

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WEI-PING ZENG,
Grievant,

v.

Docket No. 2016-1650-MU

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, Wei-Ping Zeng, is employed by Respondent, Marshall University. On May 17, 2016, Grievant filed this grievance against Respondent stating, “Denial of tenure due to discrimination based on race. Early termination of employment for opposing unlawful discrimination.” For relief, Grievant seeks “[r]eversal of decision of denying tenure. Removal of threat of early termination of employment.”

Following the June 20, 2016 level one hearing, a level one decision was rendered on June 27, 2016, denying the grievance. Grievant appealed to level two on July 8, 2016. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on September 1, 2016. The level three hearing was held over multiple days on January 20, 2017, February 15, 2017, February 17, 2017, March 15, 2017, and March 29, 2017, before the undersigned at the Grievance Board’s Charleston, West Virginia office. Grievant appeared *pro se*¹. Respondent was represented by counsel, Candace Kraus, Deputy General Counsel. This matter became mature for decision on April 27, 2017, upon final receipt of the parties’ written Proposed Findings of Fact and Conclusions of Law.

¹ For one’s own behalf. BLACK’S LAW DICTIONARY 1221 (6th ed. 1990).

Synopsis

Grievant was employed by Respondent as a tenure-track Associate Professor in its School of Medicine's Department of Biochemistry and Microbiology. Grievant was denied tenure and asserts that the tenure denial was arbitrary and capricious for many individual reasons which all relate to either errors in the process or discrimination. Essentially, Grievant argues he was more deserving of tenure than two other faculty members who had recently been granted tenure, that he was evaluated differently than the two other faculty members, and that the University made numerous procedural and factual errors throughout the process. Grievant asserts this difference in treatment was caused by racial discrimination. Respondent asserts the compared faculty members are not similarly situated, that the tenure review process was thorough and without error, and that Grievant clearly failed to meet the requirements for tenure. Grievant did not prove he was similarly situated to the compared employees. Respondent violated its policy by failing to include Grievant's tenure requirements in his contract. Under Respondent's policy and past practice, job duties and responsibilities are not the same as tenure requirements. It was improper for Respondent to consider Grievant's job duty and responsibility to secure external funding in the tenure decision. The portion of the grievance related to Grievant's challenge of his employment end date is untimely. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant was employed by Respondent as a tenure-track Associate Professor in its School of Medicine's Department of Biochemistry and Microbiology.

2. The tenure decision in this matter was governed by the Procedural Rule of the West Virginia Higher Education Policy Commission, Series 9, Academic Freedom, Professional Responsibility, Promotion, And Tenure; Marshall University Board of Governors Policy No. AA-28 and AA-26; and Marshall University School of Medicine's Faculty Promotion and Tenure Regulations.

3. The employment agreement between the parties is comprised of the letter of offer dated August 18, 2009, and the attached Notice of Faculty Appointment.

4. The letter of offer contains the department-specific terms of Grievant's employment, including agreements regarding initial grants that would be given to facilitate Grievant's research program, specifications of Grievant's laboratory space, terms of reimbursement of moving expenses for Grievant's existing laboratory and personal belongings, and the duties and responsibilities of the position. The letter states, "If you are in agreement with the above offer please sign and return the attached appointment notices to the Dean's Office as soon as possible." The Notice of Faculty Appointment is a form document that provides the contract term and salary and more generalized duties not specific to his department. The Notice of Faculty Appointment is signed by Grievant and representatives from the University on August 22, 2009. The notice states that Grievant's employment would begin September 1, 2009, and was for the fiscal year beginning July 1, 2009 and ending June 30, 2010.

5. The letter of offer states,

The duties and responsibilities of this appointment include:

- (1) Establishment of an independent and externally funded research program in cellular immunology,
- (2) Teaching in Medical Immunology Microbiology on an annual basis beginning in Fall 2011 and auditing the portions of these courses in the Fall 2010[,]
- (3) Directing and teaching in one biomedical science graduate course (e.g. Molecular Pathogenesis) in your area of expertise in 2010-11 academic year,
- (4) Service on School of Medicine and University committees as recommended by your departmental chair and/or the Dean of the School of Medicine,
- (5) Participation in the CDDC seminar program and other CDDC programs and administrative responsibilities and
- (6) Such other duties and responsibilities as are normally assigned to full-time faculty at the School of Medicine and for which you are qualified by your skill, training and/or experience.

6. Grievant's employment agreement did not comply with Marshall University Board of Governors Policy No. AA-28 section 3.1.1, which states, "At the time of initial appointment, the department chairperson will notify in writing each probationary faculty member of the requirements and guidelines for tenure, including any which apply specifically within the faculty member's department." Grievant was not notified of the requirements for tenure upon his appointment.

7. At the Marshall University School of Medicine, tenure is a five-level review process. An intradepartmental committee, in this case the Department of Biochemistry and Microbiology's Promotion and Tenure Committee, reviews the application and makes recommendation to the chairperson of the department. The chairperson reviews the application and recommendation of the intradepartmental committee and makes a recommendation to the dean of the School of Medicine, sending the application and recommendation of the intradepartmental committee. The dean then submits all the above to the college level promotion and tenure committee, in this case the School of

Medicine's Personnel Advisory Committee. The college level promotion and tenure committee evaluates the candidate and then submits a written recommendation and all the above material to the dean. The dean reviews all and submits a written recommendation and all the above material to the President. The President makes the ultimate tenure decision. See Marshall University Board of Governors Policy No. AA-28 Sections 3.2.4 – 3.2.10, School of Medicine's Faculty Promotion and Tenure Regulations Sections III, V.B, VII.

8. "Tenure shall not be granted automatically, or for years of service but shall result from a process of peer review and culminate in action by the President." Marshall University Board of Governors Policy No. AA-28 § 2.2.1.

9. "The grant of tenure requires that a candidate must have demonstrated professional performance and achievement in all of his or her major areas of responsibility. Additionally, the candidate must have demonstrated exemplary performance in either teaching and advising or in scholarly and creative activities." Marshall University Board of Governors Policy No. AA-28 § 2.2.5.

10. "All changes from a non-tenured to a tenured status will be considered in the same manner as promotions. Procedures for consideration of faculty for tenure are similar to those outlined above for promotions. For award of tenure, a faculty member should meet the criteria outlined above for promotion to Associate Professor. The review procedures and time schedule for submission of documentation are identical to those outlined for promotions." School of Medicine Faculty Promotion and Tenure Regulations Section V.

11. Faculty must submit “a thorough documentation of his or her teaching, research and other scholarly activities and service achievements.” School of Medicine Faculty Promotion and Tenure Regulations V.B. “No items may be added or deleted from the application after [the departmental personnel committee recommendation]. School of Medicine Faculty Promotion and Tenure Regulations V.B.

12. The requirements for tenure were as follows:

Overall evidence of superior worth to the University as demonstrated by effective performance in all major areas of responsibility and excellence in either teaching or research/scholarly activities.

Minimum experience requirements

- Two years on faculty at Marshall University
- Terminal degree and 4 years satisfactory teaching experience at level of Assistant Professor
- Faculty holding the M.D. degree should be Board certified in a primary or subspecialty
- Basic science faculty should be qualified to sponsor a Ph.D. student and chair a doctoral dissertation committee

Specific areas for consideration include, but are not limited to:

- Teaching
 - evaluations of satisfactory or above by chairperson and peer review
 - factors considered should include the following where appropriate:
 - ◇ teaching load
 - ◇ development of new courses
 - ◇ development of syllabus material
 - ◇ student sponsorship
 - ◇ resident training
 - ◇ courses taken to improve teaching effectiveness
 - ◇ student evaluations
- Research/Scholarly Activities
 - evidence of establishment/continuation of research/ scholarly program substantiated by publications in peer review journals, other activities and chairperson and peer review
 - continuing presentation of research at regional, national and international scientific meetings

- Professional Service/Patient Care
 - evaluations of satisfactory or above by chairperson and peer review
- Other Service
 - evaluations of satisfactory or above by chairperson and peer review

School of Medicine Faculty Promotion and Tenure Regulations Section V.2.

13. In addition, “All probationary faculty must be notified annually in writing by peer committees, chairpersons, and/or deans of their progress toward tenure and/or promotion. Notifications should identify specific areas of improvement needed for tenure or promotion.” Marshall University Board of Governors Policy No. AA-28 Section 3.1.2.

14. By letter dated October 12, 2012, the Mid-Tenure Review Committee², comprised of Dr. Pier Claudio, Dr. Terry Fenger, Dr. Elaine Hardman, and Dr. Hongwei Yu, notified Grievant of their review of his progress and recommendations. The committee recommended as follows:

Teaching Milestones

To further improve Dr. Zeng[‘s] teaching skills and to develop active learning methods we recommend the following:

- (1) To increase engagement with students during the lectures.
- (2) To attend selected lectures from successful teachers in his course with the intent of observing teaching methodology[.]
- (3) To actively participate in Professional Development lectures and Workshops on Teaching Skills and Active Learning offered from the Office of Faculty Development (Dr. Darshana Shah).
- (4) To contact Ms. Sherri Smith at smithsc@marshall.edu or 6-5268 of the Teaching and Learning Office at Marshall University. Ms. Smith will evaluate your lectures and

² The name of this committee changed in evidentiary documents, but was consistently referred to by the parties as the Promotion and Tenure Committee. The members of the committee are the same throughout all relevant timeframes, regardless of the name by which it is referred. This is the committee for the Department of Biochemistry and Microbiology.

provide constructive feedback on teaching methodologies that you might adopt.

- (5) To improve professionalism with colleagues.

Research Milestones

We all realize the significant challenges to obtaining grant support in the current funding climate. It is clear that you have submitted many proposals without success. To help you with development of successful grant proposals we suggest:

- (1) Publications to support your hypotheses are critical. You were provided with about \$300,000 in start-up funds, there is little publication from these efforts. We think that you must secure two publications within the next year to support grant proposals.
- (2) The NH is increasingly interested in supporting research with clear translational potential. We think it is important that you develop a working relationship with a Clinical Department to better develop clinically relevant grant proposals, perhaps including a clinical aim where appropriate, to increase the potential for securing external research funding.
- (3) NH supported research is becoming increasingly collaborative. Where appropriate, collaboration with other scientists, whether at Marshall or outside Marshall adds additional skill sets to your proposals, can broaden the scope and improve the chance of success. Collaboration with another scientist[s] also provides an expert in the field of work to review your proposal.
- (4) It always helps to have someone else read your proposals. An experienced scientist reviewer can help polish and evaluate your proposals, even if not in your field of expertise. You must allow time for other review in preparing your proposals. We suggest that you send grant proposals to experienced colleagues for their review prior to submission to the funding agencies. In addition, we recommend that [that] you take advantage of the West Virginia Division of Science and Research (DSR) grant application pre-view program.
- (5) Importantly, it is mandatory for you to get external independent funding as stated in your contract.

15. Grievant's 2012 - 2013 Annual Faculty Activities Evaluation found that Grievant's efforts were 60% research and 25% teaching. Grievant was rated as "Needs

Improvement” in both teaching and research. The department chair cited Grievant’s low student evaluation scores as the reason for his unsatisfactory rating in teaching and provided many recommendations for improvement. The department chair cited the need for Grievant to increase his publications per year and obtain external funding as the reason for his unsatisfactory rating in research and provided multiple recommendations for improvement.

16. By letter dated March 10, 2014, Dr. Richard Niles, Chair of the Department of Biochemistry and Microbiology, and Dr. Donald Primerano, Microbiology Section Head, memorialized their meeting with Grievant for his mid-year performance review. They noted that Grievant had been rated as “needing improvement” in both teaching and research in his June 2013 performance review. They acknowledged Grievant had published two manuscripts in 2014 and that continued publication would be needed to obtain external funding. In order to improve research productivity, Grievant agreed to be mentored by Dr. Marc Jenkins, an “established investigator” at another university and to visit his lab to learn methods relevant to his research. They offered several pieces of advice to improve the likelihood of success of Grievant’s future grant applications. They further notified Grievant that his student evaluation score for the most recent course at the time of the meeting was 3.73, provided examples of student concerns, and instructed that teaching would need to improve to be in the acceptable range. They announced their intention to attend one of Grievant’s lectures to provide constructive feedback and encouraged Grievant to invite another person to observe his class. They informed Grievant that his tenure application must be submitted by October 2014, that it would be reasonable for Grievant to ask the promotion and tenure committee for a preliminary

evaluation of his application, and if Grievant wished to reset the tenure clock to exclude 2009 to 2010, a ruling would need to be made by the dean or promotion and tenure committee.

17. By letter dated March 31, 2014, the members of the departmental Promotion and Tenure Committee notified Grievant of the results of their pre-tenure review. The members were the same as Grievant's Mid-Tenure Review Committee, except that Dr. Hardman was now chair of the committee. The committee found Grievant had not met the requirement of excellence in either teaching or research, noting Grievant had been rated as "needs improvement" in both categories in the proceeding year's evaluation. The committee also noted that not only had Grievant not met the requirement for excellence in teaching, he had not met the minimum experience requirement for teaching of four years of satisfactory teaching. The committee explained Grievant had not established a research program because he had not received a grant and noted that Grievant had only published five papers since arriving at Marshall and that three of the papers were reviews and not original research. The committee found that the publishing of two original research papers in four and one half years did not indicate an active research program. The committee further found that Grievant's *curriculum vitae* did not list any presentations since arriving at Marshall. The committee again provided lengthy recommendations. The committee stated that Grievant "should expect that [he] needed an average rating of 4 on [his] student reviews" for teaching. In addition to the previous recommendations for research, the committee pointed out that although Grievant had three grants before he came to Marshall, there was little productivity from the grants shown on his curriculum vitae. The committee specified that Grievant must secure two

research publications within the next year to support grant proposals, and that “lack of productivity by the scientist will kill a grant even if the science is great.”

18. As Grievant’s research laboratory space was not available to him for the first six months of his employment, Grievant requested he be allowed to apply for tenure in his seventh year instead of in his sixth year as required by the applicable policy.

19. By letter dated March 24, 2015, Dr. Donald Primerano, now Interim Chair of the Department of Biochemistry and Microbiology, notified Grievant that he would be permitted to apply for tenure in the Fall of 2015. The letter further states that, if tenure were denied, Grievant’s contract would expire on June 30, 2016.

20. On May 7, 2015, Grievant sent an email to Chair Primerano, in which he states, “I am concerned about 2 dates that are mentioned in the letter from you and the dean” and goes on to argue that the contract end date should be August 30, 2016 and request to discuss the issue.

21. On October 6, 2015, Chair Primerano sent the following by email to Grievant, copying Dr. Hardman:

I have attached the old and new regulations for promotion and tenure as well as Appendix C which I may or may not need to complete. I will check with Bonnie Beaver [Personnel Advisory Committee Chair] on need to complete Appendix C and how to complete it. Appendix C also includes a checklist for application materials that I reviewed with you today. Your CV (Section A), annual faculty evaluations (**from the chair (Section B)** and the medical students), letter from the departmental personnel committee (section E) and P&T guidelines (Section F) are required components of the packet. I recommend that you obtain at least two letters from external parties (Section D) but these are not required under the old guidelines.

22. On October 7, 2015, Chair Primerano sent the following by email to Grievant, copying Dr. Hardman and Dr. Beaver:

I asked Bonnie Beaver (chair of the SOM Promotion and Tenure Committee) a few questions to clarify your application process:

- (1) According to Dr. Beaver, you should follow the old guidelines given that you were hired in September 2009.
- (2) I will need to modify Appendix C indicating that I am not recommending you for tenure and provide all of the other information requested by Appendix C. I will complete this form, attach an explanatory letter and send it to you.
- (3) Your application packet must contain a copy of the departmental Promotion and Tenure committee's letter.

23. Grievant applied for tenure in October 2015. Grievant's application contained his *curriculum vitae*, Faculty Activities Plan and Reports, Annual Faculty Activities Evaluation, Student Evaluation Results, and letters of recommendation.

24. Regarding his publications, Grievant's *curriculum vitae* included six publications, one of which was from research done at his former institution and submitted for publication prior to his hire at Marshall that was not actually published until after his hire at Marshall. Of these publications, four were original research and two were reviews.³

25. Regarding presentation at meetings, Grievant did not present at any international meeting, presented only at three national meetings, and presented four times at Marshall, which does not appear to qualify as a "regional" meeting.

³ Publication of original research announces findings made by scientific research. Review articles are not based on the author's own original research, but compile and review the research of other scientists.

26. Regarding teaching load, Grievant's *curriculum vitae* lists the following: medical teaching; Lecturer, MCB720, Medical Microbiology, 2010 – 2012; Lecturer, MCB743, Immunology, 2011 - 2012; Lecturer, MDC750, Principles of Disease I (Bacterial Genetics and Immunology), 2013 – current; Lecturer, MDC 753, Disease and Therapeutics III (Virology), 2013 – current; and Lecturer, MDC 754, Disease and Therapeutics IV (Virology), 2013 – current; graduate teaching; Lecturer, MCB632, medical Microbiology, 2010 – current; Instructor, MCB622, Microbiology Journal Club, 2011; Lecturer, BMS 651, Cancer Biology, 2013; Lecturer, BIC638, Molecular Genetics, 2013. The *curriculum vitae* does not specify the number of hours taught.

27. Grievant's *curriculum vitae* lists the following relating to student mentoring, which he lists within "Graduate Teaching": Graduate Student Thesis Committee Member – R. Withers, 2010 - 2014, Graduate Student Mentor – Adam Rashid (M.S. Program, College of Science), 2011 – 2012; and Graduate Student Mentor – Brad Gillon (Medical Science Program, JCESOM), 2013 – 2014. In addition, under the heading "Resident (research) Training at MUSOM" "Basic Science Mentor, Baraa Alabd Alrazzak M.D., Department of Pediatrics, MUSOM, 2012."

28. Grievant's *curriculum vitae* also included that he participated in one teaching lecture in 2010 and one webinar on active learning in 2013.

29. The Faculty Activities Plan and Reports for 2010 – 2011 and 2011 – 2012 show the following report of yearly teaching hours: 2010 – 2011 four hours medical and five hours graduate; 2011- 2012 ten hours medical and that he "participated" as a

moderator in a graduate class:⁴ The 2012 – 2013 Annual Faculty Activities Evaluation shows ten hours of medical teaching and five hours of graduate teaching. There is no report or evaluation included in Grievant’s application packet for academic year 2013 – 2014.

30. The 2012 – 2013 Annual Faculty Activities Evaluation, states: “Developed 2 sessions of active learning for MCB720 lectures” and “Developed 2 sessions of active learning for MCB743 lectures.”

31. Grievant’s tenure application included student evaluations from academic years 2010 – 2011 through 2014 – 2015, and for one class, MDC 750, for academic year 2015 – 2016⁵. Student evaluations consist of eight to ten questions that students are to score as follows: 1 is very poor, 2 is poor, 3 is average, 4 is good, and 5 is very good. Student evaluation results are displayed in a separate document for each class and a mean score is listed for each question, with no overall score provided for the class. There were no student evaluations included of the graduate courses Grievant taught.

32. A review of Grievant’s tenure application packet shows the following: of the sixteen questions for his classes in 2010 - 2011, Grievant was rated below four on ten questions; of the sixteen questions for his classes in 2011 - 2012, Grievant was rated below four on nine questions and below three on seven questions; of the sixteen

⁴ Grievant stated: “Participated in Current Topics in Molecular Biology (served as moderator for 4 of 5 student presentation, gave 1 presentation to students), 5 hours.” It appears this refers to five hours total time for the entire class, not five weekly hours.

⁵ The parties did not explain how student evaluations were available for this class when Grievant applied for tenure in October 2015, so it is unclear if this was a summer course or a course that was only taught for part of the semester.

questions for his classes in 2012 - 2013, Grievant was rated below four on ten questions.⁶ It was not until 2014 – 2015 that the scores on all questions were above four.

33. By letter dated October 26, 2015, the department Promotion and Tenure Committee notified Chair Primerano that they did not recommend Grievant for tenure. The members of the committee were the same as the pre-tenure review committee. The committee explained its analysis of the factors in a table form, which is reproduced below:⁷

Requirement/Expectation	Finding	Score
Minimum experience requirements	All experience requirement[s] are met	A-adequate
		NA – Not Adequate
Teaching		
<ul style="list-style-type: none"> • evaluations of satisfactory or above by chairperson and peer review 	Last available Chair evaluation was 'Good'.	A
<ul style="list-style-type: none"> • factors considered should include the following where appropriate: <ul style="list-style-type: none"> ➤ teaching load 	Dr. Zeng teaches only 10 lecture hours for Medical Students and 5 lecture hours for Graduate students per year. This seems a very minimal teaching load.	NA
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ➤ development of new courses 	Dr. Zeng has not developed a new course	NA
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ➤ development of syllabus material 	Dr. Zeng has developed 2 active learning exercises. There is no evaluation of the effectiveness of these exercises.	A
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ➤ student sponsorship 	Dr. Zeng has served on graduate student committees. He has had a resident and graduate student rotate in his lab. We did not see that he has served as either the	NA

⁶ Although 2013 – 2014 student evaluations were listed in the table of contents of the tenure application packet, no score for that year were included.

⁷ The committee also evaluated whether Grievant had fulfilled his “job duties and responsibilities” which has not been reproduced.

<ul style="list-style-type: none"> ➤ resident training ➤ courses taken to improve teaching effectiveness, student evaluations 	<p>chair of a graduate student committee or the primary mentor for a graduate student.</p> <p>Not applicable</p> <p>Dr. Zeng's student evaluations have improved to an acceptable level. He did participate in one teaching lecture (Dr. Shah) and one webinar on active learning.</p>	<p>A</p>
<p>Based on the requirements and on the evidence that we were presented, we think that Dr. Zeng demonstrated adequate teaching but do not think that Dr. Zeng demonstrates <u>excellence</u> in teaching.</p>		
<p>Research/Scholarly Activities</p>	<p>Dr. Zeng's appointment is primarily (60%) for research.</p>	
<ul style="list-style-type: none"> • evidence of establishment/continuation of research/scholarly program substantiated by publication in peer review journals, other activities and chairperson and peer review 	<p>Dr. Zeng has not received a national research grant of any kind since arriving at Marshall. He has received a \$10,000 local grant (WV-INBRE) and a \$1,500 travel award. He has submitted many grants but received no awards.</p> <p>He lists 4 study section review panels, however does not give dates so it is not clear if this was before or after arriving at Marshall.</p> <p>Dr. Zeng has a letter of invitation as an editorial board member of 'Austin Journal of Immunology'. This open access Journal is apparently not listed in PubMed⁸ and has a 0 impact factor.</p> <p>Dr. Zeng's Chair evaluations for research is 'needs improvement'.</p> <p>Dr. Zeng lists 5 papers since arriving at Marshall, however, only 4 of these papers are listed in PubMed. Only 2 of these papers are research papers, the remainder are reviews. He does have another paper, ePub date Aug 26, 2009, from work done before arriving at Marshall.</p>	<p>NA</p> <p>??</p> <p>NA</p> <p>NA</p> <p>NA</p>

⁸ "PubMed is a database of bibliographic information drawn primarily from the life sciences literature." *PubMed Overview*, U.S NAT'L LIBRARY OF MED., https://www.nlm.nih.gov/bsd/disted/pubmedtutorial/010_060.html (last updated Oct. 21, 2013).

<ul style="list-style-type: none"> continuing presentation of research at regional, national and international scientific Meetings 	<p>Dr. Zeng has not been an invited lecturer since arriving at Marshall. He presented research at two national meetings in 2014, his other presentations from 2009 to 2013 were in local meetings. He lists review of only 6 manuscripts since arriving at Marshall.</p>	<p>NA</p>
<p>Based on the requirements and on the evidence that we were presented, we do not think that Dr. Zeng demonstrates <u>excellence</u> in research.</p>		
<p>Professional Service/Patient Care</p>	<p>Not applicable</p>	
<p>Other Service</p>		
<ul style="list-style-type: none"> evaluations of satisfactory or above by chairperson and peer review 	<p>Satisfactory</p>	

34. By letter dated October 30, 2015, Chair Primerano notified Dr. Joseph Shapiro, Joan C. Edwards School of Medicine Dean, that he did not recommend Grievant for tenure. Regarding Grievant’s research performance, he stated:

Dr. Zeng has not received any external funding for his research, although he has submitted many applications and has three applications that are pending review. He did receive a WV-INBRE pilot grant in 2012-13 which is not considered external. He reports six publications since his arrival at Marshall. Of these six, two are review articles (Am J Pathology 181:1504 – 1512 (2012) and Immunology 140: 31 – 38 (2013)) and one was published in August 2009 near the time of his arrival at Marshall. Dr. Zeng has presented his research at seven research meetings (3 national and 4 at Marshall). In his 2012-2013 annual faculty evaluation of Dr. Zeng, Dr. Richard Niles (department chair at that time) noted that Dr. Zeng’s research “needs improvement” and that “In order to be considered for tenure, Dr. Zeng must increase publications/year and obtain external funding.” Based on his number of publications and amount of research funding, I rate Dr. Zeng’s research as satisfactory.

Regarding Grievant's teaching performance he stated:

Dr. Zeng's has teaching responsibilities in the Year Two medical curriculum and BMS program graduate courses. Based on Dr. Zeng's annual Faculty Effort Reports, he contributed 4 hours of medical teaching in 2010-11, 10 hours in 2011-12, 10 hours in 2012-13, 15 hours in 2013-14 and 13.5 hours in 2014-15. Prior to 2013, these teaching sessions were then given as part of the Principles of Disease, Disease and Therapeutics III and Disease and Therapeutics IV courses. His evaluations by medical students have improved since he began teaching in 2010 to the present semester. In academic year 2014-2015, his composite average scores (determined by averaging over all available criteria) were 4.37, 4.32 and 4.17 for Principles of Disease, Disease and Therapeutics III and Disease and Therapeutics IV, respectively. His averages are below the composite departmental averages for the same courses and year (4.45, 4.39 and 4.31). Dr. Zeng has also contributed to four BMS graduate courses: (1) Advanced Molecular Genetics in April 2013, (2) Cancer Biology in 2013, (3) MCB631/632 Medical Microbiology I+II and (4) Microbiology Journal Club in 2011. Dr. Zeng has not served on any medical or graduation education committees (such as the Curriculum Committee, Graduate Studies Committee or the MS2 Subcommittee). He has served on one PhD Student Dissertation committee (Ryan Withers) and mentored two Master's students (Adam Rashid and Brad Gillon). He has not served as the primary mentor of any PhD students in the BMS Program. Based on his contributions to medical and graduate education and his evaluations, I rank Dr. Zeng as satisfactory in teaching.

35. Next the tenure application was reviewed by the Personnel Advisory Committee, which is the advisory committee for the dean of the School of Medicine. Dr. Bonnie Beaver was the chair of the committee. The Personnel Advisory Committee is comprised of an appointee from each of the academic departments from both clinical and basic science, which numbered thirteen appointees at the time of Grievant's tenure application. All committee members review all applications, but three committee members are assigned to review each candidate in detail. The small group then presents

to the committee at the committee meeting. The committee then votes. Dr. Beaver included in the information for committee review a seventh manuscript that had not been published but had been submitted to the Journal of Allergy and Clinical Immunology, a prestigious journal, and had received favorable reviews. The committee voted unanimously not to support Grievant's application finding Grievant had not displayed excellence in either teaching or research.

36. By letter dated February 8, 2016, Dr. Bonnie Beaver, Personnel Advisory Committee Chair, notified Grievant that the committee considered Grievant's application for tenure at its meeting on January 14, 2016, and by majority vote declined to support Grievant's tenure application. She states, "Based upon the discussion, it appears that the primary reason the Committee voted against a recommendation regarding your tenure related to lack of funded research productivity." Although Dr. Beaver sent a separate letter to Dean Shapiro, that letter was not introduced into evidence.

37. By letter of the same date to Grievant, Dean Shapiro stated, that upon the recommendation of the Personnel Advisory Committee, his meeting with Interim Chair Primerano, and his own review, he was declining Grievant's application for tenure.

38. By letter of the same date to President Gilbert, Dean Shapiro also declined to recommend Grievant for tenure, but he attached a separate document outlining his review of Grievant's performance. Dean Shapiro stated:

I do not recommend tenure for this applicant. Dr. Zheng was employed in 2009 primarily to do research. Since then he has only published four research articles and two reviews. This is a very poor record based on the 60% time he has for research. Further he does minimal service and limited teaching. His references do not give any compelling argument for his tenure and I was unable to find any support from his chair.

Dean Shapiro analyzed the tenure factors, in relevant part, as follows:

Teaching: satisfactory reviews now, but is low amount of teaching for 25% effort

- Dr. Zeng has taught in both the Medical and Graduate curriculum. The exact hours are unclear however it appears based on the curriculum map and his CV that he has a load ranging from 11-20 hours per year

Teaching Load:

- Medical Teaching
 - His teaching load is not particularly clear in his CV, however based on the curriculum map he has 11 hours of medical school teaching in MS2 in MDC750, MDC753 and MDC754.
 - His teaching was originally not good with most of his averages being below 4, however in the last year review he has improved so that all his scores average higher than 4.
- Graduate Teaching
 - He was involved in teaching in BMS651 and BIC638 in 2013 and currently teaching in MCB720 (co-taught with MS2 classes).

Mentoring:

Dr. Zeng has mentored at a number of levels, there is no evidence that this has resulted in either abstracts or publications for the students involved:

- Residents (Baraa Alabd Alrazzak MD., Pediatrics, 2012)
- Masters Students (Adam Rashid, 2011-2012, Brad Gillon, 2013-2014),
- Undergraduate Students (Matt Harlow, 2010).

He has also served on a PhD graduate student committee

- Ryan Withers, PhD. 2012-2014.

Training:

Dr. Zeng has taken two opportunities to improve his teaching in 2010-2013.

Research/Scholarly: Poor considering is employed as researcher (60%) and also based on his initial offer letter requirements.

Meetings:

- Since 2009 Dr. Zeng has presented his research via 3 posters at national meetings
- Dr. Zeng has also presented at 4 Marshall research retreats
- No invited talks / presentations since joining Marshall

Publications:

- 6 publications since joining Marshall
 - 4 research based (3 at first author)
 - 2 review (1 in Journal he is an editor for)

Funding:

Currently Dr. Zeng has no funding of any kind.

- At Marshall Dr. Zeng has received two grants
 - WV-INBRE internal award \$10,000
 - AAI travel grant \$1500. Currently has three grants under review.

Reference letters: (ok)

Dr. Zeng has two external and five internal reference letters.

- His external reviewers discussed his previous studies much of which were published prior to joining Marshall. They indicated that he had spoken about exciting new findings to them, but they did not amplify on this in any way.
- His internal letter[s] state [sic] are somewhat supportive and say that he works hard. One recommends tenure on the basis that it is hard to do research at Marshall, another states that it would be hard to replace his teaching.
- The library supported his role in adding a Pubmed tab to our search page.

39. By letter dated April 30, 2016, Dr. Jerome Gilbert, Marshall University President, notified Grievant that his application for tenure had been denied. The letter did not inform Grievant when his employment would end.

40. Grievant compares himself to two other faculty members in the Department of Biochemistry and Microbiology: Dr. Emine Koc and Dr. James Denvir.

41. Dr. Koc was hired as an Associate Professor in the Department of Biochemistry and Microbiology. Her letter of offer states:

The duties and responsibilities of this appointment will include the following:

1. Assigned teaching in the Molecular Basis of Medicine course, and the Foundations of Biomedical Sciences Graduate Student course. This assignment will be waived for your first year of service in order for you [to] establish your laboratory and submit a number of grant applications.
2. Establishment of a nationally competitive and externally-grant funded biomedical research program.
3. Service on School of Medicine and University Committees as recommended by your Department Chair and/or the Dean of the School of Medicine.
4. Such other duties and responsibilities are normally assigned to full-time faculty at the School of Medicine and for which you are qualified by your skill, training, and/or experience.

Tenure:

Due to your years of service on the faculty at Penn State University, you will become eligible for tenure after two full years of service on the faculty at Marshall University. The following achievements will be weighed heavily for recommendation of tenure at the end of your second year of service.

1. Two peer reviewed publications while a faculty member at Marshall, one of which must be as first or corresponding author.
2. Submission of at least four grant proposals (waived if extramural funding is obtained from the initial grant applications)
3. Satisfactory peer and student evaluation of your teaching.
4. Documentation of service activities at the School of Medicine and University levels.

42. Dr. Koc published four papers⁹ in two years, two of which were original research. In her *curriculum vitae*, under "Graduate Students Supervised" Dr. Koc lists

⁹ Dr. Koc's tenure was reviewed by Chair Niles, who did count in her tenure review two other papers that appear to have been based on research done at Dr. Koc's previous institution. Chair Niles was not part of Grievant's tenure review process.

two Ph.D. candidates and states she was a secondary mentor to a Master's student. She also lists eight "Students and Trainee's," which included the previously-listed two Ph.D. candidates, a medical student, two research associates, and a "SRIMS Student," and an "INBRE Fellow." The eighth student was a Ph.D. candidate, but it is unclear why this student was listed, as the dates listed for the student begin in 2007, which predates Dr. Koc's employment at Marshall by four years. Dr. Koc presented in five meetings in two years.

43. Dr. Denvir was hired as an Assistant Professor in the Department of Biochemistry and Microbiology. His letter of offer states:

The duties and responsibilities of this appointment will include:

- (1) Collaboration with the MU Genomics Core to provide bioinformatic and statistical analyses for biomedical researchers. These responsibilities will include (but not be limited to) analysis of microarray and next generation sequencing data and managing high throughput data pipelines.
- (2) Service as the Co-Director of the WV-INBRE Bioinformatics Core.
- (3) Collaboration as a co-investigator in support of biomedical research projects and in the preparation and submission of grant applications.
- (4) Collaboration with Dr. Todd Gress and other investigators in support of clinical translational research.
- (5) Providing lectures in statistical methods to medical students and residents, graduate students, and postdoctoral fellows. This will include lectures to Year 2 medical students and a required course in bioinformatics and biostatistics for the BMS graduate students.
- (6) Establishment of an original research program. We estimate that 20% of your effort will be committed to this work.
- (7) Service on School of Medicine and University committees as recommended by your departmental chair and/or the Dean of the School of Medicine.

- (8) Such other duties and responsibilities as are normally assigned to full-time faculty at the School of Medicine and for which you are qualified by your skill, training and/or experience.

Promotion and tenure:

Because of your prior employment as an associate professor at Marshall, you will be eligible to apply for tenure as early as the completion of your 2nd year of continuous full-time employment at MU but no later than the sixth year. Successful research collaboration and teaching performance will be the major criteria for granting of promotion and tenure. Evidence of research success will include publication of five manuscripts as first or co-author, and receipt of one funded grant as principal investigator or co-investigator during the probationary period. Satisfactory performance in teaching as measured by faculty and student evaluations will also be required.

44. Dr. Denvir published at least thirteen papers in three years. Under “Student Advising” Dr. Denvir states he was a committee member for a Ph.D. candidate, he “[m]entored MS dissertation”, and that he had three summer undergraduate interns. Dr. Koc presented in five meetings in two years.

45. The duties and responsibilities of an appointment are not the same as the requirements for tenure. As demonstrated by Dr. Koc’s offer letter, even when securing external funding is a job duty and responsibility, it is not necessarily a requirement for tenure as Dr. Koc was only required to submit four grant proposals to be eligible for tenure even though securing external funding was a job duty and responsibility.

46. Dr. Hardman was not prohibited from service on the Promotion and Tenure Committee. The School of Medicine’s Faculty Promotion and Tenure Regulations section III states, “[F]aculty who are not full-time employees of Marshall University School of Medicine are not eligible to serve on the Personnel Advisory Committee.” The Personnel

Advisory Committee is the college level promotion and tenure committee. Dr. Hardman served on the intradepartmental promotion and tenure committee, therefore, this provision does not apply.

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 (2008); *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).

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, 614, 474 S.E.2d 534, 544 (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 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). “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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *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 decisionmaker at the time of the decision. An applicant is responsible for informing the decisionmaker 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).

Grievant argues that the tenure denial was arbitrary and capricious for many individual reasons which all relate to either errors in the process or discrimination. Essentially, Grievant argues he was more deserving of tenure than two other faculty members who had recently been granted tenure, that he was evaluated differently than the two other faculty members, and that the University made numerous procedural and factual errors throughout the process. Grievant asserts this difference in treatment was caused by racial discrimination. Respondent asserts the compared faculty members are not similarly situated, that the tenure review process was thorough and without error, and that Grievant clearly failed to meet the requirements for tenure.

Discrimination

The undersigned must first address Grievant’s allegations of discrimination before analyzing the tenure process itself as Grievant has compared himself to others throughout his arguments regarding the alleged failures of the process and in arguing that the tenure

decision was wrong because he was better qualified than faculty members who had received tenure.

Grievant asserts that the denial of tenure was due to racial discrimination. Grievant argues that Asian members of the faculty are held to higher standards than other members of the faculty. Grievant compares himself mostly to two members of the Department of Biochemistry and Microbiology who received tenure around the same time Grievant was denied tenure: Dr. Emine Koc and Dr. James Denvir.¹⁰ However, Grievant also compares himself at times to all members of his department, and particularly to two members of the department who are of the same race as Grievant.

Discrimination for purposes of the grievance process has a very specific definition. "Discrimination' means 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). Grievant's claims of specifically racial discrimination may be addressed in his pending EEOC action. For purposes of a determination of discrimination in this grievance, the focus is simply on whether Grievant was treated differently than similarly situated employees.

Respondent argues that neither Dr. Koc nor Dr. Denvir are similarly situated to Grievant. "[E]mployees who do not have the same classifications are not performing "like assignments and duties" . . . cannot show they are similarly situated for discrimination and favoritism purposes. *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999) (*per curiam*), *overruled in part and on other grounds by Bd. of Educ. v. White*, 216

¹⁰ The only evidence of the tenure decisions made for Drs. Koc and Denvir submitted in this matter are their letters of recommendation from the department chair.

W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.*, Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark et al. v. Preston County Bd. of Educ.*, Docket No. 2013-2251-CONS (July 22, 2014).” *Crockett and May v. Wayne County Bd. of Educ.*, Docket No. 2014-1698-CONS (Feb. 19, 2015); *Cale, et. al. v. W. Va. Univ.*, Docket No. 2015-0576-CONS (Mar. 3, 2016). Grievant was an Associate Professor and Dr. Denvir was an Assistant Professor. Further, Dr. Denvir’s research effort was expected to be only 20% of his time, while Grievant’s was 60%. Grievant was not similarly situated to Dr. Denvir. Likewise, he was is not similarly situated to the other members of the department he discusses, because they are tenured professors.

Regarding Dr. Koc, Grievant and Dr. Koc were both Associate Professors who had responsibility for both research and teaching¹¹, with an emphasis on research, within the same department. Grievant points out that Dr. Koc was granted tenure even though she had not received external funding. Grievant was treated differently than Dr. Koc, however the reason for this difference in treatment was because of the difference in their employment contracts. As will be discussed more fully below, Marshall failed to include tenure requirements in Grievant’s employment contract as required by their policy. Both Grievant and Dr. Koc were required to secure external funding as a job duty and responsibility. However, Dr. Koc’s letter properly contained her specific requirements for tenure, which did not require her to secure external funding, but only to submit four grant applications for funding. Dr. Koc was then evaluated for tenure based on the tenure

¹¹ Although Dr. Primerano testified that Dr. Koc was hired primarily for teaching, Dr. Primerano was not the chair when Dr. Koc was hired or during the relevant time-period for tenure consideration. Documentary evidence shows that Dr. Koc’s time was devoted primarily to research.

requirements of her offer letter, which terms she exceeded. Therefore, the difference in treatment was agreed to in writing and cannot be said to be discriminatory.

Although Grievant cannot properly compare himself to the other members of the faculty for discrimination purposes, Grievant can use those comparisons as evidence of arbitrary and capricious behavior by the tenure reviewers, and those comparisons will be discussed more fully below in the analysis of the individual factors considered in the tenure decision. Likewise, regarding Grievant's contention that Asian members of the faculty are held to a higher standard, although Grievant is not similarly situated to the other Asian members of the faculty, who were tenured, and although this is not the type of discrimination contemplated by the Grievance Board's definition, such evidence can be considered to show that the process was arbitrary and capricious. However, Grievant's evidence on this issue is very limited. In support of his argument that he was held to a higher standard because of his race he points out the particularly distinguished accomplishments of the other two Asian members of his department who were tenured. Grievant asserts that the fact that Chair Primerano had recommended these two for tenure supports Grievant's contention that there are higher standards for Asian faculty. This is not evidence of a higher standard; it is a logical fallacy. Just because those two members of the faculty were particularly distinguished even among tenured faculty does not mean they had to be more distinguished than other tenured faculty in order to receive tenure. Grievant offered no direct evidence of racial bias by any of the reviewers.

Grievant argued there were several other instances during his employment that constituted discriminatory treatment. In support of his argument, Grievant asserted the following: that he had expected to be given the teaching responsibilities of Dr. Jackman

upon her retirement and that a newly-hired faculty member was given those responsibilities instead; that Dr. Delito had been named co-course director of the Principals of Disease course instead of him even though Dr. Delito did not teach the course; that he was hired at a lower salary than Drs. Koc and Denvir; that he was given no access to interact with visiting scholars; and that he was given “no access to clinical data research service and facility,” which refers to a research collaboration with the Clinical Research Department that ended in 2016, after the tenure decision. None of Grievant’s assertions relate to the question of this grievance, which is whether the tenure decision was arbitrary and capricious. While Grievant was allowed to place evidence into the record regarding these assertions, none of the evidence supported a bias or interference with the tenure process or decision-making, so it is not necessary to analyze these assertions in detail. They relate to either conditions of Grievant’s employment prior to the tenure decision, or following the tenure decision.

Rule and Policies Governing Tenure

The tenure decision in this matter was governed by the Procedural Rule of the West Virginia Higher Education Policy Commission, Series 9, Academic Freedom, Professional Responsibility, Promotion, And Tenure; Marshall University Board of Governors Policy No. AA-28; and Marshall University School of Medicine’s Faculty Promotion and Tenure Regulations. “Tenure shall not be granted automatically, or for years of service but shall result from a process of peer review and culminate in action by the President.” Marshall University Board of Governors Policy No. AA-28 § 2.2.1. “The grant of tenure requires that a candidate must have demonstrated professional performance and achievement in all of his or her major areas of responsibility.

Additionally, the candidate must have demonstrated exemplary performance in either teaching and advising or in scholarly and creative activities.” Marshall University Board of Governors Policy No. AA-28 § 2.2.5.

The School of Medicine Faculty Promotion and Tenure Regulations provide the specific requirements of tenure for Grievant. “All changes from a non-tenured to a tenured status will be considered in the same manner as promotions. Procedures for consideration of faculty for tenure are similar to those outlined above for promotions. For award of tenure, a faculty member should meet the criteria outlined above for promotion to Associate Professor. The review procedures and time schedule for submission of documentation are identical to those outlined for promotions.” School of Medicine Faculty Promotion and Tenure Regulations Section V. Therefore, the requirements for tenure were as follows:

Overall evidence of superior worth to the University as demonstrated by effective performance in all major areas of responsibility and excellence in either teaching or research/scholarly activities.

Minimum experience requirements

- Two years on faculty at Marshall University
- Terminal degree and 4 years satisfactory teaching experience at level of Assistant Professor
- Faculty holding the M.D. degree should be Board certified in a primary or subspecialty
- Basic science faculty should be qualified to sponsor a Ph.D. student and chair a doctoral dissertation committee

Specific areas for consideration include, but are not limited to:

- Teaching
 - evaluations of satisfactory or above by chairperson and peer review
 - factors considered should include the following where appropriate:
 - ◊ teaching load
 - ◊ development of new courses

- ◇ development of syllabus material
- ◇ student sponsorship
- ◇ resident training
- ◇ courses taken to improve teaching effectiveness
- ◇ student evaluations
- Research/Scholarly Activities
 - evidence of establishment/continuation of research/scholarly program substantiated by publications in peer review journals, other activities and chairperson and peer review
 - continuing presentation of research at regional, national and international scientific meetings
- Professional Service/Patient Care
 - evaluations of satisfactory or above by chairperson and peer review
- Other Service
 - evaluations of satisfactory or above by chairperson and peer review

School of Medicine Faculty Promotion and Tenure Regulations Section V.2.¹²

Grievant's application for tenure was denied primarily for his failure to secure external funding of his research program. Grievant argues this was an improper reason for denial of tenure in that securing external funding was not a requirement of tenure. Respondent asserts it was a proper consideration because the requirement to obtain external funding was contained in Grievant's offer letter.

Employment Contract

Of first concern is the form of the letter of offer and Notice of Faculty Appointment. It is the letter of offer that specifies Grievant's actual job duties and responsibilities, including the requirement to secure external funding, and other terms specific to his appointment within the department. Yet it is only the Notice of Faculty Appointment, a

¹² There is an apparent typographical error in that the sections "Criteria For Promotion" and "Faculty Tenure" as both are labeled as Section "V."

form that contains basic, non-specific requirements, that is signed. The Notice of Faculty Appointment does not contain the requirement to secure external funding.

“It is elementary that mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 158 W. Va. 935, 216 S.E.2d 234 (1975). In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement or by indirect evidence through facts from which an agreement may be implied. See *Lacey v. Cardwell*, 216 Va. 212, 217 S.E.2d 835 (1975); *Charbonnages de France v. Smith*, 597 F.2d 406, 415-416 (4th Cir. 1979). *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993).” *Citizens Telcoms. Co. v. Sheridan*, 799 S.E.2d 144, 150-151 (W. Va. Apr. 20, 2017). It is clear from reading the two documents together, that the contract terms include both documents. The letter states, “If you are in agreement with the above offer please sign and return the attached appointment notices to the Dean’s Office as soon as possible.” By signing the Notice of Faculty Appointment, Grievant accepted the terms of the letter of offer.

However, while Grievant’s contract, therefore, included securing external funding as a job duty and responsibility, it did not state it was a requirement of tenure. Marshall University Board of Governors Policy No. AA-28 section 3.1.1, states, “At the time of initial appointment, the department chairperson will notify in writing each probationary faculty member of the requirements and guidelines for tenure, including any which apply specifically within the faculty member’s department.” Grievant’s letter of offer in no way

refers to the requirements and guidelines for tenure. Both Dr. Denvir and Dr. Koc's letters of offer illustrate that the duties and responsibilities of an appointment are not the same as the requirements for tenure. Specifically, as discussed above, Dr. Koc's letter of offer listed external funding as a job duty and responsibility, but her tenure requirement was only to submit four grant proposals for funding.

Grievant asserts that Respondent considered external funding as a requirement of tenure, not because of the offer letter, but because of the revision of the School of Medicine's Faculty Promotion and Tenure Regulations. External funding of research was not a requirement of the regulations in effect at the time of Grievant's hiring, but it was added as a requirement to the regulations that were adopted some years after Grievant was hired. Grievant was to be evaluated under the regulations in place at the time of his hiring, not the new regulations.

"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)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). External funding was not a requirement of the applicable regulations for Grievant's tenure decision. Respondent was specifically required to notify Grievant of the requirements of tenure in his offer letter by its own policy and failed to do so. Therefore,

Respondent improperly considered Grievant's failure to secure external funding in its tenure decision.

Although Respondent's witnesses testified that the failure to secure external funding was the primary reason tenure was denied, they also testified that Grievant otherwise failed to meet the requirements for tenure. The proper remedy for Marshall's improper consideration of external funding as a requirement for tenure is not automatic success of the grievance claim, but rather exclusion of that consideration as a justification for denial of tenure. In other words, the undersigned must evaluate whether the reviewers' analysis of the remaining factors for tenure justify their refusal to grant Grievant tenure.

The Tenure Decision

Grievant was required to demonstrate "effective performance in all major areas of responsibility and excellence in either teaching or research/scholarly activities." In the five-level review process, Grievant was not found to be excellent in either teaching or research by any person or committee. Further, the departmental Promotion and Tenure Committee in both its mid-tenure and pre-tenure reviews noted significant deficiencies in both research and teaching. These same concerns were echoed in Grievant's performance reviews. With the exception of the requirement for external funding, the other factors used to evaluate Grievant for tenure were properly considered under the regulations.

The Tenure Process

Grievant asserts there was interference and irregularities in the decision-making process and disputes most of the factual findings by the reviewers in the evaluation of the

other factors. Grievant asserts that, aside from external funding, both his research and teaching were excellent. Each factor Grievant disputes will be analyzed below. Again, a tenure decision is a subjective process for which the professional judgement of the academic professionals making the decisions is given deference and the Grievance Board's inquiry is generally limited to whether the decision complies with policy or is otherwise arbitrary and capricious.

Grievant first asserts "abnormalities and interferences" in his tenure review process. Grievant protests that Chair Primerano notified the chairs of the Personnel Advisory Committee and the departmental Promotion and Tenure Committee that he would not recommend Grievant for tenure prior to Grievant's actual application for tenure. On October 6, 2015, Chair Primerano sent an email to Grievant, copying Dr. Hardman, the chair of the departmental Promotion and Tenure Committee, in which he questions whether he will need to complete "Appendix C" and that he would check with Dr. Beaver, chair of the Personnel Advisory Committee, regarding the need to complete "Appendix C" and how to complete it. On October 7, 2015, Chair Primerano sent a second email to Grievant, copying Dr. Hardman and Dr. Beaver, which, in relevant part, states: "I will need to modify Appendix C indicating that I am not recommending you for tenure and provide all of the other information requested by Appendix C. I will complete this form, attach an explanatory letter and send it to you."

Chair Primerano explained in his level one hearing testimony that "Appendix C" did not have an option not to recommend tenure. He states he was seeking to "fix Appendix C." Chair Primerano admits that he had formed the opinion not to recommend Grievant prior to his application because he had previously served on the departmental

Promotion and Tenure Committee prior to his appointment as Chair in 2014, and because he had a long history of advising Grievant and already knew about Grievant's lack of funding and limited publications.

It was improper for Chair Primerano to announce to Dr. Beaver and Dr. Hardman that he would not recommend Grievant for tenure prior to Grievant's actual application. However, this did not impact the outcome of the tenure decision. It was no mystery that Grievant was not going to be recommended for tenure by his department. Both Chair Primerano and the departmental Promotion and Tenure Committee had informed Grievant multiple times over the course of years that he was not on track to receive tenure, including in the pre-tenure review made only a year and a half prior to Grievant's application. Grievant had not complied with the recommendations of chair Primerano and the Committee to receive tenure, so it was obvious Grievant was not going to be recommended for tenure by them. It is unreasonable to expect Chair Primerano and the Committee to not have an opinion prior to the official application, when they were already very familiar with the relevant factors to be considered due to their previous review of Grievant's performance. Further, there was also no practical effect on Dr. Beaver. In the proper course of review, the Personnel Advisory Committee reviews the department chair's recommendation as part of the review process. Dr. Beaver was simply made aware of Chair Primerano's ultimate opinion slightly early.

Grievant also asserts impropriety in the process due to the participation of Dr. Hardman on the Promotion and Tenure Committee, citing the School of Medicine's Faculty Promotion and Tenure Regulations which state: "[F]aculty who are not full-time employees of Marshall University School of Medicine are not eligible to serve on the

Personnel Advisory Committee.” The Personnel Advisory Committee is the School of Medicine level promotion and tenure committee. Dr. Hardman did not serve on the School of Medicine’s Personnel Advisory Committee; Dr. Hardman served on the intradepartmental promotion and tenure committee. This provision in the School of Medicine’s Faculty Promotion and Tenure Regulations does not apply to the intradepartmental promotion and tenure committee, and there was no policy or regulation submitted in this matter that would prohibit Dr. Hardman’s service on the intradepartmental promotion and tenure committee.

Grievant also asserts the reviewers erred when they did not compare his performance to that of other faculty members who had recently received tenure. This assertion is not supported by law or Respondent’s policy or regulations. The School of Medicine’s Faculty Promotion and Tenure Regulations governs what factors were to be considered in Grievant’s tenure decision. Comparison to other faculty members is not a factor that is included. While Grievant is permitted to compare himself to other faculty members in this grievance to attempt to prove arbitrary and capricious behavior, there was no error on the part of reviewers for not comparing Grievant to other faculty.

Grievant next disputes most of the factual findings by the reviewers in the evaluation of the individual tenure factors. As a preliminary matter, the reviewers appeared to approach the review process slightly differently. The departmental Promotion and Tenure Committee’s analysis was presented in table format as reproduced in the findings of fact section above. The committee’s scoring is somewhat unclear as there is no scoring key. Instead, to the side of the evaluation of minimum experience requirements, it states “A-adequate” and “NA-Not Adequate.” The committee evaluated

each of the individual factors as listed in the School of Medicine's Faculty Promotion and Tenure Regulations in the table and rated them as "adequate" or "not adequate" for each factor. As the determinative consideration for tenure is whether excellence has been demonstrated, the committee's choice to evaluate as only "adequate" or "not adequate" is perplexing. The department chair, Chair Primerano, provided a detailed letter citing specific supporting examples, which discussed most of the relevant factors, but did not assign a specific rating to individual factors. Dr. Beaver, Chair of the Personnel Advisory Committee, provided only a very short letter to Grievant stating that, by majority vote, the committee did not support Grievant's application for tenure and that "the primary reason the Committee voted against a recommendation regarding your tenure related to a lack of funded research productivity." However, it must be noted, that this letter was addressed only to Grievant, with Dr. Shapiro copied. It is unclear if a more detailed letter was submitted by Dr. Beaver directly to Dr. Shapiro. Only the letter to Grievant is included as an exhibit in this matter. There are two letters from Dr. Shapiro: one to President Gilbert, which attached a three-page breakdown of his review of the relevant factors, and a separate short letter to Grievant that provides no analysis of the factors.

Although the reviewers approached the review of Grievant's application somewhat differently, no specific format was required by law or school policy or regulation. The reviewers were simply directed to review the relevant factors, which, with the exception of the error regarding the consideration of funding, they did. Although Dr. Beaver's letter to Grievant only provided that the primary reason for denial was the lack of funding, in her testimony, she explained in more detail the process of review and the consideration of the other factors.

The Tenure Factors

At the heart of Grievant's dispute of the ratings of the factors is data Grievant compiled after the tenure decision that he asserts shows factual errors in the decision. It is important to note that a tenure decision is to be made based on the information submitted in the application. While Grievant's independent calculations may be used to show calculation errors by the committee, Grievant cannot include information that was not in the application packet or exclude information that was in the application packet. Faculty is told to submit "a thorough documentation of his or her teaching, research and other scholarly activities and service achievements." School of Medicine Faculty Promotion and Tenure Regulations V.B. "No items may be added or deleted from the application after [the departmental personnel committee recommendation]. School of Medicine Faculty Promotion and Tenure Regulations V.B. It is also noted that Grievant appears to frequently manipulate data in his own calculations to detract from the performance of compared faculty members and enhance his own as will be discussed more fully in the individual factors below.

Research

Research was to be Grievant's main focus for which 60% of his time was to be devoted. Per the regulations, Grievant could demonstrate excellence in research through two factors: "evidence of establishment/continuation of research/scholarly program substantiated by publications in peer review journals, other activities and chairperson and peer review" and "continuing presentation of research at regional, national and international scientific meetings."

In his own calculations, Grievant compares his career publications to that of other faculty members, asserting that the tenure decision should be made based on career accomplishments, not just work done at Marshall. Grievant asserts that his research should have been considered excellent because of the quality of his publications shown by the impact factor of the journals in which he published, by his position as first and corresponding author, and because the reviewers improperly discounted review articles.

Grievant lists six publications in his *curriculum vitae* that were published while Grievant was employed by Marshall. In addition to those six publications, during the tenure review process, Grievant submitted a seventh manuscript to the Personnel Advisory Committee that had not been published but had been submitted to the Journal of Allergy and Clinical Immunology, a prestigious journal, and had received favorable reviews. Grievant had not included this manuscript in his *curriculum vitae*, nor had he requested that the departmental Promotion and Tenure committee or Chair Primerano consider it.

None of the reviewers considered career publications or the first of the six publications Grievant listed in his *curriculum vitae*. That publication, "Immune suppressive activity and lack of T helper differentiation are differentially regulated in nTreg cells" was based on research done at Grievant's previous institution and was submitted prior to Grievant's employment at Marshall. However, because the publication review process for scientific research is so lengthy, the manuscript was published shortly after Grievant became employed by Marshall in 2009. Reviewers who testified at level three all stated that publications are reviewed for evidence of research productivity at Marshall, which career publications do not demonstrate. Per the School of Medicine regulations,

reviewers review publications for “evidence of the establishment/continuation” of a research program. None of the reviewers considered career publications or the 2009 publication because they did not reflect evidence of the establishment or continuation of a research program at Marshall. There is nothing in the applicable regulations or policy that would require the reviewers to consider career publications, nor is it unreasonable for the reviewers to make a tenure decision based only on the work a faculty member had done while employed by Marshall. Therefore, the reviewers properly excluded the 2009 publication from consideration, leaving five publications considered by the departmental Promotion and Tenure Committee and Chair Primerano and six publications considered by the Personnel Advisory Committee and Dean Shapiro, who considered the unpublished manuscript.

Also in dispute is the quality of Grievant’s publications and the role of quality in the review process. There are two types of publications at issue in this case: publication of original research and review articles. Publication of original research announces findings made by scientific research. Review articles are not based on the author’s own original research, but compile and review the research of other scientists. While research articles are helpful to the scientific community, they are not a reflection of research productivity, which is the relevant consideration for a publication’s worth in a tenure decision regarding excellence in research. Further, there are different types of authors for scientific papers: first author, corresponding author, and co-author. The first author is the person who has done the majority of the actual experiments. The corresponding author is the principal investigator, who conceived the research project and led the research team. There is no dispute regarding these types of authors. As for co-authors, Grievant discounts this type

of authorship stating that a co-author would play a minor role and that it is not uncommon for such authorship to be “gifted” and for the author to have actually had no role in the research or publication. Multiple reviewers contradicted Grievant’s view of co-authorship, explaining that scientific research has become increasingly specialized and collaborative, and that co-authors can play a major role in the research. Grievant has emphasized his view as important, because he asserts that the reviewers should have placed more value on his publications because he was first and corresponding officer for all his publications as compared to other faculty members who were granted tenure but did not have as many first or corresponding authorships.

Grievant also asserts that the impact factor of the journals in which he was published should have been taken into account and show that his research was excellent. Impact factor is a numerical representation of the quality of a journal. Grievant asserts that the cumulative impact factor of his publications was much greater than that of Drs. Koc and Denvir based on his own calculations. As with most of the calculations Grievant presented, Grievant excluded data based on his own opinions in that he refused to include any of Dr. Denvir’s publications because he was a co-author rather than first or corresponding author and removed three of Dr. Koc’s publications for the same reason. The reviewers did not deny that impact factors have meaning, but were united in the opinion that the greater impact factors of the some of the journals in which Grievant published did not negate the lack of publication productivity overall.

In support of his contentions, Grievant cites Board of Governor’s Policy No. AA-26 section 3.5.2, which he asserts states that consideration “may include, but [is] not limited to: number, quality and importance of publications.” This policy was not entered into

evidence and is not applicable to Grievant. This language is from the revised policy provisions in effect after Grievant's hire. Grievant was evaluated according to the policy in place at the time of his hire and Grievant's cited language does not appear in the applicable policy.

The reviewers' rejection of Grievant's assertions regarding the quality of his publications is exactly the type of determination requiring scholarly expertise for which the reviewers are to receive deference. Grievant points to no applicable regulation or policy that supports his opinions regarding the considerations of different authorship and impact factors in evaluating publications. None of the reviewers who testified agreed with Grievant's opinions on these issues and provided reasonable explanations regarding their interpretation and application of these factors. Again, reviewers were to look to publications as "evidence of the establishment/continuation" of a research program. All reviewers testified that Grievant's number of publications of original research was low and that publication of three or four original research papers during six years of employment did not demonstrate research productivity. In contrast, Dr. Koc published four papers¹³ in two years, two of which were original research, and Dr. Denvir published at least thirteen in three years.¹⁴ Grievant did not demonstrate that the reviewers erred in determining his publication was not excellent.

¹³ Dr. Koc's tenure was reviewed by Chair Niles, who did count in her tenure review two other papers that appear to have been based on research done at Dr. Koc's previous institution. Chair Niles was not part of Grievant's tenure review process.

¹⁴ Dr. Denvir's *curriculum vitae* listed sixteen publications, the letter of recommendation stated fifteen publications, and Grievant asserted three of the publications were not Marshall affiliated. Direct comparison to Dr. Denvir has limited value as Dr. Denvir's role in bioinformatics and biostatistics is collaborative in nature. However, it does show Dr. Denvir's significant research productivity.

The other factor at issue for research excellence is “continuing presentation of research at regional, national and international scientific meetings.” Some confusion was present on this issue because, while the factor to be considered is presentation of research at meetings, not simply attendance, Grievant had previously been encouraged to attend meetings to network for collaboration in an effort to secure funding. Grievant testified it was his opinion that meeting participation should have limited weight for several reasons and that his participation was limited due to budgetary restraints. Grievant also asserts that his meeting participation was better than that of Dr.’s Koc and Denvir. Although Grievant’s presentation at meetings had been included in Grievant’s Faculty Activities Plan, Grievant did not present at any international meetings, presented only at three national meetings, and presented four times at Marshall, which does not appear to qualify as a “regional” meeting. Grievant’s calculations comparing himself to Drs. Koc and Denvir are misleading. Grievant listed the total presentations at meetings without regard to the fact that the participation covered a different total of years for each. In Grievant’s calculations, Grievant presented in seven meetings in six years, Dr. Koc presented in five meetings in two years, and Dr. Denvir presented in three meetings in three years. He also counted three of Dr. Koc’s presentations as local when only one presentation was at Marshall.¹⁵ Grievant’s calculation is also misleading as he counted local meetings in the totals, when the tenure factor does not include consideration of local meetings. A fair comparison of the relevant considerations shows Grievant only participated in three meetings in six years, while Dr. Koc participated in four meetings in

¹⁵ Dr. Koc had two presentations at the Appalachian Regional Cell Conference in Charleston, West Virginia. Although this meeting was held “locally” it was clearly a regional meeting.

two years and Dr. Denvir participated in two meetings in three years.¹⁶ The reviewers did not believe Grievant's number of meeting presentations was excellent. Grievant does not, in fact, compare favorably with Drs. Koc and Denvir on this factor. Other than his opinion that meeting participation should be given "minimum weight" Grievant offered no argument why this would be so when it is listed as one of two factors to be considered, or why the reviewers should have considered his meeting participation to be excellent.

Although the reviewers' main concern in denying tenure was Grievant's failure to receive funding, which was improper as discussed above, they also considered the other factors for evidence of research excellence and did not find that Grievant's publications or presentation at meetings was excellent. These determinations were not unreasonable or in violation of any applicable regulation or policy. Removing failure to receive funding entirely from consideration, and including only permissible review factors, Grievant's research performance was not excellent.

Teaching

Per the regulations, Grievant could demonstrate excellence in teaching through evaluations of satisfactory or above by chairperson and peer review and the following factors: teaching load, development of new courses, development of syllabus material, student sponsorship, courses taken to improve teaching effectiveness, and student evaluations.¹⁷ Although Grievant had previously been rated as needs improvement in his chair evaluations, his evaluation was "good" at the time of application. All of the reviewers considered his chair evaluation as satisfactory, so this factor is not at issue.

¹⁶ Although Grievant had calculated that Dr. Denvir had participated in three meetings, Dr. Denvir only had presentations at two of the three meetings he attended.

¹⁷ Resident training appears in the regulations, but is not applicable to Grievant.

Grievant's *curriculum vitae* lists the following medical teaching: Lecturer, MCB720, Medical Microbiology, 2010 – 2012; Lecturer, MCB743, Immunology, 2011 - 2012; Lecturer, MDC750, Principles of Disease I (Bacterial Genetics and Immunology), 2013 – current; Lecturer, MDC 753, Disease and Therapeutics III (Virology), 2013 – current; and Lecturer, MDC 754, Disease and Therapeutics IV (Virology), 2013 – current. Grievant's *curriculum vitae* lists the following graduate teaching: Lecturer, MCB632, medical Microbiology, 2010 – current; Instructor, MCB622, Microbiology Journal Club, 2011; Lecturer, BMS 651, Cancer Biology, 2013; Lecturer, BIC638, Molecular Genetics, 2013. The *curriculum vitae* does not specify the number of hours taught. The Faculty Activities Plan and Reports for 2010 – 2011 and 2011 – 2012 show the following report of yearly teaching hours: 2010 – 2011 four hours medical and five hours graduate; 2011- 2012 ten hours medical and that he “participated” as a moderator in a graduate class:¹⁸ The 2012 – 2013 Annual Faculty Activities Evaluation shows ten hours of medical teaching and five hours of graduate teaching. There is no report or evaluation included in Grievant's application packet for academic year 2013 – 2014. Although Grievant introduced course calendars as evidence attempting to prove that he taught a greater number of hours, Grievant is limited to the information he included in his application packet. It was Grievant's responsibility to include the proper information for the reviewers to consider.

All reviewers found Grievant's teaching load to be low. The departmental Promotion and Tenure Committee found that Grievant taught only 10 lecture hours for medical students and 5 lecture hours for graduate students a year. Chair Primerano listed

¹⁸ Grievant stated: “Participated in Current Topics in Molecular Biology (served as moderator for 4 of 5 student presentation, gave 1 presentation to students), 5 hours.” It appears this refers to five hours total time for the entire class, not five weekly hours.

Grievant's medical student teaching from the "Faculty Effort Reports" as follows: 4 hours in 2010-11, 10 hours in 2011-12, 10 hours in 2012 - 2013, 15 hours in 2013 -14 and 13.5 in 2014 - 2015.¹⁹ Chair Primerano noted Grievant had "contributed" to four graduate courses, but did not state how many hours for these courses. Dean Shapiro found that Grievant's teaching hours were not clear from his *curriculum vitae*, which was a valid concern, but that it appeared Grievant taught between 11 and 20 hours per year. Based on the content of his application packet, Chair Primerano and Dean Shapiro actually credited Grievant for more hours than his packet shows he taught.

The information Grievant included in his packet showed Grievant taught, at most, 15 hours per year. Grievant's attempt to dispute these numbers with evidence not before the reviewers is not proper and his assertion that his load compared favorably to others is not credible. The reviewer's determination that Grievant's teaching load was not excellent is not unreasonable or in violation of school policy or regulation.

Grievant argues that, as it was not a job duty and responsibility in his offer letter, the lack of development of a new course should not have been considered as a factor in the tenure decision. As has already been found above, job duties and responsibilities and tenure requirements are different. If Respondent had been permitted to consider tenure based on Grievant's job duties and responsibilities, then the analysis of his tenure decision would have been very simple: he was required to secure external funding as a

¹⁹ It appears Chair Primerano was referring to the yearly "Faculty Activities Plan and Report." In addition, no Faculty Activities Plan and Report for 2013 – 2014 or 2014 – 2015 was included in the application packet. Chair Primerano testified he had calculated those numbers from review of the curriculum map. Therefore, Grievant received credit for hours for which he was not entitled as he had failed to include them in his application packet.

job duty and responsibility and failed to do so. Likewise, Grievant may not argue that Respondent cannot consider a proper factor of tenure because it was not included as a job duty or responsibility.

The 2011 - 2012 Faculty Activities Plan and Report lists a plan for the development of a new graduate course, Nucleic Acids/Molecular Genetics, of 6 – 10 hours by Grievant and others, however the report does not list the course as created. Grievant asserts that his development of four active learning “modalities” should have been counted as a new course developed. Grievant testified, that rather than developing a new course in Immunology for graduate students, Grievant decided that, due to the low number of graduate students²⁰, there was no need for such a course. Instead, because the University had been rated as “not in compliance” for “Lifelong learning in the curriculum” by the Liaison Committee on Medical Education, Grievant decided to develop the four active learning “modalities”²¹. Although Grievant asserts these should be considered as the development of a new course, they are clearly included only as a part of Grievant’s Principals of Disease course, just the same as active learning sessions of the other faculty members are also included in their existing courses. Grievant complains that the course director improperly refused to grant Grievant more time on the schedule for these active learning “modalities”, instead requiring him to reduce his lecture hours. However, this

²⁰ While Grievant consistently testified as to the unusually low number of graduate students regarding several factors, there was no evidence that there were truly so few students.

²¹Chair Niles had recommended in Grievant’s 2011 – 2012 Faculty Activities Evaluation that Grievant attend Dr. Jackman’s lectures and participate in workshops to “develop active learning methods.” Further, although Grievant terms these “active learning modalities,” they are referred to as “sessions” in The 2012 – 2013 Annual Faculty Activities Evaluation as “sessions of active learning.”

actually provides additional evidence that the active learning “modalities” should not be considered a separate course development. Grievant did not develop a new course and it was not unreasonable for the reviewers to take that into consideration in determining Grievant’s teaching was not excellent.

The departmental Promotion and Tenure Committee credited the development of two “active learning exercises” as development of syllabus material. Grievant asserts that he developed four, not two, “active learning modalities.” As noted above, while Grievant consistently referred to the active learning as “modalities” they were described as “sessions” in the Annual Faculty Activities Evaluation. No one provided any explanation of whether this difference in terms has any practical effect. Grievant did not list the active learning modalities in his *curriculum vitae*. They appear only in the 2012 – 2013 Annual Faculty Activities Evaluation, which states: “Developed 2 sessions of active learning for MCB720 lectures” and “Developed 2 sessions of active learning for MCB743 lectures.” As the departmental Promotion and Tenure Committee considered these active learning sessions as a part of the development of syllabus material, it is reasonable that they only considered it the development of two exercises as there were only two classes for which Grievant developed two sessions per class.

Grievant asserts the development of these “modalities” should have been viewed as more important because the University had been rated as “not in compliance” for “Lifelong learning in the curriculum” by the Liaison Committee on Medical Education. This, again, is Grievant’s opinion. The committee considered this adequate, stating that there had been no evaluation of the effectiveness of the exercises. Further, while Grievant attempted to characterize this development as something special and in

response to the Liaison Committee report, he had been told as early as his 2011 – 2012 Faculty Activities Evaluation to develop active learning methods. Also, the course calendar shows the multiple other faculty members were conducting active learning sessions.

Grievant's *curriculum vitae* lists the following relating to student mentoring, which he lists within "Graduate Teaching": Graduate Student Thesis Committee Member – R. Withers, 2010 - 2014, Graduate Student Mentor – Adam Rashid (M.S. Program, College of Science), 2011 – 2012; and Graduate Student Mentor – Brad Gillon (Medical Science Program, JCESOM), 2013 – 2014. In addition, under the heading "Resident (research) Training at MUSOM" "Basic Science Mentor, Baraa Alabd Alrazzak MD., Department of Pediatrics, MUSOM, 2012." The departmental Promotion and Tenure Committee found Grievant "has served on graduate student committees. He has had a resident and graduate student rotate in his lab. We did not see that he has served as either the chair of a graduate student committee or the primary mentor for a graduate student." Chair Primerano noted Grievant had only served on one PhD student dissertation committee, and mentored two Master's students. He noted Grievant had not served as the primary mentor of any Ph.D. student. Dean Shapiro found Grievant had mentored Dr. Alrazzak, Mr. Rashid, Mr. Gillon, and an undergraduate student, Matt Harlow, and had served on the committee for Ph.D. candidate Withers. However, he found "there is no evidence that this has resulted in either abstracts or publications for the students involved."

Of initial concern is that all witnesses discussed this factor as "mentoring." The factor to be considered is "student sponsorship." There is no explanation of these terms in the policy or regulations and no witness gave any explanation of what is considered to

be “mentoring” or “student sponsorship.” The reviewers appeared to review this factor somewhat differently, as they counted different students, Dean Shapiro found concern that there was no evidence of student publication, which is not mentioned by any of the other interviewers, the departmental committee had concern that Grievant had not served as the chair of a graduate student committee, and both the departmental committee and Chair Primerano had concern that Grievant had not served as the “primary mentor” of a graduate student. In testimony, Dr. Hardman stated Grievant had a resident and a graduate student “in his lab” but that he had not served as a mentor for either.

Grievant asserts the assessment of his student sponsorship was unfair in comparison to the student sponsorship of Drs. Koc²² and Denvir and considering the very small graduate student population, of which he asserts there was only one new PhD student since Grievant had arrived at Marshall. Grievant also asserts it would have been unfair of him to host a Ph.D. student in his lab because of his lack of funding. Grievant calculated that Drs. Koc and Denvir had “mentored” two and zero students respectively compared to Grievant’s five students. Again, Grievant’s calculations comparing himself to Drs. Koc and Denvir appear to be self-serving in that he included mentoring a third graduate student that does not appear in his *curriculum vitae* and excludes mentoring Drs. Koc and Denvir listed in their *curriculum vitae*. In her *curriculum vitae*, under “Graduate Students Supervised” she lists two Ph.D. candidates and states she was a secondary mentor to a Master’s student. She also lists eight “Students and Trainee’s,” which included the previously-listed two Ph.D. candidates, a medical student, two

²² Dr. Koc appears to have been awarded tenure based on her excellence in research, so a favorable comparison to her student sponsorship does not support an excellent rating.

research associates, and a “SRIMS Student,” and an “INBRE Fellow.” The eighth student was a Ph.D. candidate, but it is unclear why this student was listed, as the dates listed for the student begin in 2007, which predates Dr. Koc’s employment at Marshall by four years. Under “Student Advising” Dr. Denvir states he was a committee member for a Ph.D. candidate, he “[m]entored MS dissertation”, and that he had three summer undergraduate interns. Based on the information from the three *curriculum vitae*, Grievant, again, does not appear to compare favorably to Drs. Koc and Denvir, considering the large number of years difference in their period of review. Further, Dr. Yu testified that he, personally, mentors five to six students *each year*.

As to Grievant’s assertion there were not enough Ph.D. students to mentor because there had only been one since he arrived at Marshall, Dr. Koc lists two separate Ph.D. candidates and Dr. Denvir lists yet another in their *curriculum vitae*. Therefore, there have been at least three Ph.D. candidates since 2011 when Drs. Koc and Denvir were hired. Even if the Ph.D. student population is somewhat low, other faculty members have been able to mentor such students, which makes Grievant’s contention unpersuasive.

While there is certainly some confusion in the analysis of this factor by the reviewers, it appears to be caused by the lack of specificity in the policy and regulations. With the exception of the low student number argument above, Grievant does not argue that the criteria considered by each reviewer were inappropriate. Although the departmental committee did neglect to consider the resident mentoring, the addition of one more student would not have changed the determination. The reviewers

determination that Grievant's student sponsorship was not excellent is not unreasonable and does not violate policy or regulation.

Grievant participated in one teaching lecture in 2010 and one webinar on active learning in 2013. Grievant attended the teaching lecture before beginning his regular load of teaching. Grievant's initial student evaluations were good. However, in academic year 2011 - 2012, following a confrontation with Dr. Jackman in class, Grievant's student evaluations dropped drastically. As a result, Chair Niles recommended Grievant "participate in workshops on teaching skills and active learning offer[ed] through the office of Faculty Development (Dr. Darshana Shah)." In response, Grievant attended the webinar on active learning, but did not participate in any teaching skills workshops. Dean Shapiro and the departmental committee acknowledged the two courses Grievant completed.

Grievant's tenure application included student evaluations from academic years 2010 – 2011 through 2014 – 2015, and for one class, MDC 750, for academic year 2015 – 2016²³. Student evaluations consist of eight to ten questions that students are to score as follows: 1 is very poor, 2 is poor, 3 is average, 4 is good, and 5 is very good. Student evaluation results are displayed in a separate document for each class and a mean score is listed for each question, with no overall score provided for the class. There were no student evaluations included of the graduate courses Grievant taught.

The departmental Promotion and Tenure Committee found that Grievant's student evaluations had "improved to an acceptable level" and rated that factor as "adequate."

²³ The parties did not explain how student evaluations were available for this class when Grievant applied for tenure in October 2015, so it is unclear if this was a summer course or a course that was only taught for part of the semester.

Chair Primerano also noted Grievant's scores had improved, but only specifically listed in his recommendation letter Grievant's composite average scores for academic year 2014 - 2015 as 4.37, 4.32, and 4.17. Chair Primerano further stated that this was below the respective course averages for the department of 4.45, 4.39, and 4.31. Dean Shapiro stated, "His teaching was originally not good with most of his averages being below 4, however, in the last year review he has improved so that all his scores average higher than 4." A review of Grievant's tenure application packet shows the following: of the sixteen questions for his classes in 2010 - 2011, Grievant was rated below four on ten questions; of the sixteen questions for his classes in 2011 - 2012, Grievant was rated below four on nine questions and below three on seven questions; of the sixteen questions for his classes in 2012 - 2013, Grievant was rated below four on ten questions.²⁴ It was not until 2014 – 2015 that the scores on all questions were above four.

Grievant asserts Respondent misrepresented and discounted the student evaluations of his teaching. Grievant asserts Chair Primerano improperly used his 2014 – 2015 scores and excluded his better 2015 - 2016 scores. Although the School of Medicine regulations state that student evaluations are to be considered, there is no guidance in the regulations or the Board of Governor's policy as to which student evaluations to consider. Grievant asserts his teaching should be evaluated based only on the academic year in which he applied for tenure. To that end, Grievant's presented evidence of his 2015 – 2016 student evaluations including two courses that were not included in his application packet because Grievant applied for tenure in October 2015

²⁴ Although 2013 – 2014 student evaluations were listed in the table of contents of the tenure application packet, no scores for that year were included.

and the student evaluation results were from January 4, 2016 through May 27, 2016.²⁵ Grievant wishes to emphasize the 2015 – 2016 school year, because his scores were better in that year, but the scores were not available to the reviewers at the time of Grievant's application in October 2015.

Grievant correctly asserts that Chair Primerano incorrectly listed the score for one of his 2014 – 2015 courses as 4.32 when it was 4.36. As stated above, no average score is listed on the document, so an average score can only be determined by manual calculation of the average. This .04 difference in the score appears likely to be due to a simple calculation or typographical error. The score of 4.36 is also still below the departmental average of 4.39.

Grievant also alleges his teaching was evaluated differently than that of Drs. Koc and Denvir. Although Grievant asserted that Koc's scores for the academic year of her tenure decision were considered in her tenure decision, this is not supported by the only documentary evidence of her tenure decision, the October 28, 2013 recommendation from then chair, Dr. Niles, in which he only references the 2012 semester of a particular course. While Dr. Niles does not provide a specific rating for either Dr. Koc's research or teaching, it appears from his discussion that he considered her to be excellent in research not teaching. Although he appears to refer to her teaching hours and directorship of a course favorably, he states that her student evaluations were "average." Grievant also alleges Dr. Denvir was considered excellent in teaching due to his student evaluation score of 4.3. While it is true that Dr. Denvir was rated excellent in teaching, the 4.3 score referred only to Dr. Denvir's medical student evaluations, and Chair Primerano described

²⁵ Grievant Exhibit 5 pages 19 – 23.

his student evaluation scores only as “solid.” In finding Dr. Denvir’s teaching excellent, Chair Primerano emphasized Dr. Denvir’s creation of a new graduate course, which had 45 contact hours, that left students “better prepared to apply statistical methods in their grant application and ongoing lab work.” He stated that, although the number of evaluators for the course was small, the students rated Dr. Denvir as “strongly agree” for all questions. He also discussed Dr. Denvir’s contributions in statistical methods instruction and bioinformatics in two other courses. Thus, it does not appear that Dr. Denvir’s student evaluation score was what caused him to be considered excellent in teaching.

The student evaluation rating, poor to very good, cannot be directly compared to the standard for tenure review, which is excellence. There is no guidance in the regulations what student evaluation score average would be considered excellent. All reviewers considered all years of Grievant’s student evaluations, noting that his evaluations had improved. However, the Promotion and Tenure Committee and Chair Primerano do appear to slightly downplay Grievant’s most recent student evaluations, with the committee stating they had improved to an “acceptable” level and with Chair Primerano characterizing them as below the departmental average. The committee had previously stated in its pre-tenure review recommendations that Grievant would “need an average rating of 4 for your student reviews.” Grievant’s most recent student evaluations were all above four. While Chair Primerano was technically correct that Grievant’s scores were below the departmental average, they were only below by .08, .03, and .14. This comparison seems to have little value as there was no information regarding how many faculty members taught each class or whether the departmental average included

Grievant's scores. Despite the downplay of Grievant's most recent scores, it is clear that the reviewers considered Grievant's student evaluation scores for all years of his teaching at Marshall, and it was not unreasonable for them to consider his evaluations less than excellent when viewed as a whole.

The reviewers are to consider a list of factors in evaluating teaching. Although there were some irregularities in the process, the reviewers all reviewed relevant factors in the decision. Grievant's focus at the University was supposed to be research. The allocation of Grievant's time was 60% research, 25% teaching, and 15% service. To secure tenure, a faculty member must demonstrate superior worth to the University. Considering all the relevant factors, including the small amount of teaching Grievant contributed, it cannot be said that the determination Grievant's teaching was not excellent was in violation of applicable policy or regulation or was otherwise arbitrary and capricious.

Although they are not listed as a factor to consider in the tenure decision, Chair Primerano recommended Grievant submit letters of recommendation for consideration, and the reviewers considered the letters of recommendation. Grievant provided two external and five internal letters of recommendation. Dr. Hardman testified she considered Grievant's recommendation letters "weak." Dean Shapiro evaluated the letters as "ok" stating:

- His external reviewers discussed his previous studies much of which were published prior to joining Marshall. They indicated that he had spoken about exciting new findings to them, but they did not amplify on this in any way.
- His internal letter[s] state [sic] are somewhat supportive and say that he works hard. One recommends tenure on the basis that it is hard to do research at

Marshall, another states that it would be hard to replace his teaching.

- The library supported his role in adding a PubMed tab to our search page.

Grievant's external recommenders were clearly qualified to make recommendation and there was no evidence of a personal relationship. Both recommenders were enthusiastic in their recommendations and talked with specificity regarding the importance of Grievant's past research at his previous institution. However, while the letters expressed excitement and enthusiasm regarding the expected course of Grievant's current research, the recommenders could provide no direct review of the same as their only knowledge of the current research was from discussion with Grievant as this research had not been published. The internal recommendation letters are brief and speak mostly about what Grievant's research might contribute in the future, and urge the reviewers to consider the difficulty in securing funding and the value in his teaching in his field of expertise.

Dr. Hardman's criticism of the letters is unduly harsh, but Dean Shapiro's criticism that the external letters focus on Grievant's research before joining Marshall is fair. Regardless, positive letters of recommendation cannot negate Grievant's otherwise failure to meet the requirements of tenure.

Although Grievant also disputes the evaluation of his service, as the regulations required Grievant to demonstrate excellence in either research or teaching, which he did not, the evaluation of his service is not relevant.

There were some irregularities in the tenure review process. There were some factors various reviewers appeared to downplay. However, when viewed as a whole, the reviewers stated rational, relevant reasons supporting their denial of Grievant's tenure.

Grievant was hired primarily to research, for which he was to devote 60% of his time, and he demonstrated very little productivity in research. Grievant's teaching had improved greatly per his student evaluation scores, however, given his limited student sponsorship and teaching load, it is not unreasonable for the reviewers to consider Grievant's teaching less than excellent. With the exception of the improper consideration of lack of funding, which was cured by analyzing whether the tenure decision was sound without that consideration, the reviewers' decision was not contrary to law or school policy or regulation.

Terminal Contract

Grievant further argues that, even if tenure was properly denied, Respondent retaliated against Grievant by failing to provide him with a one-year terminal contract upon the denial of his tenure. Respondent argues that this portion of the grievance is untimely, and that Grievant was not entitled to a one-year terminal contract because non-tenured faculty can only be employed for seven years and Grievant was already in his seventh year of employment when tenure was denied because he had been permitted to apply for tenure one year late.

“Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two.” W. VA. CODE § 6C-2-3(c)(1). Although Respondent did not raise the issue of timeliness in writing, the level one transcript reflects that Respondent's counsel did raise the issue of timeliness orally during the level one hearing. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely

filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

An employee is required to “file a grievance within the time limits specified in this article.” W. Va. Code § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

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

W. Va. Code § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

By letter dated March 24, 2015, Dean Shapiro and Chair Primerano notified Grievant that he would be permitted to apply for tenure in the fall of 2015, but that if tenure was denied, Grievant’s contract would expire on June 30, 2016. In his level one and level three testimony, Grievant denied receiving the letter until he received a copy of the letter

by email in October 2015. At the level three hearing, Respondent introduced an email from Grievant to Chair Primerano dated May 7, 2015, in which he states, "I am concerned about 2 dates that are mentioned in the letter from you and the dean" and goes on to argue that the contract end date should be August 30, 2016 and request to discuss the issue. After the introduction of this email, Grievant testified that he had forgotten the letter. Grievant offered no credible evidence that he had not received the March 24, 2015 letter shortly after it was dated. When Grievant challenged this decision by email on May 7, 2015, thirty-two days after the date of the letter, the time-period to grieve the matter had already expired. Grievant's untimely challenge of his employment end date by his May 7, 2015 email, and the responses to that challenge, do not negate the unequivocal notice Grievant received of the decision in March 2015. The portion of the grievance related to Grievant's challenge of his employment end date is untimely.

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 (2008); *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).

2. “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).

3. 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, 614, 474 S.E.2d 534, 544 (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 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). “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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. “The undersigned ‘is limited to considering the record before the decisionmaker at the time of the decision. An applicant is responsible for informing the decisionmaker 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).

5. “‘Discrimination’ means 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).

6. “[E]mployees who do not have the same classifications are not performing “like assignments and duties” . . . cannot show they are similarly situated for discrimination and favoritism purposes. *Flint v. Bd. of Educ.*, 207 W. Va. 251, 257, 531 S.E.2d 76, 82 (1999) (*per curiam*), *overruled in part and on other grounds by Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Sisson v. Raleigh County Bd. of Educ.*, Docket No. 2009-0945-CONS (Dec. 18, 2009); *Clark et al. v. Preston County Bd. of Educ.*, Docket No. 2013-2251-CONS (July 22, 2014).” *Crockett and May v. Wayne County Bd. of Educ.*, Docket No. 2014-1698-CONS (Feb. 19, 2015); *Cale, et. al. v. W. Va. Univ.*, Docket No. 2015-0576-CONS (Mar. 3, 2016).

7. Grievant did not prove he was similarly situated to the compared employees.

8. “It is elementary that mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 158 W. Va. 935, 216 S.E.2d 234 (1975). In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement or by indirect evidence through facts from which an agreement may be implied. See *Lacey v. Cardwell*, 216 Va. 212, 217 S.E.2d 835 (1975); *Charbonnages de France v. Smith*, 597 F.2d 406, 415-416 (4th Cir. 1979). *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993).”

9. Grievant’s employment contract consists of the letter of offer and Notice of Faculty Appointment together.

10. "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)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dep't of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995).

11. Respondent violated its policy by failing to include Grievant's tenure requirements in his contract. Under Respondent's policy and past practice, job duties and responsibilities are not the same as tenure requirements. It was improper for Respondent to consider Grievant's job duty and responsibility to secure external funding in the tenure decision.

12. With the exception of the improper consideration of lack of funding, which was cured by analyzing whether the tenure decision was sound without that consideration, the reviewers' decision to deny tenure was not contrary to law or school policy or regulation or arbitrary and capricious.

13. "Any assertion that the filing of the grievance at level one was untimely shall be made at or before level two." W. Va. Code § 6C-2-3(c)(1).

14. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis

to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

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15. W. Va. Code § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011).

16. The portion of the grievance related to Grievant’s challenge of his employment end date is untimely.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: August 18, 2017

Billie Thacker Catlett
Chief Administrative Law Judge