

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMIL CHAUDRI,
Grievant,

v.

Docket No. 2017-1220-MU

MARSHALL UNIVERSITY,
Respondent.

DECISION

Jamil Chaudri, Grievant, filed this grievance against his employer Marshall University ("MU"), Respondent, protesting the denial (non-renewal) of Graduate Faculty Membership Status. The original grievance was filed on November 22, 2016, which provides:

On or about November 7, 2016, Grievant was notified that he was denied Graduate Faculty Membership status. Grievant has held Graduate Faculty Membership status for the past 12 years, and most recently was granted such status five years ago under Marshall University BOG Policy AA-20. Grievant asserts his recent denial of Graduate Faculty Membership status is arbitrary & capricious, discriminatory, and a violation of laws, policies, and procedures, including, but not limited to, Marshall University Board of Governors Policy No. AA-20.

The relief sought states:

Grievant seeks to be awarded Graduate Faculty Membership status. Alternatively, Grievant seeks specific reasons detailing which requirements under current policy he did not meet for determining Graduate Faculty Membership status.

A level one conference was conducted by Steve Hensley, the designee of Respondent's Chief Administrator on February 6, 2017. By decision dated February 9, 2017, the grievance was denied at that level. Grievant appealed to level two on February 13, 2017, and a mediation session was held on March 22, 2017. To permit the parties the opportunity to pursue a mutually acceptable resolution, the grievance was placed in

abeyance for a period of time. Grievant appealed to level three on May 22, 2017. A level three hearing was held before the undersigned Administrative Law Judge on April 5 and 6, 2018, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by John Everett Roush, Legal Services, American Federation of Teachers-WV, AFL-CIO. Respondent was represented David Pittenger, Dean Graduate College, and legal counsel Candace Kraus, Deputy General Counsel. Both parties submitted post hearing Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision upon receipt of the last of the parties' proposed fact/law proposals on or about May 29, 2018.

Synopsis

Grievant is employed as a full professor with tenure at Marshall University. Grievant contends that Respondent illicitly denied him "Graduate Faculty" status. Grievant avers that Respondent's agent(s) inequitable applied determining factors to assess his application and qualifications. Grievant alleges discriminatory analysis of his accomplishments coupled with an arbitrary and capricious assessment process. Respondent maintains they followed appropriate policy and criteria in review of Grievant's application. Respondent maintains, despite providing Grievant ample opportunity to document prerequisites, Grievant's application was denied due to lack of evidence of continuing scholarly or creative activity over the five-year period immediately preceding his application, as required by relevant policy. Grievant did not establish Respondent violated germane procedure, policy, or law. Grievant did not persuasively convey the non-

renewal (denial) of his Graduate Faculty Membership Status is arbitrary and capricious, or discriminatory. Grievant did not achieve the burden of proof. This Grievance is denied.

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

Findings of Fact

1. Grievant, a native of Pakistan, was raised and educated in Great Britain from age sixteen. He received his bachelor's degree from the University of Salford. He received a Master's Degree in Computer Science and a Doctorate in Information Systems from the prestigious University of Nottingham.

2. Grievant went to work for Marshall University in 1984. Grievant is a tenured full professor. Grievant is a Professor in the Marshall University College of Information Technology and Engineering.

3. Graduate Faculty status is administered by the Graduate Faculty Council ("Graduate Council") according to the criteria and guidelines set forth in Marshall University Board of Governors Policy AA-20, Graduate Faculty Membership ("MU-AA-20"). R Ex 1

4. Marshall University Board of Governors Policy No. AA-20 § 2.2 provides that there are four levels of graduate faculty membership or status. The first is Doctoral Graduate Faculty membership, which is not relevant to the current grievance. The second level, Graduate Faculty membership, is the focus of the current grievance. An employee enjoying Graduate Faculty membership may not only teach graduate level

courses, but also participate in grading comprehensive assessments¹ and serve on committees. Employees approved for Graduate Faculty membership receive a five-year term after which renewal of membership must be sought. The third level, Associate Graduate Faculty membership, primarily permits a member to teach. Employees approved for Associate Graduate Faculty membership receive a three-year term after which renewal of membership must be sought. The fourth and lowest level is that of Graduate Instructor. Membership at this level permits the employee to teach graduate level courses and entails a two-year term. R Ex 1

5. Grievant enjoyed Graduate Faculty membership for two or more five-year terms prior to 2016.

6. In order to qualify for Graduate Faculty membership, the second level referenced above and the one that is the subject of the current grievance, an applicant is to meet the following criteria as provided by Marshall University Board of Governors Policy No. AA-20:

6.2 Minimum Criteria for Appointment

6.2.1 Graduate Faculty members must hold a continuing full-time appointment and have ongoing faculty responsibilities at Marshall University and hold an appointment (may be a joint appointment) in the division or department or program area offering the graduate degree. In circumstances where the full-time appointment is not a tenure track position, documentation of the full time, continuing nature of the appointment must be supplied by the sponsoring dean, and documentation of at least majority support for the appointment must be supplied by the sponsoring department/division's chair.

6.2.2 Graduate Faculty members must hold a terminal degree (thesis

¹ This may consist of rating an oral presentation of a dissertation or grading a comprehensive written examination, depending upon the discipline involved. David Pittinger, Dean of the Graduate College L-3 Testimony.

or dissertation) or an appropriate professional degree. Alternatively, they should have demonstrated equivalent scholarly or creative achievement.

6.2.3 Graduate Faculty members must have attained the rank of Assistant Professor or higher.

6.2.4 Graduate Faculty members must have current or expected departmental responsibilities in the graduate program during the term of their membership. Example departmental responsibilities include, but are not limited to, teaching, advising, program development, and chairing or serving on committees, all within the graduate program.

6.2.5 Graduate Faculty members must present evidence of continuing scholarly or creative activity over the most recent five* years just prior to application for, or renewal of, Graduate Faculty status. Evidence of scholarly or creative activities must include at least two significant contributions or activities in one or more of the following: publication in discipline-respected peer-reviewed journals; publication of scholarly books or book chapters; publication in discipline-respected periodicals; invited and/or competitively selected presentations of scholarly work at regional, national or international meetings; academic or professional consultation; application for or receipt of an external research, scholarly, or creative activity grant; official leadership (officer) positions in regional, national, or international professional organizations; scholarship-based clinical practice; or exhibits, presentation, or performance of scholarly, creative, or artistic work at professionally recognized events. An academic unit may approve additional areas or categories for evidence of continuing scholarly or creative activity, if these additional areas or categories are clearly specified, and communicated to all interested parties, including all faculty members in the academic unit, and only if approved in advance by the Graduate Council.

6.2.6 Graduate Faculty members must present assessment evidence of continuing high-quality teaching and advising over the most recent five* years just prior to application for, or renewal of, Graduate Faculty status. The five-year* assessment requirement may be shortened, or eliminated as appropriate, if the applicant has not yet been teaching for the most recent five* years, but it must be met for a second term of Graduate Faculty level membership

R Ex 1

7. Camella Holley is a Senior Administrative Assistant to the dean of the graduate college, Wael Zatar, Dean of College of Information Technology and Engineering (CITE). In January 2015, Ms. Holly contacted Grievant by email to alert him

to the fact that his Graduate Faculty membership had lapsed or expired and that he needed to submit an application with appropriate attachments for renewal.

8. Grievant needed to submit an application and an updated *curriculum vitae* for renewal. Grievant submitted an application but did not provide an updated *curriculum vitae* (“CV”).

9. Ms. Holley sent a follow-up email in February 2015 and again in June 2016.

10. On June 23, 2016, Ms. Holley notified Grievant via email that he needed to renew his Graduate Faculty status, and further informed Grievant that he was not supposed to be teaching graduate courses until his Graduate Faculty status was renewed. Ms. Holley informed Grievant that his renewal could not be processed unless he submitted an “updated CV showing activity within the past 5 years.” R Ex 5

11. Again, on June 27, 2016, Ms. Holley notified Grievant via email that he needed to submit an updated CV, immediately. She further informed Grievant that he was not listed in the Redbook², and was not eligible to teach graduate courses. R Ex 5

12. On or about June 28, 2016, Grievant provided the appropriate form and his resume/*curriculum vitae* to perfect his application.

13. Grievant’s application for Graduate Faculty membership was approved by the chairman of his department, Dr. Wook-Sung Yoo, Division of Computer Science, granted preliminary approval of Grievant’s application. Grievant’s application was then reviewed and approved by the academic dean of his college, Dr. Wael Zatar.

² The “Redbook” is Marshall’s university-wide electronic database which lists Graduate Faculty Membership status at all levels. Ms. Holley administers the Redbook for Marshall University College of Information Technology and Engineering (“CITE”) faculty.

14. Following a grant of Graduate Faculty status by a Dean, a faculty member's application must thereafter be approved by the Graduate Council. Accordingly, Grievant's application for renewal was entered into the college's database, the Red Book, by Ms. Holley and forwarded to the Graduate Council for review.

15. On or about August 26, 2016, the Graduate Council considered Grievant's application for Graduate Faculty membership. A concern was raised regarding Grievant's credentials. Approval of his application was tabled pending additional information being gathered.

16. The Council tabled the application and sought further information from Grievant to determine whether Grievant satisfied the Graduate Faculty status requirements established in MU-AA-20 § 6.2.5. R Ex 6

17. The identified eligibility criteria for Graduate Faculty status in discussion, in pertinent part, are as follows:

6.2.5 Graduate Faculty members must present **evidence of continuing scholarly or creative activity over the most recent five* years just prior** to application for, or renewal of, Graduate Faculty status. Evidence of scholarly or creative activities must include **at least two significant contributions or activities in one or more of the following: publication** in discipline-respected peer-reviewed journals; publication of scholarly books or book chapters; **publication** in discipline-respected periodicals; **invited and/or competitively selected presentations of scholarly work** at regional, national or international meetings; **academic or professional consultation**; application for or receipt of an external research, scholarly, or creative activity grant; **official leadership (officer) positions** in regional, national, or international professional organizations; scholarship-based clinical practice; or exhibits, presentation, or performance of scholarly, creative, or artistic work at professionally recognized events. An academic unit may approve additional areas or categories for evidence of continuing scholarly or creative

activity, if these additional areas or categories are clearly specified, and communicated to all interested parties, including all faculty members in the academic unit, and only if approved in advance by the Graduate Council. [emphasis added]

R Ex 1, MU-AA-20 § 6.2.5

18. Grievant believed that the information originally provided was adequate, but he responded to the request. After an exchange of multiple emails, Grievant's application for Graduate Faculty membership was rejected.

19. Grievant requested re-evaluation of his application.

20. The Graduate Faculty Credentialing Committee, a subset of the Graduate Council, was tasked with the re-evaluation of Grievant's application for Graduate Faculty membership.³

21. The Credentialing Committee is a standing committee of the Graduate Council which is charged with routinely auditing the credentials of all Graduate Faculty members as a means of validating the decisions of College Deans to grant Graduate Faculty status. MU-AA-20 § 3 provides as follows:

§3. Audits

3.1. The Graduate Council audits academic unit rosters and all supporting materials of two or more colleges, departments, or divisions, etc., per semester on a rotating basis to ensure that the academic unit requirements and the minimum criteria are being followed. The supporting materials include the completed graduate faculty membership application forms (obtained from the Graduate Council or its website), faculty vitae, and any other supporting materials which demonstrate that the faculty members have been placed in an appropriate level of graduate faculty membership. Annual Reports may be used to supplement supporting materials if so desired.

³ G Ex 6, Level One & Testimony of Susan Lanham, Level Three.

22. The Credentialing Committee reviews each application individually, identifies any deficiencies that exist, and solicits any additional information or explanation the faculty member might have to reconcile the deficiency. The Committee is charged with conducting rotating audits of each College, which provides for each College to be audited on a biennial basis.

23. The Credentialing Committee conducted an audit of Graduate Faculty credentials for Marshall's College of Information Technology and Engineering ("CITE") on September 7, 2016, which coincided with the Graduate Council's consideration – and tabling – of Grievant's application.

24. The purpose of the Credentialing Committee is to verify that Graduate Faculty application packets satisfy the eligibility standards. The Credentialing Committee provides a more in-depth evaluation of the application packets to verify eligibility.

25. At the time Grievant's application was audited, the Credentialing Committee members were Susan Lanham, Assistant Professor, Marshall University Division of Accountancy & Legal Environment, Eldon Larson, and Vincent Sollars, with Dr. Lanham serving as Chair. Pursuant to Credentialing Committee protocol, Dr. Larson did not participate in auditing the CITE records because he is a faculty member in CITE.

26. During its audit of CITE, the Credentialing Committee identified deficiencies in the applications of three faculty members, one of which was Grievant. R Ex 2

27. On September 8, 2016, the Credentialing Committee reported its findings via email to the Graduate Council Chair, Tracy Christofero, and to Dean Zatar and Ms. Holley. The Credentialing Committee requested that Dean Zatar provide additional

information regarding what activities he was counting as the two scholarly or creative contributions for the three faculty members. R Ex 2

28. The Credentialing Committee solicited supplemental or explanatory information for each of the three faculty members to reconcile the deficiencies.

29. On September 19 and 23, 2016, respectively, Ms. Holley provided updated CVs for two of the faculty members which satisfied the Credentialing Committee's concerns. Grievant was not one of these faculty members.

30. In lieu of a direct response to the Credentialing Committee with additional or explanatory information as requested, Grievant emailed the entire Graduate Faculty Council his CV along with a letter detailing his concerns with the process of determining his Graduate Faculty status. R Ex 3

31. Ultimately, the Graduate Faculty Credentialing Committee upheld and affirmed the rejection of Grievant's application for Graduate Faculty membership. The Credentialing Committee recommended to the Graduate Council that it deny Grievant's application. The Graduate Council denied Grievant's application on September 30, 2016.

32. An appeal procedure is established in MU-AA-20 § 10 for faculty members whose Graduate Faculty applications have been denied by the Graduate Council, as follows:

§10 Appeals for Graduate Faculty Membership Levels

10.1 In the event that a faculty member feels unjustly excluded from graduate faculty membership or unjustly placed in a graduate faculty membership level lower than he or she desired, that faculty member may appeal to the Graduate Council or

higher for further consideration as follows. . . . If the Graduate Council determines that a suitable resolution cannot be achieved with the dean, the Graduate Council will submit its findings and recommendations to the Vice-President for Academic Affairs who will determine any further action to be taken.

10.1.2 If it is the Graduate Council that made the disputed graduate faculty membership level the faculty member may appeal to the Vice-President of Academic Affairs, in which case the Graduate Council will submit its findings and recommendations to the Vice-President for Academic Affairs, who will in turn determine any further action to be taken.

(Emphasis in original).

33. Grievant requested a re-evaluation of his application on December 6, 2016.

34. On December 7, 2016, Grievant was asked to provide details to the Credentialing Committee regarding what two items on his CV satisfied the requirements of MU-AA-20 § 6.2.5. Grievant failed to provide any such information. R Ex 3

35. Again, on December 10, 2016, the Credentialing Committee asked Grievant to respond to the previous requests and notified him that it would be reconsidering his application on December 14, 2016. R Ex 3

36. On December 13, 2016, Grievant submitted an email which restated the provisions of his CV. Grievant failed to provide any explanatory information.

37. The Credentialing Committee submitted a recommendation to the Graduate Council on December 14, 2016, that it deny Grievant's application. R Ex 3 The Graduate Council adopted the recommendation and again denied Grievant's application. Grievant appealed this decision to Gayle Ormiston, Provost and Senior Vice President for Academic Affairs. Provost Ormiston upheld the Graduate Council decision to deny Grievant Graduate Faculty status. See MU-AA-20 § 10 appeal procedure.

38. Susan Lanham, Assistant Professor, Division of Accountancy & Legal Environment and David Pittenger, Interim Associate Vice President for Outreach and Continuing Studies and Dean of the Graduate College, provided credible testimony regarding the types of activities that qualify as evidence of scholarly or creative activities.

39. Dr. Lanham testified at length regarding the consideration that the Credentialing Committee gives to the criteria required by MU-AA-20 and the activities that do, and do not, satisfy those requirements. Dr. Pittenger testified at length regarding the types of activities that do, and do not, constitute “continued scholarly or creative activity or academic or professional consultation” under MU-AA-20 § 6.2.5.

40. Dr. Tracy Christofero is Chair of Graduate Faculty Council (“Graduate Council”). As Graduate Council Chair, Dr. Christofero abstains from all votes of the Graduate Council as a standing practice.

41. Dr. Christofero and Grievant while colleagues, they do not hold each other in high regard (they have history). Grievant is of the opinion that Dr. Christofero’s presence impacted Grievant’s application in a negative manner. Dr. Christofero formally recused herself from consideration and voting on Grievant’s application.

42. Grievant has held Graduate Faculty status in the past, and his most recent term expired in 2014. Upon denial of his application for Graduate Faculty status, Grievant was granted Graduate Instructor status.⁴ This status permits Grievant to teach

⁴ Pursuant to MU-AA-20 § 2.2, “[t]here are four levels of graduate faculty membership or status: (1) Doctoral Graduate Faculty, (2) Graduate Faculty, (3) Associate Graduate Faculty, and (4) Graduate Instructor.” Graduate Faculty status is a five-year term, and Graduate Instructor status is a two-year term. R Ex 1

graduate-level courses. Grievant has continuously maintained the ability to teach graduate-level courses. Grievant's salary is not negatively altered due to the non-renewal of Graduate Faculty status.

Discussion

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

Marshall University Board of Governors Policy No. AA-20 provides four levels of membership for graduate faculty. The "Graduate Faculty" membership level is the focus of the current grievance. An employee enjoying Graduate Faculty membership may not only teach graduate level courses, but also participate in grading comprehensive assessments and serve on committees. Employees approved for Graduate Faculty membership receive a five-year term after which renewal of membership must be sought.

Grievant is a tenured professor at Marshall University who wishes to be acknowledged as Graduate Faculty membership status. Grievant avers that Respondent did not properly apply determining factors to assess his application and qualifications. Grievant alleges discriminatory analysis of his accomplishments coupled with an arbitrary and capricious assessment process. Graduate Faculty status is administered by the Graduate Faculty Council in accordance with the criteria and guidelines set forth in Marshall University Board of Governors Policy AA-20, Graduate Faculty Membership. R Ex 1 Respondent maintains that Grievant's application was reviewed and the application process was administered pursuant to and consistent with MU-AA-20.

Grievant has identified how he would have decided the issue differently. Grievant does not necessarily assert that other identified applicants should have been denied Graduate Faculty membership. However, Grievant does strongly assert that factors such as absence of individual, original contributions; work at conferences; work with the research efforts or dissertations of students were evaluated in a different manner for those applicants than they were applied to Grievant. Grievant argues what was deemed acceptable for others was deemed insufficient for him. Grievant asserts his recent denial of Graduate Faculty Membership status is a violation of applicable laws, policies, and procedures.

The issue throughout this proceeding is whether Grievant met the criteria set out in Marshall University Board of Governors Policy No. AA-20, and perhaps more

specifically § 6.2.5 of said policy.⁵ Grievant asserts that the following activities meet the requirements of the policy:

Grievant served as an outside thesis examiner for the University of Cape Town, in South Africa. This position involves judging whether the thesis is worthy of obtaining the desired degree for the student and, if not, how it might be improved to meet the standard.

Grievant served as a chairman or moderator of a two-hour session of the Annual Conference of Information System Institute. This position involves great responsibility in directing the discussion and question and answer period and requires intimate knowledge of the subject matter of the session. Grievant successfully shouldered this responsibility each year since 2011.

Grievant serves as an editor for the International Journal of Doctoral Studies, a peer reviewed or refereed journal. In this position, Grievant reviews articles and judges whether these articles were worthy of publication.

Grievant contends that these accomplishments meet and exceed the requirements of Marshall University Board of Governors Policy No. AA-20, § 6.2.5. The Graduate Council and the Graduate Faculty Credentialing Committee tend to disagree with Grievant's assertion. One reason given by a member of credential committee for rejecting Grievant's achievements was a requirement that the contribution be original and/or personal and individual work. This alleged deficiency, however, is not necessarily the only factor that was viewed negatively by the Graduate Council review of Grievant and his application for renewal of Graduate Faculty membership status.

The Graduate Faculty Council declined to renew Grievant's Graduate Faculty Membership status after review and re-evaluation. Initially, Grievant was contacted and additional information, seeking clarification, was requested. Ultimately Grievant was

⁵ Seemingly it is not contested Grievant meets the criteria set out in §§ 6.2.1 – 6.2.4 and § 6.2.6. Thus, the latch-key issue apparently is defiance(s) relevant to § 6.2.5.

asked to provide details regarding what two items on his CV satisfied the requirements of MU-AA-20, § 6.2.5. The explanatory information or quality of the response did not satisfy the Faculty Council and/or the Credentialing Committee.

Graduate Faculty status applications, like promotion and tenure applications, are evaluated by individuals with expertise in the qualifications needed for such status. Tenure review is a subjective, evaluative decisional process by academic professionals. The review of an institution of higher learning decision regarding Graduate Faculty status 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.” *Karle v. Bd. Of Trustees/Marshall University*, Docket No. 98-BOT-258 (Apr. 19, 1999); *Harrison, supra*; *Nelson v. Bd. of Trustees/W. Va. Univ.*, Docket No. 99-BOT-514 (June 22, 2001). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-

HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Susan Lanham, Assistant Professor, Division of Accountancy & Legal Environment and David Pittenger, Interim Associate Vice President for Outreach and Continuing Studies and Dean of the Graduate College, testified at length regarding the types of activities that qualify as evidence of scholarly or creative activities. Significantly, both individuals testified that such activities should demonstrate an individual's own work which serves to enhance or provide betterment to the academic discipline. Further, Dr. Lanham and Dr. Pittenger explained that “continued scholarly or creative activity” must be an activity that contributes to the profession. It was opined that the activities

submitted by Grievant, while arguably noble endeavors, simply are activities that faculty members are expected to perform as a standard job requirement. Grievant's identified activities were deemed less than demonstrative or clearly adequate. Grievant was afforded opportunities to supplement and provide explanation pertaining to his application. Specific information was requested. Other applicants submitted additional information or explanation to the evaluators to satisfy questions of uncertainty. Grievant held fast to his contentions that as tenured Professor the accomplishments he has identified exceed the requirements of MU AA-20.

Grievant alleges discriminatory analysis of his accomplishments. 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). "Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

The isolated information that Grievant has chosen to highlight with regard to other applicants is not nearly as persuasive as Grievant thinks. Grievant's myopic review of others' information is not necessarily a true comparison or like circumstances. It is far from clear that granting or denial of Graduate Status for the various applicants was based solely upon the information Grievant chooses to emphasize. A variety of factors

contribute to the final determination of each applicant, field of study, type of status in contention, type of individual works, graduate status in contention, research efforts and original works, for example. The testimony of Dean Pittenger and Dr. Christofero was consistent with Dr. Lanham's testimony, providing insight to the purpose of the requirements of MU-AA-20 and as to explain why Grievant's activities were deemed not to qualify. Grievant has failed to demonstrate that his denial of Graduate Status was a manifestation of discrimination or in the alternative favoritism. Grievant presented how he would have decided the issue differently. Difference of opinion is not the standard. What Grievant did not do was establish that the actions of the Credentialing Committee or the Graduate Council violated any policy, procedure, or law. Multiple applicants submitted additional information to the evaluators to satisfy questions of uncertainty. Grievant choose a different course of action.

Grievant acted as the chairman or moderator of a session at several IT Annual Conference of Information System Institute; Grievant's service as an editor of the International Journal of Doctoral Studies. There were questions regarding the depth and original work involved with these achievements. It would have been most prudent to satisfy the request of the analyzing body in a timely manner, be it the Graduate Counsel, the Credentialing Committee or just an administrative individual assimilating the necessary documentation. Credible witnesses testified extensively about the specific and thorough consideration Grievant's application received. It could be said that Grievant tends to demand to be granted Graduate Faculty status simply because he believes he deserves it as a long-standing professor. "In higher education, promotions

are not a statutory right nor a reward for a faculty member's years of service.” *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (Apr. 30, 1998); *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996).

Specifically, Respondent’s witnesses explained that serving as thesis examiner is neither a unique quality nor an academic or professional contribution, but rather is an activity expected of all faculty serving at the graduate level; reviewing a dissertation is not a scholarly activity, in that it is not indicative of ongoing scholarly contribution, but at best displays a commitment to the teaching responsibility. Such information is not generally perceived as arbitrary. Grievant was presented with numerous opportunities to submit additional activities for consideration, he was also urged to merely provide clarifying information regarding the activities he submitted.

Respondent expressed the opinion that reviewing a journal article does not contribute significantly to the discipline or to the corpus of knowledge in the discipline. The debatability of this point is not lost on the undersigned. In this situation Grievant’s degree of contribution is relevant and was potentially persuasive to the Graduate Council. Nevertheless, Grievant failed to present sufficient timely explanation. Graduate Faculty status applications, like promotion and tenure applications, are evaluated by individuals with expertise in the qualifications needed for such status. Subjective, evaluative decisional process by academic professionals is not without some discretion.

Ultimately, Grievant’s application was denied due to lack of evidence of continuing scholarly or creative activity over the five-year period immediately preceding his application, as required by relevant policy. Respondent effectively presented testimony

that the Credentialing Committee's decision to deny Grievant's application was based solely on the analysis and expertise of its members as well as the requirements of MU-AA-20 and the contents of Grievant's application. Grievant has presented no persuasive fact undermining this contention. Grievant did not establish Respondent violated germane procedure, policy, or law. Grievant did not persuasively convey the non-renewal (denial) of his Graduate Faculty Membership status is arbitrary and capricious, or discriminatory. Grievant did not achieve the burden of proof necessary to find that Respondent unlawfully denied Grievant Graduate Faculty status. Grievant is free to resubmit his application to Marshall University for reevaluation at any time he so desires.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. The Grievance Board's review in cases involving the denial of tenure or promotion in higher education "is generally limited to an inquiry into whether the process

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

3. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). See *Siu v. Johnson*, 748 Fed. 2d 238 (4th Cir. 1984). See also *Carpenter v. Bd. of Trustees/W.Va. Univ.*, Docket No. 93-BOT-220 (Mar. 18, 1994).

4. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. Grievant did not establish by a preponderance of the evidence that the decision to not renew his Graduate Faculty status was arbitrary or capricious.

6. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

7. “In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service.” *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (Apr. 30, 1998); *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996).

8. 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).

9. Grievant did not establish that the non-renewal (denial) of his Graduate Faculty Membership Status was discriminatory.

10. Grievant did not demonstrate by a preponderance of the evidence that the decision not to award him Graduate Faculty Membership Status should be overturned.

Accordingly, this grievance is **DENIED**.

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

Date: June 15, 2018

Landon R. Brown
Administrative Law Judge