which faculty may submit for inclusion in their file.

32. WVU did not consider the annual evaluations required for achievement of tenure. All 18 CEE faculty considered for RIF were tenured or tenure-track. To ensure uniformity in the RIF process, WVU only used the portion of annual evaluations considered for non-tenured faculty (years 1 – 5), which included the three areas of teaching, research, and service. However, the evaluations for promotion to tenure involved significant additional accomplishments.

33. Annual evaluations are also the primary basis for performance-based salary adjustments in years when such adjustments are available, and for the program of Salary Enhancement for Continued Academic Achievements. Positive recommendations for promotion and tenure are supported both by a series of annual reviews above the "satisfactory" level and by performance and output which are deemed to meet expectations identified in the appointment letter and under the rigorous standard of "significant contributions".

34. New faculty members, such as the ones retained by CEE, are given a start-up package that helps them begin work more effectively. Experienced faculty normally must spend 40% of their time on teaching, 40% on research, and 20% on service. New faculty are given an easier assignment percentage. For instance, the newest CEE faculty retained through the RIF process were, in the last year of evaluation used in the process, assigned 5% of their time for teaching (with no course teaching assignment), 85% for research, and 10% for service. Further, the faculty review committee refused these new CEE members a rating for teaching because they lacked a teaching assignment. Yet, the CEE Chair rated them "good" for teaching. Because they could spend 85% of their time on research, these new CEE faculty were at an advantage over senior faculty members for their research performance while being gifted high ratings for teaching and service.

35. WVU determined that "knowledge & qualifications" meant "specific knowledge and skills critical to the continuation of the department." In undergoing its academic transformation, WVU determined that its primary focus was its ability to deliver program curriculum. For instance, if World Languages required a course in Chinese, and

only one faculty member was qualified to teach Chinese, that could warrant the retention of that one member at the expenses of faculty with higher performance averages.

36. Thus, WVU used the “knowledge & qualifications” factor simply to determine whether any faculty member was “critical to the continuation of a department.” After considering every faculty member’s “knowledge & qualifications,” WVU determined that in most departments, including CEE, there were no faculty with specialized qualifications “critical to the continuation of the department.”

37. Rule 4.7 delegates decision making on the “knowledge & qualifications” factor to the Provost and Dean. WVU relied on CEMR Dean Mago’s judgment on this factor as it related to CEE faculty. Associate Provost Morris sent a memo to Dean Mago on August 14, 2023, explaining the RIF process. WVU sent identical memos to all deans. The procedure for RIF determinations was communicated to all deans. Dr. Konrad and Dean Mago discussed Grievant’s work on the BRAIN program. After assessing each member, Dean Mago determined that no CEE faculty had specialized knowledge and qualifications necessary for the continuation of CEE. Dr. Fred King, Vice President for Research, was on the RIF Review Committee and was responsible for oversight of WVU’s entire research portfolio. Dr. King was aware of Grievant’s association with Dr. Konrad and the BRAIN program but did not voice any concerns that Grievant had specialized knowledge and qualifications necessary for CEE. Dean Mago signed off on the RIF plan.

38. When one of the 14 highest rated CEE faculty members resigned, the 15th highest rated member moved into the retained list. As the lowest rated member, Grievant’s RIF went forward, along with the two other lowest rated faculty. The 3 RIF’d faculty were tenured. All 5 non-tenured CEE faculty were retained.

39. Two of the 5 retained non-tenured CEE faculty were recently hired in fall 2022, had only a single semester of seniority when WVU made its RIF determination, and were given “performance” ratings for just one semester. WVU did not adjust the “performance” average score or account for the difference in time at WVU between faculty who had been there a semester and those who had been teaching for decades.

40. For departments that were not eliminated, but whose faculty were reduced through the RIF process, WVU applied the same interpretation of the three RIF factors as it had with CEE.

41. A meeting was held on September 27, 2023, between Dean Mago, Associate Dean Robin Hissam, Assistant Dean Jason Dean, Sarah Seime (Employee Relations), Chris Staples, and Tracy Morris (Provost’s Office), with the advice from WVU General Counsel’s office, to discuss which faculty members would be retained and which would be subject to RIF.

42. On October 13, 2023, Grievant was notified of his RIF selection, provided reasons, and notified of his pretermination meeting. The letter pointed out that “[t]he elimination of [Grievant’s] position is part of the ongoing Academic Transformation and/or other personnel actions associated with budgetary concerns.” Grievant attended on October 25, 2023, and provided information for consideration prior to his RIF.

43. On October 31, 2023, Grievant was issued a letter of termination via RIF, effective May 9, 2024, in conjunction with the end of the academic year.

44. Since the RIF plan took effect, the CEE Chair has contemplated hiring more faculty in geotechnical engineering.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 spring 2023, WVU announced projected deficits of \$45 million for FY 2024 and \$75 million by FY 2029. On September 15, 2023, the WVU BOG approved recommendations involving program reductions and eliminations. WVU determined that CEE’s operating costs were substantially more than its revenue. WVU BOG Rule 4.7 governs the RIF process and mandates that, “as part of a holistic assessment,” WVU “shall give consideration to” “performance,” “knowledge & qualifications,” and “seniority.” WVU relied on three-years of annual reviews to RIF Grievant (and two other tenured faculty) and instead retained 5 non-tenured, recently hired faculty, some of whom had not begun teaching, (along with 9 tenured faculty).

Rule 4.7, Sec. 3.2, sets forth the following factors for RIF of tenured faculty and tenure-track faculty when a department is reduced but not eliminated:

In situations where a RIF results in the elimination of some, but not all of the Faculty positions within the Unit, the Provost and Dean shall evaluate the skills and qualifications of the individual Faculty Members potentially subject to the Faculty RIF. In making the determinations on who will be selected to remain, the Provost and Dean **shall give consideration to the following factors as part of a holistic assessment** [emphasis added]:

3.2.1 Performance: each Faculty Member's documented performance history as demonstrated in performance evaluations of record including, but not limited to, annual performance evaluations, and disciplinary history.

3.2.2 Knowledge and qualifications: specific duties and responsibilities of each position, and the Faculty Members' knowledge and skills; and

3.2.3 Seniority: the length of service as defined by the rules established for the calculation of years of service outlined in WVU BOG Tal. & Cutl. R. 3.7 – Annual Increment.

“An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). An agency's interpretation of the provisions of its own internal policy is entitled to some deference by this Grievance Board, unless the interpretation is contrary to the plain meaning of the language, or is inherently unreasonable. See *Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996).

Grievant claims WVU was arbitrary and capricious in not considering criteria set forth in its own policy in failing to make a “holistic assessment” of all three RIF factors, in lacking the financial need to RIF CEE faculty, and in ignoring his constitutional tenure rights. Grievant contends that WVU acted improperly in confining its application of the 3 RIF factors to just one, “performance,” then limiting “performance” to just annual evaluations rather than the broader “performance” subfactor of “documented performance history,” and further limiting evaluations to just three years. Grievant argues that nothing in Rule 4.7 limits consideration of “performance” to a 3-year period, and that WVU considers a much longer period to make tenure decisions. Grievant argues that WVU was required to actually apply all the RIF factors and not just think about applying them. Grievant contends that in contemplating the hire of another geotechnical engineering faculty at CEE, WVU has

rendered Grievant's RIF unnecessary and revealed it to be a sham to get rid of tenured faculty.

WVU hints that it has leeway to interpret ambiguous terms in Rule 4.7 in creating its RIF methodology, so that it can interpret "consideration" as "thought" rather than "action," "performance" as "three-years of annual evaluations," "seniority" as "years of service" devoid of any consideration of tenure, "knowledge & qualifications" as "specific knowledge and skills critical to the continuation of a department," and "holistic" as leeway to avoid some or all of the RIF factors.

There is no ambiguity to the common meaning of "consideration" and "holistic." "Holistic" means "encompassing the whole of a thing, and not just the part."¹ In other words "complete." "Consideration" requires "careful thought," but not necessarily action.² "Shall" mandates that WVU give careful thought to all 3 RIF factors. The plain meaning of Rule 4.7 obligates WVU to give "careful thought" to the 3 RIF factors as part of a "complete" assessment. WVU can properly choose not to apply the 3 RIF factors, after giving each factor careful thought as part of a holistic assessment, and WVU can properly decide how much weight, if any, to give each of these factors, so long as its actions are not arbitrary and capricious.

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)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the

¹Vocabulary.com Dictionary.

²THE NEW MERRIAM-WEBSTER DICTIONARY 170 (1989).

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).

“[T]he “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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

WVU’s treatment of the “seniority” factor is determinative in this matter. WVU reasonably defined “seniority” as “years of service,” making it the most objective and easy to apply RIF factor. WVU easily compiled each faculty member’s years of service. Yet, unlike the “performance” and “knowledge & qualifications” factors, it only considered “seniority” when candidates had the same “performance” score to the hundredths of a point. This

applied to only 4 faculty members. Otherwise, the spreadsheet WVU used to compare faculty members clearly shows faculty members were ranked solely by their “performance” score. WVU failed to consider “seniority” for the remaining 14 faculty, including Grievant. Giving “consideration” as “part of a holistic assessment” meant that WVU was to consider each of the 3 RIF factors for every faculty member subject to RIF, not just some of them. WVU appropriately gave consideration of the “performance” and “knowledge & qualifications” factors to each CEE faculty member, as will be discussed further below, but only gave consideration of the “seniority” factor to 4 faculty members. In accordance with the plain meaning of Rule 4.7, WVU was mandated to consider each of the RIF factors for every CEE faculty member subject to RIF due to the requirement of “consideration” “as part a holistic assessment.” WVU’s failure to consider Grievant’s “seniority” rendered Grievant’s RIF arbitrary and capricious, as it “did not rely on criteria intended to be considered.” *Trimboli, Supra*. Grievant proved that WVU did not consider his “seniority,” rendering his RIF arbitrary and capricious.

The RIF factors of “performance” and “knowledge & qualifications” are broader than “seniority” and can be measured in various ways. WVU decided to measure “performance” using just three years of annual evaluations. At first glance, limiting an assessment of “performance” to just 3 years of evaluations seems arbitrary because this limitation overlooks the special performance traits acquired by tenured faculty. There are differences in the allocations of duties among faculty members. These differences tend to favor non-tenured faculty in annual evaluations. Two of the retained CEE faculty had only a semester of work at WVU and no classroom teaching. The faculty review committee refused these new CEE members a rating for teaching because they lacked a teaching assignment. Yet,

the CEE Chair rated them “good” for teaching. Further, as with any new employee, it is doubtful they would have had enough time to do anything of significance at WVU like tenured professors. Yet, the evidence was insufficient to prove a lack of careful thought by WVU to its chosen 3-year period. The evidence implies that WVU put careful thought into the appropriate period and determined that three years was a perfect window to assess “performance.” WVU’s actions imply that it did not want to give much weight, if any, to the expertise brought by tenured professors, and instead opt for other priorities such as cost savings and ensuring it met the minimum criteria for accreditation. WVU also implies that recent evaluations are more indicative of current performance since tenured faculty may get complacent after receiving tenure.

Grievant points to Rule 4.7 as providing a two-part definition of “performance”; one being performance evaluations and the other being “documented performance history as demonstrated in performance evaluations of record.” Grievant treats the latter as different due to the specific accomplishments of tenured faculty. However, WVU’s interpretation of performance as 3 years of evaluations is reasonable. WVU chose not to use the special accomplishments in assessing performance after deciding they were not critical to the continued operation of CEMR and CEE.

Grievant further claims that bias and errors in his evaluations led to his low “performance” average. During his 2022 grievance, Grievant reached a written settlement that obligated WVU to revise the low ratings on Grievant’s 2022 evaluation. Apparently, WVU failed to make the agreed revisions. W. VA. CODE § 6C-2-4(b)(2) provides that agreements reached in the settlement of grievances “are binding and enforceable in this state by a writ of mandamus.” The Grievance Board does not have jurisdiction over

mandamus proceedings. As for evaluations not covered by the settlement agreement, they were never grieved. “If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); See *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. See *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).” *Agliinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff’d*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). This restriction is not limited to discipline but is read more broadly to include annual evaluations and performance improvement plans. The “performance” factor is a close call. Ultimately, Grievant failed to prove that WVU did not give careful thought to the “performance” category.

As for “knowledge & qualifications,” WVU defined this factor as “specific knowledge and skills critical to the continuation of a department.” WVU determined that, based on its assigned definition, this factor did not apply to CEE and many other departments. WVU’s definition and limited use of this factor seems to reflect a thoughtful holistic approach. The uniquely tailored nature of this definition, along with WVU’s decision that no faculty at CEE met the definition, after assessing each faculty member’s “knowledge & qualifications,” reveals the careful thought, individual application to each faculty member, and due diligence that went into this factor. The simplicity of its utilitarian role as both intrinsically practical and

easily non-applicable to each CEE faculty member artfully illustrates how RIF factors can be considered for each faculty member without actually being applied.

Grievant counters that his subspecialty of geotechnical engineering was critical to maintaining CEE's accreditation and that his involvement in the BRAIN program is critical to attracting students to CEE. Yet, WVU explained that it retained a single geotechnical CEE faculty member to maintain the correlating accreditation and that Dean Mago and Dr. King knew about Grievant's involvement in the BRAIN Program and did not find it critical enough to retain him at CEE. Grievant argues that the fact that WVU is now hiring faculty shows the disingenuousness of its RIF rationale. WVU counters that Grievant can apply for those positions. The problem for Grievant is that there is no priority for rehiring RIF'd faculty at WVU as there is in elementary and secondary public schools. Ultimately, WVU could have various reasons for rehiring faculty when downsizing, including a need that did not exist when the RIF was implemented. Grievant provided no legal authority for the presumption of impropriety when WVU rehires or recreates a position in proximity to a RIF. Nor does the burden of proof switch to WVU to prove that hires it makes in proximity to its RIFs are justified. WVU is entitled to broad leeway, and any reversal would necessitate finding these actions to be arbitrary and capricious. Grievant did not prove WVU was arbitrary and capricious in the way it applied the "performance" and "knowledge & qualifications" factors.

Grievant further contends that CEE was not in financial need and that the RIF of CEE faculty was therefore unjustified. There is some confusion as to WVU's RIF justification because it contends there was no "Financial Exigency" as envisioned by Rule 4.7 due to lack of an appropriate declaration by the President. In accordance with Rule 4.7, a Faculty RIF may also occur "in response to institutional reorganization as a result of a Program

Reduction or Program Discontinuation.” In conjunction with the circular reasoning of this rule, WVU clearly reduced its CEE program, thus justifying its RIF of CEE faculty. In fulfillment of its duty to provide justification for the Program Reduction of CEE, WVU justified its RIF of faculty based on financial need created by years of decreasing enrollments and projected budget deficits. This also provided a constitutional basis to RIF tenured faculty, as will be discussed later. It is uncontested that in 2023, when the RIF plan was formed and implemented, WVU had projected deficits of \$45 million for FY 2024 and \$75 million by FY 2029. Grievant offered no evidence to the contrary but instead attacked the RIF of CEE faculty by presenting testimony that CEE was both solvent and expanding with incoming class enrollment.

An educational institution “is entitled to exercise, as a matter of academic freedom, its own judgement as to how to apportion its resources...” *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 994 (S.D. Iowa 1993) (permitting under Title IX elimination of men’s wrestling program). “Our respect for academic freedom and reluctance to interject [the judiciary] into the conduct of university affairs counsels that [courts] give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits.” *Cohen v. Brown Univ.*, 101 F.3d 155, 187 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (requiring that university be afforded opportunity to present its solution to address Title IX concerns).

Before making reductions to academic program offerings and faculty positions, WVU made every effort to address budget situations by first making reductions in non-academic areas and implementing a voluntary work-time reduction program for faculty and staff. WVU also offered severance packages. WVU was able to reduce the number of involuntary faculty

reductions from 146 to 76. WVU undertook actions it felt were necessary to ensure the financial stability and viability of the institution. In this case, WVU is “entitled to exercise, as a matter of academic freedom, its own judgement as to how to apportion its resources.”

Gonyo, supra.

Grievant opined that CEE was in good financial shape and presented his own financial analysis that WVU did not need to conduct a program reduction. Associate Provost Morris disagreed with Grievant’s opinion and stated that there were serious structural deficits and that CEE’s operating costs were substantially more than it was bringing in. Associate Provost Morris went on to explain that Grievant’s financial analysis was inaccurate, that his blended tuition rate did not consider the discounting of student tuition, and that it is not unusual for the discount rate to be as high as 60% in some departments. Associate Provost Morris explained the other more critical component is that Grievant’s analysis did not incorporate all relevant costs and that WVU must also cover staff salaries and costs to run the institution. Tuition monies must cover police, libraries, roads and grounds, and the entire university. WVU must bring in approximately 50% more than its direct costs just to break even, and that is why WVU is losing money. The undersigned gives WVU great deference and will not second-guess its financial decisions even if there could have been a more efficient way to manage its resources. While it is questionable that such evidence would have made a difference, Grievant did not even show that WVU was unsuccessful in alleviating its projected deficit. Grievant failed to prove that the projected university-wide budget deficit was inaccurate or that WVU did not have broad leeway to reorganize its programs.

Lastly, Grievant argues that WVU violated his constitutional rights in not considering his tenure in the RIF process. WVU has leeway to terminate tenured faculty under one of two circumstances, cause or financial exigency. *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978). WVU claims there was no “Financial Exigency” because the President did not make the required declaration. Yet, it argues it implemented the RIF process due to financial need. Financial need is the equivalent of financial exigency in the context of *Krotkoff*. As previously discussed, while the President failed to declare “Financial Exigency,” Grievant failed to prove that the RIF process was not caused by financial need.

However, the real constitutional issue regarding Grievant’s tenure rights is the retention of non-tenured faculty at the expense of tenured faculty. Tenure-track non-tenured faculty are at will employees on year-to-year contracts and are subject to non-renewal without cause. As such, they do not have the same constitutional rights as tenured faculty. *Krotkoff* did not deal with the rights of tenured faculty in the context of their being RIF’d over non-tenured faculty. Yet, WVU implies that it was motivated outside of the two *Krotkoff* factors in hinting that tenured faculty often underperform once they achieve tenure. The remedy for underperformance of tenured faculty would normally be termination for cause, unless WVU can properly RIF tenured faculty by limiting its assessment of “performance” to the 3 most recent years to catch them while underperforming or to accentuate the good evaluations given to newer non-tenured faculty assisted by their more advantageous assignments.

Rule 4.7 permits termination of tenured faculty if WVU gives careful thought to the RIF factors. Grievant did not prove that WVU’s limitation of the “performance” lookback period to 3 years was improper under Rule 4.7. WVU’s underperformance rationale implies

that WVU chose the limited 3-year evaluation period to avoid accounting for the better evaluations tenured faculty may have received in conjunction with being awarded tenure. In so doing, WVU would have been able to assess tenured faculty based on their recent performance and avoid having their better, older evaluations skew their performance averages upward. Grievant implies this violates Grievant's constitutional tenure rights.

However, WVU acted under the protection of Rule 4.7 and no authority has been offered to show that the Grievance Board has jurisdiction to declare Rule 4.7 unconstitutional and to mandate that WVU consider tenure in the RIF process. "[I]t is not the role of this Grievance Board to change agency policies.... The [Grievance Board] 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." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted).

While the Grievance Board may not have jurisdiction to address the constitutionality of WVU's rules, it is able to address constitutionality as it relates to due process. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), overruled in part on other grounds by *W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "The constitutional guarantee of procedural due process requires "some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177

W.Va. 729, 356 S.E.2d 483 (1987). “The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given ‘oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story’ prior to termination.” *Id.* at 732, 356 S.E.2d at 486. Grievant received a pretermination hearing, notice thereof, and an opportunity to respond. Grievant did not prove WVU violated his due process rights.

Regardless, as previously discussed, Grievant did prove that WVU failed to consider his “seniority” as required by Rule 4.7, which rendered its RIF decision arbitrary and capricious. However, as to the remedy requested, Grievant failed to prove he was entitled to reinstatement. The Grievance Board cannot simply substitute its judgment for WVU’s. While WVU violated its policy by failing to holistically consider “seniority,” WVU was not required to assign “seniority” any particular weight. Thus, it is impossible to determine whether Grievant would have been retained if his “seniority” had been considered. Grievant’s “seniority” alone does not entitle him to retention. It is true that WVU may achieve the same CEE faculty rankings even after considering the “seniority” of every CEE faculty member. Yet, the undersigned cannot presume this is WVU’s desired outcome or that a proper consideration by WVU of each CEE faculty member’s “seniority” will not result in WVU assigning a weight to “seniority” that would reorder its faculty rankings. Thus, this grievance is GRANTED, IN PART and DENIED, IN PART.

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 his 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.*

2. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

3. An agency’s interpretation of the provisions of its own internal policy is entitled to some deference by this Grievance Board, unless the interpretation is contrary to the plain meaning of the language, or is inherently unreasonable. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996).

4. “Our respect for academic freedom and reluctance to interject [the judiciary] into the conduct of university affairs counsels that [courts] give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits.” *Cohen v. Brown Univ.*, 101 F.3d 155, 187 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

5. “[I]t is not the role of this Grievance Board to change agency policies.... The [Grievance Board] 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.” *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted).

6. “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).

7. “The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given ‘oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story’ prior to termination.” *Fraley v. Civil Service Commission*, 177 W.Va. 729, 732, 356 S.E.2d 483, 486 (1987).

8. Grievant did not prove by a preponderance of the evidence that WVU lacked a proper basis to initiate a RIF of CEE faculty, that the Grievance Board has jurisdiction to mandate a change to WVU’s rules to account for constitutional protections, or that WVU violated Grievant’s constitutional due process rights.

9. Grievant proved by a preponderance of the evidence that WVU violated its RIF policy in not considering his “seniority,” rendering his RIF arbitrary and capricious.

Accordingly, this grievance is **GRANTED, IN PART** and **DENIED, IN PART**. Respondent is **ORDERED**, as part of a holistic assessment, to consider the Rule 4.7 “seniority” RIF factor for each of the CEE faculty members that were part of the RIF process and to thereafter reassess its RIF rankings of CEE faculty for any changes. If the reassessment by WVU results in Grievant’s retention, WVU shall reinstate Grievant with back wages and benefits.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed.” W. VA. CODE § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-5(b). 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: November 15, 2024

Joshua S. Fraenkel
Administrative Law Judge