

# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHERRI ELAINE RITTER,**  
Grievant,

v.

**Docket No. 2016-0160-BVCTC**

**BRIDGEVALLEY COMMUNITY  
AND TECHNICAL COLLEGE,**  
Respondent.

## **DECISION**

Sherri Elaine Ritter, Grievant, filed this grievance against her employer, BridgeValley Community and Technical College (“BridgeValley”), Respondent. The original statement of grievance was filed on August 14, 2015, which provides:

Discrimination – Expectation of working 60 hour weeks on a regular basis, because I refuse I am denied promotions and raises. The latest incident resulted in hiring someone with no experience infield at almost the same pay as me. I have nearly 17 years’ experience and a doctorate, while the new person has no experience and masters.

The relief sought states, “Raise and promotion, back pay and restitution for pain and suffering.”<sup>1</sup>

A conference was held at level one on September 30, 2015. Pursuant to the level one conference, the issue(s) in dispute were resolved, in part, and denied, in part. As to the Grievant’s work expectations, it was agreed/clarified Grievant is not required to work

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<sup>1</sup> The Grievance Procedure allows for fair and equitable relief, which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Dunlap v. Dep’t of Environmental Protection*, Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997). The Grievance Board does not award tort-like or punitive damages. *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Troutman v. Dep’t. of Health and Human Res./William R. Sharpe Jr. Hospital*, Docket No. 2013-0630-DHHR (April 26, 2013) This issue will not be addressed further in this decision.

sixty (60) hours a week. As to the Grievant's rank and salary, the grievance was denied. The level one decision was dated October 12, 2015. Grievant appealed to level two on October 21, 2015, and a mediation session was held on January 11, 2016. Grievant appealed to level three on January 14, 2016. A level three hearing was held before the undersigned Administrative Law Judge on March 29, 2016, at the Grievance Board's Charleston office. Grievant appeared in person and with legal counsel Dwight Staples, Esquire and Gail Henderson-Staples, Esquire. Respondent was represented by Chief Human Resources Officer, Michelle Bissel, with its legal counsel Brian Lutz, Assistant Attorney General. Both parties submitted written proposed findings of fact and conclusions of law documents and this matter became mature for decision on or about May 18, 2016, upon receipt of the last of these proposals.

### **Synopsis**

Grievant contends Respondent discriminated against her and demonstrated favoritism with a later hiree. Grievant contends her assigned designation of Assistant Professor is insufficient with negative fiscal repercussions. There was a change of Grievant's employee category from non-classified to faculty. Respondent interjects the change of Grievant's classification from non-classified to faculty was readily influenced by compliance with legislative mandates. Grievant argues that with her appointment to faculty status she should have been awarded the rank of Professor.

The crux of a discrimination claim is that a grievant is impermissibly treated differently than similarly situated employees. Grievant's initial appointment as Assistant

Professor is consistent with initial appointments of other BridgeValley faculty with doctoral degrees, and is consistent with BOG Policy B-1 and Faculty Evaluation Guidelines. It is not established that Respondent abused its discretion in determining Grievant's faculty status. Further, Grievant did not officially grieve her appointment at or near the time of the event. Respondent has a level of discretionary authority. Grievant contends illegal conduct in that Respondent subsequently hired an individual and said individual is compensated at an amount similar to Grievant's salary. A grievant's belief that the supervisor's management decision(s) are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health. Grievant need not agree with all of Respondent's promotion and hiring decisions. Favoritism is not established. Grievant did not establish that Respondent's actions were in violation of any governing rule, regulations or laws. This grievance is DENIED.

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

### **Findings of Fact**

1. Grievant, Sherri Elaine Ritter, is employed by BridgeValley Community and Technical College in the position of Assistant Professor, in the category of faculty.
2. Grievant was originally hired by the former Kanawha Valley Community and Technical College in 2010, in the position of Instructional Technologist, a non-classified position.

3. Kanawha Valley Community and Technical College merged with Bridgemont Community and Technical College on March 20, 2014, to form a new institution, named BridgeValley Community and Technical College (“BridgeValley”).

4. The West Virginia Legislature enacted legislation which mandated a merger of the two institutions.

5. During the merger, BridgeValley undertook an extensive review of the staff at both Kanawha Valley and Bridgemont to ensure that, after the merger, they would be in compliance with the Senate Bill then in effect, which required institutions to reduce their non-classified staff down to 20%.<sup>2</sup>

6. Prior to the merger, Grievant’s title was Instructional Technologist, a non-classified employee with Kanawha Valley Community and Technical College.

7. During the merger/consolidation process, Grievant was given the choice of whether to be placed into a classified position or to be appointed as a faculty member.

8. Grievant expressed her preference and specifically chose to be appointed as a faculty member.

9. At the time of the Grievant’s appointment with Respondent, she had a doctorate’s degree.

10. There are four levels of faculty at BridgeValley (and generally throughout the statewide system of Community and Technical College Education): Instructor, Assistant Professor, Associate Professor and Professor. See G Ex 6

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<sup>2</sup> Senate Bill 330 set the date of July 1, 2015, for colleges and universities to meet the 20% threshold. Senate Bill 439, which was passed in 2015, extended the timeline for colleges and universities to reach the 20% threshold to 2016.

11. Pursuant to Respondent's Faculty Evaluation Handbook, R Ex 2 and Respondent's Policy B-1, G Ex 7, requirements for appointment or promotion at BridgeValley to the various ranks include as follows:

**Assistant Professor:**

Earned Doctorate.

OR

Master's plus 30 hours of appropriate graduate study and 3 years of experience.

\* \* \*

**Associate Professor:**

Earned Doctorate AND 6 years of experience, some of all of which may be relevant non-teaching experience.

- Faculty Evaluation Committee must review candidate's credentials prior to initial appointment at this rank.

\* \* \*

**Professor:**

Earned Doctorate in field AND 10 years of experience, 5 of which must be relevant teaching experience.

\* \* \*

- For appointment and/or promotion to Professor, faculty should hold professional registration/certification/license, if available in field.
- Faculty Evaluation Committee must review candidate's credentials prior to initial appointment.

G Ex 6

12. Respondent made a determination that Grievant, based on her experience and qualifications, should be appointed to the position of Assistant Professor.

13. Grievant was not a new hire, she was already employed with one of the merging unities. Both Grievant and Respondent agreed that at the time of Grievant's appointment, she was not a new hire.<sup>3</sup>

14. At the time of the merger, Grievant was an Instructional Technologist, a non-classified employee with Kanawha Valley Community and Technical College. Sometime after the merger, Grievant's new title was Assistant Professor and her job duties essentially remained the same.

15. Grievant did not suffer a decrease in pay or benefits as a result of the title change and merger; she, in fact, got a small raise in the form of a one-time payment of (\$1,000) one thousand dollars.

16. Michelle Bissell, the Human Resources Director at BridgeValley did not make the decision with regards to Grievant's appointment.

17. Dr. Beverly Harris is the President of BridgeValley Community and Technical College. Dr. Harris made the decision as to Grievant's appointment rank.

18. Dr. Beverly Harris signed Grievant's appointment letter on May 30, 2014.

R Ex 4

19. Grievant met with Dr. Harris in late June or early July 2014 and advised President Harris that she was improperly designated at the rank of Assistant Professor.

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<sup>3</sup> Grievant was employed at Kanawha Valley Community and Technical College (KVCTC) at the time of the consolidation of Bridgemont and KVCTC as an Instructional Technologist, a non-classified, will-and-pleasure employee reporting to the Vice President of Academic Affairs. She was formerly employed as a "shared" instructional technologist at both Bridgemont and KVCTC. Grievant eventually requested to work only at KVCTC, and this request was granted. Bridgemont subsequently hired Dr. Laura Little in the same position for the Montgomery campus.

20. Grievant acknowledges and credibly testified that President Harris advised Grievant that she would not be given rank of Professor.<sup>4</sup>

21. Grievant did not grieve her appointment as an Assistant Professor after discussing and expressing her opinion with President Harris or at the signing of her appointment letter.

22. Grievant signed her appointment notice in July 2014. R Ex 4 & G Ex 8  
Grievant accepted the offer of employment.

23. Grievant again signed a subsequent appointment notice a year later in 2015. R Ex 4 & G Ex 8

24. Grievant was never given a specific instruction, by her supervisors or anyone else, that she was required to work 60 hours per week.

25. Grievant's supervisors requested that she post a sign on her door which indicated her office hours and also what time she would be out of the office for lunch. Grievant was further requested to post a sign on the door if she was out of the office for other reasons indicating such.<sup>5</sup>

26. Grievant was not the only employee of whom posting requests were made; in fact, it was expected of most faculty members as a courtesy.

27. While employed at Marshall University, Grievant occasionally taught some academic based courses, usually one per semester.

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<sup>4</sup> Dr. Harris among other information highlighted that another individual, Bill Fischer, had a doctorate degree and had accepted a position at BridgeValley as an assistant professor.

<sup>5</sup> Grievant highlights that she was told to post notes on her door anytime she left her office, including when she went to the restroom.

28. Grievant's employment experience consists mostly of workshop-based courses taught to other faculty members and staff, teaching them how to use certain technological programs. These courses generally did not involve teaching students and the courses were not graded.

29. At BridgeValley, in 2014-15, there was a posting for a position vacancy entitled "Coordinator of Instructional Technologist/Blackboard Administrator." This position is responsible for the technical administration of the Blackboard Learning Management System (LMS) and collaboration with all college departments to ensure the LMS remains continuously operational and capable of meeting college-wide program goals. The position operates within a fast-paced, collaborative team environment centering on cyclical activities. G Ex 15

30. At a time subsequent to the aforementioned position, there was a posting for a position vacancy entitled "Instructional Technologist Coordinator" posted at BridgeValley. This posting among other information provided:

This is a full time, partially grant-funded position. The position provides technical support for Bridging the Gap consortium-level technology projects, including prior learning assessment and career planning portal development and analytics implementation and on projects and assignments within the Blackboard Learn environment and BridgeValley.

This position will be responsible for providing support to instructional technology users by working collaboratively to improve the quality of instruction. The position will work in support of the development of courses for the BTC program. Responsibilities include supporting technology integration into the classroom and faculty on instructional design issues. This position will require expertise in the areas of technical design associated with various multimedia and simulation packages.

This position will work with staff, faculty, and students to ensure the continuous operation of the learning management systems (LMS). This

position works with campus-wide departments and staff, as well as with key stakeholders across the higher education community.

G Ex 17

31. The descriptions for the two positions are not identical. G Ex's 15 and 17

32. The qualifications for the two positions are not identical. In fact the qualifications and duties for the vacancy entitled "Coordinator of Instructional Technologist /Blackboard Administrator" are more advanced than that of the position entitled "Instructional Technologist Coordinator." See G Exs 15 and 17

33. Amanda McClellan applied for the Instructional Technologist Coordinator position. G Ex 19 The salary for this position was identified as to be "commensurate with experience and education."

34. Amanda McClellan, was hired at BridgeValley as an Instructional Technology Coordinator. Specifically, an August 10, 2015 letter provides that Respondent was "pleased to offer [Ms. McClellan] an appointment as Instructional Technology Coordinator-Instructional Specialist, in the Division of Technology at BridgeValley Community and Technical College." G Ex 18

35. At the time of Amanda McClellan's appointment, she had a Master's degree and no experience in blackboard instruction.

36. Amanda McClellan signed the appointment offer letter on August 11, 2015.

37. This grievance was filed approximately three to four days after Amanda McClellan was hired into the position of Assistant Professor in Extended Learning.

(Grievance form dated August 14, 2015). Ms. McClellan was previously employed at the institution in the role of Assistant Professor in Engineering Technology.<sup>6</sup>

38. At the time of Amanda McClellan's appointment, she was given a salary of \$57,450.00. R Ex 8 Grievant's salary is approximately \$62,735.00. G Ex 8

39. Grievant is Ms. McClellan's supervisor and makes approximately \$5,000.00 more, per year, than Ms. McClellan.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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<sup>6</sup> Ms. McClellan's ten-month faculty pay in the Engineering Technology Division was \$55,504.00, she accepted the twelve-month Instructional Technology position at a salary of \$57,450.00.

Grievant highlights a number of factual events and theorizes regarding Respondent's authority and motivations. It is readily apparent that a triggering event for this grievance was the hiring of Amanda McClellan in the position of Instructional Technologist Coordinator.<sup>7</sup> At issue is the difference between discretionary business decision(s) and illegal conduct. Grievant argues that Respondent discriminated against her and/or demonstrated favoritism. Grievant contends the faculty rank of Assistant Professor assigned to her employment with Respondent is an insufficient appointment, with negative fiscal repercussions. Grievant avers that she should have been awarded the rank of Professor.

At one point earlier in the grievance process, Grievant asserted that her work expectations exceed those of others. However, it was clarified and agreed by the parties that the work expectation complaints were resolved, a 60-hour week was not required and that posting notices is an expected courtesy. See Level One Decision. With regard to that issue, Administrative Dean Connie Fox testified that employees at BridgeValley were expected to post a sign on their office door if they were not available. She also said that it was a common practice and was a requirement for any employees under her supervision. Dr. Kristen Mallory, who is second-in-command behind the President at BridgeValley, testified that "all faculty post their current office hours and classroom hours, and if they are not in [their office] during their posted office hours, they are to indicate [as

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<sup>7</sup> Ms. McClellan was selected as the best candidate for the position by a search committee that included Grievant. Respondent highlights that Grievant awarded Ms. McClellan high marks when evaluating her for the position and recommended her as one of the top candidates for the position.

such].” Grievant is or was of the belief that her office activity was more scrutinized than others. Grievant did not establish that she was being requested to more stringently report her work day activities more than any other similarly situated employee.

There was a change of Grievant’s employee category from non-classified to faculty. Grievant asserts Respondent’s discrimination against her is evident by her inequitable work environment and/or demonstrated by the favoritism granted to another hiree. Grievant maintains that she should have been placed into a higher level of faculty following the merger of Kanawha Valley and Bridgemont, based on her experience and qualifications. Respondent highlights that the change of Grievant’s classification from non-classified to faculty was driven by compliance with legislative mandates rather than consolidation.<sup>8</sup> Grievant argues that with her initial appointment the alleged discrimination translates into significant lost compensation/miscalculation of proper wage.

Respondent filed a motion to dismiss prior to the level three hearing on or about March 15, 2016. The document presents some of Respondent’s position(s) regarding Grievant’s claims (some points more sensible than others). Respondent represented there was no issue in litigation upon which this Board could lawfully rule. This is

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<sup>8</sup> Implementation of Senate Bill 330 provisions occurred at all colleges and universities. Institutions were mandated to reduce the percentage of non-classified staff to 20 percent of the classified/non-classified employee total. The non-classified category of employees was defined as those reporting directly to the president or individuals with policy-making authority. All non-classified positions were reviewed and similar pay/responsibility positions were identified on the classified schedule for transfer. Grievant requested that her position instead be transferred to faculty. This request was granted, and both Grievant Ritter and Dr. Laura Little were transferred to faculty. Effective July 1, 2014, Grievant’s appointment was Instructional Specialist/Assistant Professor. Director of Digital Education was maintained as her working title.

inaccurate. Grievant contends discrimination and/or favoritism these are recognized grievance issues addressed by this Grievance Board on a regular basis.

Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a 'continuing violation,' so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if is filed within the statutory limitation period after such compensation disparity last occurred. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297 (W. Va. 1995). When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted into a continuing practice giving rise to a timely grievance. See, *Spahr v. Preston Co. Bd. of Educ.*, [182 W. Va. 726], 391 S.E.2d 739 (1990). *Young v. Div. of Corr.*, Docket No. 01-CORR-059 (July 10, 2001); *Nutter v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-630 (Mar. 23, 1995). See also *Jones v. Div. of Rehabilitation Services*, Docket No. 00-RS-046 (June 22, 2000).

Respondent argues that the triggering event for this grievance is not a "continuing practice," but Grievant's attempt to litigate, tongue in cheek, an untimely filed grievance. The undersigned comprehends Respondent's point and to some degrees is sympathetic but finds no evidence that Respondent argued an untimely filing defense at or prior to the

level two proceedings. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed.<sup>9</sup> Accordingly, while the undersigned ‘may’ be of a belief, similar to Respondent, that this matter is suspiciously akin to an untimely filed continuing damage matter, the merits of this grievance matter will be addressed. Respondent’s motion for dismissal is denied.

The time period for filing a grievance “ordinarily begins to run when the employee is unequivocally notified of the decision being challenged.”<sup>10</sup> Grievant accepted Respondent’s offer of employment, she signed her appointment notice in July 2014, and again a year later in 2015. R Ex 4 & G Ex 8 Nevertheless, Grievant contends the faculty rank of Assistant Professor assigned to her employment with BridgeValley is insufficient and erroneous. Grievant contends Respondent discriminated against her and/or demonstrated favoritism to others when determining appointment status.

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<sup>9</sup> See W. VA. CODE § 6C-2-3(c)(1) This Grievance Board has previously reviewed and analyzed applicable statutory language and determined, applying principles of statutory construction, in cases involving state employees the timeliness defense should be raised at or before the level two proceedings.

<sup>10</sup> W. VA. CODE § 6C-2-3(a)(1) states that, “[a]n employee shall file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

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). Favoritism is defined in W. Va. Code § 6C-2-2(h) as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities or is agreed to in writing by the parties.” In order to establish a discrimination or favoritism 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); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievant attempts to highlight alleged differences between her employment condition and that of other employees, highlighting specifically Amanda McClellan, the person who was eventually selected for the position of Assistant Professor in Extended Learning. Grievant’s claim pertaining to a disparate working environment is NOT found to be credible. This grievance was filed on August 14, 2015, just three to four days after Ms.

McClellan was hired into her position. Grievant did not provide evidence or facts specific which persuasively established she has been treated differently from a similarly-situated employee. It is more likely than not, and readily apparent, what Grievant is unhappy with is the similar amount of compensation that she and Ms. McClellan receive as wages for their respective duties. Grievant is of the opinion that she should receive more and that the compensation granted to the position of "Assistant Professor in Extended Learning" was disproportionately generous. Grievant perceives the proximity of the two wages to be evidence of unequal treatment (allegedly discrimination or favoritism). Grievant did not prove this contention.

In this administrative setting, the record did not establish that the management decisions complained of in this grievance were arbitrary and capricious.<sup>11</sup> There was an impending change of several employees' classification. Grievant requested that her position be transferred to faculty, the request was granted. Grievant maintained her office and gained additional employment security as a faculty member. Respondent is of the opinion that Grievant is properly ranked as an Assistant Professor. Respondent

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<sup>11</sup> 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 is 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). 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))." 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 judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

presented comparative analogy. Both Grievant and Dr. Laura Little were transferred from non-classified status to faculty status at the Assistant Professor rank, consistent with initial appointments of other doctoral-prepared faculty. A Ph.D. in the Workforce Division was hired at the Instructor level in 2011, an Ed.D. in the General Education Division at the Assistant Professor level in Fall 2014, an Ed.D. in the Technology Division at the Assistant Professor level in Fall 2014, and a DNP in the Health Division at the Assistant Professor level in Fall 2014. Individuals with a doctorate are eligible to apply for their first promotion to associate rank after serving in the initial rank for a semester or year and after completing all required extensive documentation for the faculty evaluation process per guidelines outlined in the BridgeValley Faculty Evaluation Handbook. Grievant has not demonstrated she was treated differently from one or more similarly-situated employee(s).

Respondent made a determination of Grievant's faculty status based on a review of her qualifications and experience. Authority is not at issue. Grievant disagrees with Respondent's assessment. Respondent's determination is not clearly wrong. Grievant's doctorate degree and her experience were not in the same field, diminishing her assertion that she should have been hired into BridgeValley at the level of Professor, rather than Assistant Professor. Grievant also argues that teaching one course per semester was equal to one year of teaching experience. This is not a persuasive argument. Witnesses representing BridgeValley clearly indicated that teaching one course per semester would not be considered a full year of teaching experience for the purposes of determining faculty rank and status. Michelle Bissell, BridgeValley's Chief

Human Resources Officer, testified that new faculty hires would not be given credit for a full year of teaching experience if they had only taught one course per semester as an adjunct because the typical faculty load is to teach five to six courses per semester.

A grievant attempting to prove wrongful denial of promotion must demonstrate by a preponderance of the evidence that the denial was arbitrary and capricious, clearly wrong, or a violation of college policy. See *Kilburn v. Bd. of Directors/W. Va. State College*, Docket No. 94-BOD-1046 (Dec. 29, 1995); *McMullin v Higher Educ. Policy Comm'n/W. Va. Univ.*, Docket No. 01-HE-081 (July 31, 2001). 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)). "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 judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Initial appointments of individuals with doctoral degrees and limited teaching experience follow traditional college guidelines for rank at the Assistant Professor level per the Faculty Evaluation Handbook. Ms. Bissell explained the process of determining the faculty level of the Grievant's appointment and how new faculty are evaluated. She testified that no new hires had been brought in at a level higher than Assistant Professor.

The Chief Human Resources Officer also explained that Grievant's appointment was very similar and nearly identical to Dr. Laura Little, who was Grievant's equivalent at the former Bridgemont Community and Technical College and was also appointed to BridgeValley during the merger.

Grievant claims that salary inequity exists between her salary and that awarded to Dr. Little's replacement, Amanda McClellan, an Assistant Professor in Engineering Technology. This allegation was considered. Grievant alleged illegal conduct in that Respondent hired someone with little or no experience in a particular field and is compensated within the parameters of Grievant's pay range. A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code §29-6A-2(i). See, *Ball v. Dep't. of Highways*, Docket No. 96-DOH-141 (1997). "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See *Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20 2002); *Lusher, et al. v. Dep't. of Transportation/Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

Ms. McClellan was selected by a search committee as the best candidate for the position of "Instructional Technologist Coordinator." Ms. McClellan qualified for the

position and demonstrated the necessary skill set to perform the duties of the position.<sup>12</sup> The hiring of Ms. McClellan at a salary five thousand dollars below that of Grievant does not demonstrate favoritism as defined in W. Va. Code § 6C-2-2(h). It is not established that Ms. McClellan's employment violated any recognized hiring constraint. Unlawful preferential treatment was not found in the facts.

Respondent's interpretation, explanation and Job Descriptions at issue are given great weight unless clearly erroneous. See *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995); *Burke, et al., v. Bd. of Directors*, Docket No. 94-MBOD-349 (Aug. 8, 1995). Grievant's initial appointment as Assistant Professor is consistent with initial appointments of other BridgeValley faculty with doctoral degrees, and is consistent with BOG Policy B-1 and Faculty Evaluation Guidelines. It is not established that Respondent has abused its discretion in determining that Grievant's rank would be Assistant Professor. Grievant's pay is comparable to rank and duties performed. Grievant is not entitled to dictate Respondent's promotion and hiring decisions.<sup>13</sup> This Grievance Board's review in cases involving the denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such

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<sup>12</sup> There were two separate job vacancy postings. One was entitled "Coordinator of Instructional Technologist/Blackboard Administrator" and the other entitled "Instructional Technologist Coordinator." The qualification for the two positions are not identical, it is possible Grievant misinterpreted the applicability of the job posting(s). Amanda McClellan applied for the Instructional Technologist Coordinator position. G Ex 19

<sup>13</sup> The decisional subjective process by which promotion and tenure are awarded or denied in the higher educational setting is best left to the professional judgment of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong. *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984); See also *Carpenter v. Bd. of Trustees/W. Va. Univ.*, Docket No. 93-BOT-220 (Mar. 18, 1994).

decisions are made conform to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process. *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

Grievant signed her appointment notice in 2014. She also signed her appointment notice again in 2015, voluntarily, and did not protest either her title or salary at that time. It is difficult to not perceive this action as agreeing to her appointment in writing. Grievant did not establish that her appointment is unlawful. Grievant testified that her main issue with the hiring of Ms. McClellan was her pay. This ALJ does not find that a salary inequity exists simply because another employee makes “almost the same pay” as Grievant. Both employees are Assistant Professors. Grievant makes approximately (\$5,000.00) five thousand dollars more, per year, than Ms. McClellan. It is not established that the hiring of Ms. McClellan had any impact whatsoever on Grievant’s job position, title, salary, benefits, or any other significant aspect of Grievant’s employment with Respondent.

Grievant has alleged she was denied a promotion. Grievant was not eligible to apply for promotion until she had been at her faculty position for approximately two years. This would have been, at the earliest, January of 2016 – long after this grievance had been filed. Grievant’s allegation is not credible. The promotion guidelines were available to Grievant and are consistent with BridgeValley’s policies and are not in violation of any known rule, regulation or statute. *Also see R Ex 2*

Grievant need not agree with all of Respondent’s promotion and hiring decisions.

The crux of a discrimination claim is that Grievant is impermissibly treated differently than similarly situated employees. This was not established as factually accurate in the fact pattern of this matter. Grievant did not demonstrate that she was treated differently than similarly situated employees and/or that Respondent engaged in favoritism with regards to the hiring and/or appointment status of others.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. The subject matter of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. The Grievance Board does not award tort-like or punitive damages. *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Troutman v. Dep't. of Health and Human Res./William R. Sharpe Jr. Hospital*, Docket No. 2013-0630-DHHR (April 26, 2013); *See also Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006).

3. Grievant did not demonstrate that she was erroneously assigned the Faculty position, nor did she demonstrate that Respondent unlawfully evaluated her designated status.

4. 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)). "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 judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

5. The Grievance Board's review in cases involving the denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process." *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)

6. 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).

7. Favoritism is defined in W. Va. Code § 6C-2-2(h) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a

similarly situated employee unless the treatment is related to the actual job responsibilities or is agreed to in writing by the parties.”

8. In order to establish a discrimination or favoritism 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); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

9. Grievant did not demonstrate she was treated differently than any other similarly situated employee.

10. Grievant did not demonstrate that Respondent’s determination that her appointment to faculty as an Assistant Professor was clearly wrong.

11. Grievant did not demonstrate that Respondent’s determination that her appointment to faculty as an Assistant Professor was an arbitrary and capricious decision.

12. Grievant has failed to prove that Respondent has abused its discretion in the facts of this case. Grievant has failed to establish that Respondent’s actions were unlawful.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

**Date:** July 28, 2016

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**Landon R. Brown**  
**Administrative Law Judge**