

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**K. SUBRAMANI,
Grievant,**

v.

DOCKET NO. 2012-1353-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, K. Subramani, a tenured Associate Professor at West Virginia University, filed a grievance against his employer, West Virginia University, on May 25, 2012, when his application for promotion to Full Professor was denied. The statement of grievance indicates that Grievant is claiming “discrimination; violation, misapplication and misinterpretation of statutes, rules and policies; discriminatory and aggrieved application of unwritten policies and practices; harassment and reprisal.” As relief, Grievant seeks “any and all further relief as may be appropriate, including but not limited to granting my application for Full Professorship in the current application cycle.”

The parties agreed to waive this grievance directly to level three, and this grievance was then placed in abeyance pending a ruling by the Circuit Court of Kanawha County on the appeal of an earlier Grievance Board Decision, and it was again placed in abeyance pending the outcome of a civil suit involving the parties. Two days of hearing were held before the undersigned Administrative Law Judge at level three on September 9 and 16, 2016, in the Grievance Board’s Westover office. Grievant was represented by Jacques R. Williams, Esquire, Hamstead, Williams, & Shook, PLLC, and Respondent was represented

by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on November 21, 2016.

Synopsis

Grievant's application for promotion to Full Professor was denied based on a conclusion by the Provost that his teaching efforts did not meet the standard for promotion. Grievant's research and service met the standard for promotion. Grievant argued that too much emphasis was placed on student evaluations and graduate student advising in the evaluation of his teaching efforts, in violation of the applicable guidelines. The Grievance Board has long-standing case law which holds poor student evaluations may support a finding that teaching and advising does not meet the effectiveness standard. Grievant was advised of the importance of mentoring graduate students in his annual evaluations. Grievant did not demonstrate that the decision not to promote him to Full Professor was arbitrary and capricious.

The following Findings of Fact are made based on the evidence presented at levels one and three.

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University ("WVU"), since August 2000. He was promoted from Assistant Professor to Associate Professor in 2006 in the Lane Department of Computer Science and Electrical Engineering ("LDCSEE"), of the College of Engineering and Mineral Resources ("the College"),¹ and

¹ The College's name has changed to the Benjamin M. Statler College of Engineering and Mineral Resources.

granted tenure. Grievant continues to be employed by WVU, but at some point prior to the level three hearing, he had submitted another request for promotion which was approved, and he has been a Full Professor in that department since 2014.

2. Grievant submitted an application for promotion to Full Professor during the 2009-2010 annual review process. That application was denied, Grievant filed a grievance challenging this decision, and the grievance was denied.

3. Grievant again submitted an application for promotion to Full Professor in late 2011.

4. WVU has in place Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure (“WVU Guidelines”). The WVU Guidelines state that:

In order to be recommended for promotion, a tenured or tenure-track faculty member normally will be expected to demonstrate significant contributions in two of the following areas: teaching in the classroom or other settings, research, and service. In the third area of endeavor, the faculty member will be expected to make reasonable contributions. The areas of significant contribution in which each faculty member is expected to perform will be identified in the letter of appointment, or modified in a subsequent document.

Significant contributions are defined in the WVU Guidelines as contributions “which meet or exceed those of faculty peers recently (normally within the immediately previous two-year period) achieving similar promotion and/or tenure who are respected for their contributions in teaching at WVU.”

5. Grievant’s appointment letter dated May 1, 2000, states that he “will be expected to demonstrate significant contributions in teaching and research with satisfactory contributions in service.” The appointment letter also states, “we will develop a memorandum of understanding concerning your teaching, research, and service assignments and plans prior to each academic year . . .”

6. The College has also developed written Criteria for Promotion and Tenure. This document states that to qualify for promotion to the rank of Professor, a candidate must show a sustained record of significant contributions in teaching and research. Evidence of significant contributions in teaching “must include documentation of effective instruction as measured by student feedback.”

7. The College’s written Criteria for Promotion and Tenure list four categories under teaching which will be evaluated, noting that other relevant categories may also be evaluated in determining whether significant or reasonable contributions have been made. This document states that “it is not the intent of this document that significant contributions must be made in all four categories of teaching.” (Emphasis in original.) The four listed categories are:

1. Documentation of significant contribution in teaching (such as student evaluation of instruction, in-class peer observation, or student exit interviews)
2. Development of significant instructional materials
3. Documentation of effective advising and/or guidance of students and mentoring students to degree completion where appropriate.
4. Significant and demonstrable participation in educational program development.

8. The WVU Guidelines state that:

[t]he prime requisites of any effective teacher are intellectual competence, integrity, independence, a spirit of scholarly inquiry, a dedication to improving methods of presenting material, the ability to transfer knowledge, respect for differences and diversity, and, above all, the ability to stimulate and cultivate the intellectual interest and enthusiasm of students. Supporting documentation for the evaluation of performance in teaching might include evidence drawn from such sources as the collective judgment of students, of student advisors, and of colleagues who have visited the faculty member’s classes. It might also include analyses of course content, evaluation of

products related to teaching such as textbooks or videotapes, the development or use of instructional technology and computer-assisted instruction, pedagogical scholarship in refereed publications and media of high quality, studies of success rates of students taught, or other evidence deemed appropriate and proper by the department and college.

9. The College's written Criteria for Promotion and Tenure state that "[e]valuations and recommendations are to be based on both quantitative and qualitative evidence. The primary evidence to be weighted must be contained in the faculty member's personnel file. To it are added professional judgments as to the quality of the faculty member's teaching, research, and service, as applicable."

10. The College's written Criteria for Promotion and Tenure also states that the "annual evaluations establish a continuous written record *of expectations* and performance that will encourage professional growth and provide support for retention, promotion, tenure, and other recognition." (Emphasis added.) It further provides that "[t]he primary purpose of these annual evaluations is to assist individual faculty members in developing their talents and expertise to the maximum extent possible, and in promoting continuing productivity over the course of their careers, consistent with the role and mission of the university." However, the annual evaluation also "should be a basis for those periodic recommendations forwarded to the Provost which relate to promotion, tenure, or negative action. Positive recommendations for promotion and/or tenure should be supported both (a) by a series of annual reviews above the 'satisfactory' level, and (b) beyond those reviews, by performance which is judged to meet the more rigorous standard of 'significant contributions' (see below)."

11. In the letter approving Grievant's promotion to Associate Professor dated May 15, 2006, Provost Gerald E. Lang advised Grievant that "[d]emonstration of improvement

and effectiveness in your teaching will be necessary for consideration of your promotion to Professor and in consideration of future performance-based salary adjustments.”²

12. The WVU Guidelines provide a multi-level evaluation process for the award of promotion, beginning with the Department Promotion and Tenure Committee, and the Department Chair, and concluding with the Provost, who has been delegated the decision-making authority of the President for matters of promotion and tenure. The faculty member may include written rebuttals in the promotion file throughout this process.

13. Grievant’s promotion request was first reviewed by the nine member LDCSEE Promotion and Tenure Committee. On January 31, 2012, the LDCSEE Promotion and Tenure Committee recommended promotion, concluding that Grievant had made significant contributions in teaching, highly significant contributions in research, and reasonable contributions in service. This Committee stated in its recommendation, however, that “the Lane Department Promotion and Tenure Committee is concerned with Dr. Subramani’s low productivity in leading graduate students to successful degree completion. In the past two years (2010-2011), for example, only one of Dr. Subramani’s advisees completed MSCS degree following the coursework-only program option, which requires no research credits.”

14. The Chair of the LDCSEE, Brian Woerner, did not support Grievant’s promotion request, finding Grievant’s teaching contributions to be reasonable, based

² Grievant pointed out that the applicable standard is not that the faculty member must demonstrate improvement, but rather, that his contributions meet or exceed those of recently promoted peers. While Grievant is technically correct, the point to be taken from Provost Lang’s letter would seem to be that he considered Grievant’s teaching to be suspect, and that he needed to improve in order to meet or exceed the teaching contributions of his peers.

primarily on an evaluation of graduate student advising activities, which he found to be “below that of recently promoted peers.” Chair Woerner’s letter notifying Grievant of his recommendation was dated February 22, 2012.

15. On February 27, 2012, Grievant submitted a rebuttal to Chair Woerner’s recommendation to the College Dean, Eugene Cilento. On that same date he also submitted a letter “to respond to the concerns of the” LDSCSEE Promotion and Tenure Committee.

16. The seven-member College Promotion and Tenure Committee reviewed Grievant’s application, and on March 9, 2012, recommended promotion, concluding that Grievant had made significant contributions in teaching, highly significant contributions in research, and significant contributions in service.

17. The Dean of the College, Eugene V. Cilento, did not support Grievant’s promotion request, finding his teaching, research, and service contributions to be reasonable. Grievant was notified of this recommendation by Memorandum dated March 15, 2012.

18. C. B. Wilson, Associate Provost for Academic Personnel, reviewed Grievant’s promotion file, and made a recommendation to deny the application to Provost Michele G. Wheatley, who agreed with this recommendation. Associate Provost Wilson drafted Provost Wheatley’s decision denying Grievant’s request for promotion. The Provost concluded that Grievant had achieved the level of significant contributions in research and reasonable contributions in service, but that his teaching did not meet the standard for promotion of “significant contributions.”

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

20. A bank of questions is available to be placed in the Student Evaluation Forms (“SEIs”) to be used for any individual course at WVU, although certain questions are to be used in all SEIs. The students may respond to each of these questions with a rating of NA, poor (1), fair (2), satisfactory (3), good (4), or excellent (5).

21. The SEI Guide states that “[o]ver the past decade there is some indication that ‘global’ item ratings of teacher effectiveness and course value correlate more highly with student learning than do specific instructional style items (e.g. student-teacher interaction). Therefore, inclusion of more global item ratings could be more suitable for evaluative review than specific style item ratings.”

22. In evaluating applications for promotion and tenure, the Provost’s Office has focused on the student responses to three questions that are on all SEIs, having found that, in general, those faculty who have received the higher scores on these three questions are excellent teachers. The three questions which are the focus of review by the Provost’s Office are: “The instructor’s teaching effectiveness was,” “Considering the course objects, organization, quality of materials, class presentations, tests, course policies, etc., my overall rating of the course is,” and “Overall, my learning in this course was.”

23. The SEI Guide sets forth several limitations observed in the use of SEIs, but concludes that, despite the limitations, “student ratings have been shown to be a useful feedback tool to instructors and administrators if designed in such a way to be flexible

enough to elicit appropriate and valid information.” One of the limitations stated in the SEI Guide is “*some researchers recommend* that ratings from at least five representative classes taught over the past one or two years be presented in faculty evaluation. At least two-thirds of the students in each class *should* participate in the evaluation, and the number of participating students *should* be at least 15.” (Emphasis added.) The SEI Guide states, “it is usually cause for concern when a third of the responses give relatively low ratings to some aspect of the course or instruction.” It further states, “[i]f the standard deviation is greater than 1.20, be cautious in interpreting an item mean. A spread this large may indicate either a heterogeneity of student backgrounds and interests, or that the instructor only attended to a proportionally small group of students within a class.”

24. Grievant’s SEI’s for the Fall of 2010 and the Spring of 2011³ which were placed into the record show one course with 11 student responses, one course with 3 student responses, one course with 2 graduate student responses, one course, CS 220, with 24 student responses, and one course, CS 220, with 19 student responses. The three courses that had the smaller number of student responses were not CS 220, and the ratings for every question on all the SEI’s was a mean and a median of 4.0 or above, out of a possible 5.0. The two CS 220 courses, however, reflected mean scores ranging from 2.96 to 4.72 for 18 questions. For the three global questions, Grievant’s mean scores for

³ Grievant also included in Grievant’s Exhibit Number 9, which were the SEI survey results for seven courses, two SEI survey results from the Spring of 2012. These two survey results would not have been available during this promotion review and will not be considered by the undersigned. These were the only SEI’s placed into the record. No student comments were placed into the record, other than those quoted in the various recommendations on the promotion request. Three letters from students were placed into the record which commented favorably on Grievant’s teaching. Only one of these letters provided comments on CS 220.

this course for the Fall of 2010 were 3.04, 3.29, and 3.38, and for the Fall of 2011, Grievant's mean scores were 3.47, 3.79, and 3.58 for these three questions.

25. The Provost concluded that Grievant's aggregate SEI mean scores on the three global questions were 3.58 (Teaching Effectiveness), 3.64 (Course), and 3.68 (Overall Learning). The last three faculty members from the LDCSEE who were promoted to Professor whose SEI scores were compared by the Provost to Grievant's all had aggregate mean scores on the three global questions above 4.0, ranging from 4.21 to 4.94.

26. The Provost's letter also noted that Grievant's aggregate SEI mean data for the three global questions had not shown improvement since his last promotion, but rather, the scores had declined, particularly in CS 220. The Provost noted that student comments on the SEI's were generally encouraging. The Provost's letter, however, also compared the SEI scores in just CS 220 over a period of several years, and stated that the student responses supported "Dean Cilantro's concern that your teaching of this course shows inconsistency and needs to be improved."

27. According to the letter from the Department Chair recommending another LDCSEE faculty member for promotion in 2012, that faculty member had average SEI scores on the three global questions of 3.78 (Teaching Effectiveness), 3.87 (Course), and 3.88 (Overall Learning), all slightly higher than Grievant's scores. The Chair's letter notes that these scores are "slightly below the average SEI scores for candidates for promotion from [redacted information] within [the College] over the last six years. However, they are not unreasonably below those averages. The fact that the significant majority of your teaching and SEI results come from two large required undergraduate classes should be taken into account in interpreting those scores." The Chair found the SEI scores to be

“comparable to recently promoted peers.” The Chair went on to analyze other aspects of this faculty member’s teaching, including graduate advising, finding that his “graduate student advising is comparable to recently promoted candidates with the college.” The Chair concluded that this faculty member’s teaching contribution was highly significant, based on his significant teaching load, comparable teaching quality, graduate student advising productivity, and contributions to curriculum.

28. The Provost’s letter also states that the data provided by Grievant’s Department Chair in his recommendation indicates that Grievant was “far below seven of the eight colleagues recently promoted to Professor, and below the eighth colleague, as well,” in mentoring of students to degree completion.

29. Grievant’s recent annual evaluations recommended that Grievant increase the level of graduate student advising and mentoring to graduation.⁴

30. Grievant challenged his 2010 annual evaluation through the grievance procedure, specifically arguing that “he should not be penalized for his students not completing their degrees because the challenges to degree completion in his field are such that very few students are successful.” *Subramani v. W. Va. Univ.*, Docket No. 2011-1704-WVU (Mar. 15, 2013). That decision stated that “Grievant did not demonstrate that it is unreasonable to expect that he will guide more students to successful completion of their degree,” and the grievance was denied. *Id.*

⁴ None of Grievant’s annual evaluations were placed into the record. This fact is made from the testimony of Associate Provost C.B. Wilson, and the statements made in the written promotion recommendations.

31. Grievant and his Department Chair signed the annual Memorandum of Understanding in December 2002, which “is to further document expected performance criteria.” After Grievant’s promotion in 2006, Grievant refused to sign an annual Memorandum of Understanding, primarily because he did not agree to the language insisted on by the Department Chair to be evaluated as part of his research, “that advising of graduate students to completion is an appropriate evaluation measure.” Grievant did not agree that mentoring of graduate students to degree completion should be a factor in evaluation of his research.

32. Recently promoted faculty members to whom Grievant was compared had signed a Memorandum of Understanding. WVU faculty, including Grievant, are expected to have signed a Memorandum of Understanding annually. The record does not reflect whether there are any faculty members to whom Grievant could be compared who have not signed a Memorandum of Understanding.

Discussion

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

"The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). See *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984)(Tenure review is "a subjective, evaluative decisional process by academic professionals." The standard of review is whether the decision is "manifestly arbitrary and capricious.") See also *Carpenter v. Bd. of Trustees/W. Va. Univ.*, Docket No. 93-BOT-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995); *Gardner v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, the review of an institution of higher learning promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." *Harrison, supra*; *Nelson v. Bd. of Trustees/W. Va. Univ.*, Docket No. 99-BOT-514 (June 22, 2001); *Baroni v. Bd. of Directors/Fairmont State College*, Docket No. 92-BOD-271 (Feb. 11, 1993).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable.

State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *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 her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Further, "[t]he undersigned 'is limited to considering the record before the decision-maker at the time of the decision. An applicant is responsible for informing the decision-maker of [his] qualifications for promotion. If [he] does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a promotion grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it.' *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citations omitted). See also, *Castiglia v. Bd. of Trustees*, Docket No. 97-BOT-360 (May 27, 1998)." *Brozik v. Bd. of Trustees*, Docket No. 98-BOT-142 (Nov. 30, 1998).

This strategy generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." *Kunda, supra*, at 548.

See also *Bina v. Providence College*, 39 F.3d 21 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1406 (1995); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980).

Grievant argued Respondent's emphasis on his failure to attract and mentor graduate students to completion of their degrees was improper because this criteria is not found in the applicable WVU or College Guidelines or any other policy or procedure, or in his appointment letter. Grievant argued this requirement could not be imposed on him without his consent. Grievant further argued that excessive reliance was placed on SEI's, which are only one tool to be used in the evaluation of teaching performance. Grievant did not dispute the conclusions reached by the Provost regarding the SEI's, and the undersigned will not address that issue. Grievant did point to the lower SEI scores of the faculty member who was promoted in 2012. Finally, Grievant argued he was discriminated against because he was "held to the same standard as other faculty who had consented to having their teaching obligations modified by negotiated memoranda of understanding."

With regard to the use of student evaluations, "[t]his Grievance Board has previously held poor student evaluations may support a finding that teaching and advising does not meet the effectiveness standard, even when classroom observations by peers have resulted in good evaluations. *Brozik v. Bd. of Trustees*, Docket No. 98-BOT-142 (Nov. 30, 1998); *Shackleford v. W. Va. Bd. of Directors*, Docket No. 96-BOD-414 (Oct. 9, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995). Despite their arguable shortcomings, student evaluation scores constitute an accepted method for evaluating teaching performance. *Brozik, supra*. See *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995). It cannot be seen as arbitrary and capricious for the

academic leaders and evaluators at [Marshall University] to decide to weigh this evidence rather heavily since Grievant was seeking to obtain the highest rank within the academic structure, and she was required to demonstrate excellence in teaching and advising.” *Schiavone v. Higher Educ. Policy Comm’n/Marshall Univ.*, Docket No. 02-HEPC-152 (Nov. 22, 2002). While Grievant is correct that other factors must also be considered, Grievant has not convinced the undersigned that this issue need be revisited. The WVU and College Guidelines both discuss the importance of student input in the analysis of whether a faculty member has achieved the required standard, and SEIs in particular. It was not arbitrary and capricious for Respondent to place great weight on the student evaluations.

Grievant further seemed to question the reliance on the student responses to what are referred to as the three global questions in the SEIs. This Grievance Board has already addressed the validity of focusing on the three global questions, and the undersigned is not going to revisit that issue. *See, Subramani v. W. Va. Univ.*, Docket No. 2010-1473-WVU (July 22, 2011); *aff’d*, Cir. Ct. of Kanawha County, Civil Action No. 11-AA-114 (Mar. 7, 2013).

Finally, while the other faculty member who was promoted in 2012 also had SEI scores below those of other recently promoted faculty, Grievant’s scores were below his as well, and that faculty member apparently had exhibited other attributes which led his colleagues to conclude that his teaching contributions met the applicable standard.

As to the requirement that Grievant mentor graduate students to degree completion, Associate Provost Wilson testified that it is the expectation of the College that faculty obtain grants, and that this grant money is used to hire graduate assistants who the faculty are expected to advise or mentor to degree completion, and Grievant has been aware of

this expectation for many years. Indeed, Grievant's annual evaluations have made him specifically aware of this expectation, whether it is set forth in these specific words in the College guidelines or not, and other faculty have this same expectation and have been evaluated based on this expectation. Grievant challenged this aspect of his annual evaluations through the grievance procedure, and the undersigned specifically found that Grievant failed to demonstrate that it was unreasonable to expect that Grievant would guide more students to successful completion of their degrees.

Finally, Grievant claimed it was discrimination for Respondent to compare him to other faculty members who had a Memorandum of Understanding in place. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

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

Grievant was indeed treated differently from other employees. Grievant was allowed to continue his employment even though he had refused to sign a Memorandum of

Understanding for several years, which faculty members are expected to have in place each year, while other faculty had signed a Memorandum of Understanding. Now Grievant seeks to use this choice of his not to sign a Memorandum of Understanding to assert that he is the victim of discrimination. Grievant is grasping at straws. Further, no evidence was placed into the record that there were any other faculty members to whom Grievant **could** be compared who did not have a Memorandum of Understanding in place. It appears from the evidence that it is unlikely that there is such a faculty member since faculty are expected to sign a Memorandum of Understanding annually. Grievant was not discriminated against in this regard.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).
2. 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).

3. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). See *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).

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 her 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. "This Grievance Board has previously held poor student evaluations may support a finding that teaching and advising does not meet the effectiveness standard, even when classroom observations by peers have resulted in good evaluations. *Brozik v. Bd. of Trustees*, Docket No. 98-BOT-142 (Nov. 30, 1998); *Shackleford v. W. Va. Bd. of Directors*, Docket No. 96-BOD-414 (Oct. 9, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995). Despite their arguable shortcomings, student evaluation scores constitute an accepted method for evaluating teaching performance.

Brozik, supra. See Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995). It cannot be seen as arbitrary and capricious for the academic leaders and evaluators . . . to decide to weigh this evidence rather heavily since Grievant was seeking to obtain the highest rank within the academic structure . . .” *Schiavone v. Higher Educ. Policy Comm’n/Marshall Univ.*, Docket No. 02-HEPC-152 (Nov. 22, 2002).

6. This Grievance Board has previously found that “Grievant did not demonstrate that it is unreasonable to expect that he will guide more students to successful completion of their degree,” and the grievance was denied. *Subramani v. W. Va. Univ.*, Docket No. 2011-1704-WVU (Mar. 15, 2013).

7. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm’n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant was not discriminated in the denial of his promotion request.

9. Grievant did not demonstrate that Respondent violated any law, rule, regulation, policy, or procedure, or that Respondent acted in an arbitrary and capricious manner in its determination that he had not met the standard for promotion.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: January 4, 2017