

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

IYAD HIJAZI,
Grievant,

v.

Docket No. 2019-1638-MU

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, Dr. Iyad Hijazi, was employed by Respondent, Marshall University. On May 23, 2019, Grievant filed this grievance against Respondent protesting the denial of promotion and tenure alleging discrimination and violation of policies, guidelines, procedures, and contract. For relief, Grievant seeks promotion to Associate Professor with tenure.

Following the June 3, 2019 level one hearing, a level one decision was rendered on June 13, 2019, denying the grievance. Grievant appealed to level two on July 1, 2019. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on August 30, 2019. A level three hearing was held over three days on January 29, 2020, June 11, 2020, and June 30, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office.¹ Grievant appeared *pro se*². Respondent appeared by Dr. Isaac Wait and was represented by counsel, Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision on August 11, 2020,

¹ The second day of hearing was originally scheduled for March 18, 2020, but was continued due to the pandemic.

² For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant was employed by Respondent as a probationary Assistant Professor within the College of Information Technology and Engineering in the Weisberg Division of Engineering to serve as faculty in a new mechanical engineering program. Grievant applied for promotion and tenure asserting exemplary performance in research, scholarly, and creative activity. Although the division committee had a tie vote for and against recommendation, and the division chair recommended Grievant, Grievant's application was not recommended by the college committee, the dean, or the provost. and the university president ultimately denied promotion and tenure. The decisional process by the non-recommending reviewers through the college level did not conform with applicable policy and procedure, and Grievant suffered significant harm as a result. The non-recommending decisions were also arbitrary and capricious. Deference must be extended to the recommendation of Grievant's department chair, whose review and recommendation letter complied with policy and procedure and whose recommendation had a rational basis and was supported by substantial evidence. Accordingly, the grievance is granted.

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 probationary Assistant Professor within the College of Information Technology and Engineering (“CITE” or “college”) in the Weisberg Division of Engineering (“WDoE” or “division”).

2. CITE is comprised of three divisions, including the WDoE, which was the largest division.

3. Grievant was offered his appointment by letter dated May 31, 2013. The offer letter specified that Grievant’s employment would begin on August 17, 2013, that his pre-tenure review would be in academic year 2016-2017, and that his tenure application date would be academic year 2018-2019. The letter states, “Promotion and tenure will be contingent upon satisfactory completion of guidelines and criteria outlined in Series #9 [of the Procedural Rule of the West Virginia Higher Education Policy Commission], as well as individual college and departmental promotion and tenure guidelines.” The letter “credited” Grievant with one year of full-time teaching experience. The letter listed the following as Grievant’s duties:

- Teaching responsibilities in the above named Division/Department/School, which may include both on-campus off-campus, and e-course assignments.
- A minimum of six (6) office hours per week to be designated by the Dean.
- Advising students on curricular requirements and course schedules related to registration for classes.
- Participation in scholarship, research and/or creativity, meeting college expectations for annual renewal of appointment, tenure and promotion, and in professional organizations.
- Providing service to the University and the community.
- Such additional duties as may be designated by the Dean of [CITE] and/or the Chairman of the [WDoE].

4. An *Addendum to the Letter of Employment* agrees that Respondent will provide startup funding of \$30,000 “to support research activities and professional

development.” In return Grievant would agree “to continue your research in Mechanical Engineering and to utilize start-up funding to actively pursue grant funding and related contact in the field of Mechanical Engineering” and “as circumstances within the division permit, to include undergraduate research activities in your research. The *Addendum* further states, “Assessment of your performance in these activities, as stated in the letter and addendum, including specific expectations stating in the College tenure and promotion guidelines, will be included in your annual evaluation, and as part of the review of you[r] achievements for promotion and tenure consideration at all levels of review. . . .”

5. The letter does not specifically state but Grievant was the third hire made for the division’s new undergraduate and graduate mechanical engineering program, which would later be approved by the university’s Board of Governors in 2015.

6. Grievant accepted his appointment by his signature on the offer letter and addendum on June 8, 2013.

7. Promotion and tenure in this case is governed by the procedural rules of the West Virginia Higher Education Policy Commission, the university’s promotion and tenure policies, and the college’s promotion and tenure guidelines.

8. The Higher Education Policy Commission’s (“HEPC”) procedural rules make clear that promotion and tenure cannot be granted automatically or solely on length of service. W.VA. CODE ST. R. §§ 133-9-7.1.3 and 7.2 9.4.

9. “Tenure applies to those faculty members who qualify for it and is a means of making the profession attractive to persons of ability. There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; publications and research; professional and scholarly activity and recognition;

accessibility to students; adherence to professional standards of conduct; effective service to the institution, college and department; possession of the earned doctorate, special competence, or the highest earned degree appropriate to the teaching field; continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to tenure shall rest with the institution.” W.VA. CODE ST. R. § 133-9-9.1.

10. Respondent’s faculty promotion policy is Policy No. AA-26, *Faculty Promotion*, and its faculty tenure policy is Policy No. AA-28, *Faculty Tenure*. These policies were revised in 2014. Faculty seeking promotion and/or tenure who had been appointed prior to the revision of the policies, like Grievant, were permitted to chose which version of the policies under which they would be evaluated. The policies that were in effect prior to the revision are now designated with an “x.”

11. In making his application, Grievant chose to be evaluated under the pre-revision versions of the policies, Policy No. AA-28x and Policy No. AA-26x.

12. Policy No. AA-28x states that “[t]he 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 (“MUBG”) Policy No. AA-28x § 2.2.5. The qualifications of the candidate are to be evaluated using the guidelines pertaining to promotion. *Id.* at § 2.2.4.

13. “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.” *Id.* at § 2.2.1.

14. “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.” *Id.* at § 3.1.2.

15. Policy No. AA-26x explains that promotion is “a reward for achievement” and that “[i]t is based on the professional qualifications of a faculty member, including performance specific to the candidate’s contractual responsibilities and duties.” MUBG Policy No. AA-26x § 2.1.

16. The individual colleges determine “the relative importance of the various faculty functions for purposes of personnel decisions” and “should provide flexibility in the weighing of such functions in order to accommodate a range of departments, disciplinary specialties and individuals with varying assignments.” *Id.*

17. Faculty are to be evaluated for promotion and tenure in “teaching and advising,” “scholarly and creative activities,” “service to the university,” and “service to the community.” *Id.* at § 2.2.

18. The criteria at issue in this case are “teaching and advising” and “scholarly and creative activities.” “Teaching and advising” is to be evaluated for:

command of disciplinary knowledge and methodology;
effectiveness of classroom performance; advising load and
effectiveness of academic advising; effectiveness in
assessing student learning; rapport with students;
contributions to curricular development, including
development, promotion and delivery of off-campus academic

programs, either through electronic means or conventional travel to off-campus course locations; instructional developments of faculty colleagues, etc.

Id. at § 2.2.1. “Scholarly and creative activities” is to be evaluated for:

number, quality and importance of publications and creative productions; memberships and contributions to professional societies; professional growth and development; scholarly presentations and creative performances; contributions to the professional development and achievement of colleagues, etc.

Id. at § 2.2.2.

19. Both policies require each college to “develop written procedures and performance criteria for implementing” the promotion and tenure guidelines and requirements of the HEPC procedural rules. MUBG Policy No. AA-26x § 2.9.1; MUBG Policy No. AA-28x § 3.2.1.

20. Both policies also specify that the candidate will submit an application to the “chairperson/division head, who will forward it to an intradepartmental promotion committee” and that the committee must “prepare a written recommendation with respect of the qualifications of the candidate . . . and submit it with the candidate’s application to the chairperson/division head.” MUBG Policy No. AA-26x § 2.9.3; MUBG Policy No. AA-28x § 3.2.4.

21. The chairperson/division head then prepares a written recommendation and submits it “with all other materials received from the candidate and from the intradepartmental committee to the college dean. . . .” MUBG Policy No. AA-26x § 2.9.5; MUBG Policy No. AA-28x § 3.2.6.

22. This process repeats with the college-level committee and dean, which is then submitted by the dean to the Provost, who make a recommendation to the President,

who makes the ultimate decision. MUBG Policy No. AA-26x § 2.9.6 – 2.9.9; MUBG Policy No. AA-28x § 3.2.7 – 3.2.10. Throughout the process, both policies state at each level that all materials are to be forwarded to the next level. *Id.*

23. The college-level promotion and tenure procedure is contained in the CITE *Promotion/Tenure Application & Portfolio Guidelines*, (“CITE Guidelines” or “Guidelines”) last updated December 7, 2009. New policies, CITE Policy No. 2, *Tenure and Promotion Criteria*, and CITE Policy No. 3, *Tenure and Promotion Portfolio Guidelines*, were drafted in 2017, which attempted significant changes to the criteria and procedure. Although these draft policies had been completed, discussed, and circulated among the faculty before Grievant applied for promotion and tenure, the policies had not been approved. The policies were, at some time not made clear by the record, eventually rejected as they did not comply with university policy.

24. The CITE Guidelines establish the timeframes and procedures for each step of the college-level process and the required contents of the application and portfolio. The Guidelines specify that, after the applicant submits the application, “Nothing can be added to the personal portfolio after this submission, except for the recommendation/non-recommendation letters from the Department/Division Chair, CITE Personnel Committee, and CITE dean. . . .” However, the Guidelines specifically state that there were no division committees at that time.

25. The Guidelines do not provide performance criteria *per se* but instead list “required portfolio contents.” Of relevance to the grievance, the Guidelines include as “teaching and advising” activity advising, chairing, or serving on the “comprehensive assessment” committees of graduate students for “comprehensive project, capstone, or

exam” but are silent regarding graduate theses. Of “research, scholarly, and creative activity” the Guidelines list publications and presentations separately, require the indication of which publications were peer reviewed, and that the applicant list “federal/state grant activities.”

26. The Guidelines require the applicant to include a list of annual report ratings and to provide copies of all annual reports.

27. Regarding outside activity, the guidelines state, “While all documented evidence will be considered, the greatest weight will be placed on the ratings while at Marshall University, as this is the most recent performance.”

28. The Guidelines specifically allow the inclusion of letters of recognition and letters of support.

29. The unapproved draft CITE policies are quite different than the guidelines. Of particular relevance to the grievance, the unapproved draft policies, unlike the CITE guidelines under which Grievant should have been evaluated, specifically prefer lead authors of publications and lead investigators on research projects, require external research funding be attributed to the applicant, require that the “funding amounts evaluated are those attributed to the applicant,” require that the applicant report the funding only for their scope of work, include University Citizenship, require the inclusion of pre-tenure review documentation, and forbid the inclusion of letters of support.

30. The CITE Guidelines total five pages. The unapproved draft policies total fifteen.

31. The makeup of the CITE Personnel Committee is governed by CITE Policy No. 1, which does not prohibit the service of committee members who also served on a division-level committee.

32. At the time of Grievant's hire, there were no division level promotion and tenure committees within CITE.

33. In 2017, when the unapproved CITE Policy No. 2 was drafted, it included division-level promotion and tenure committees. At the same time, WDoE created its Promotion and Tenure Committee ("division committee") and approved bylaws for the same that refer to the unapproved CITE Policy No. 2.

34. Although it was clearly required by university policy that Grievant be informed yearly of his progress toward promotion and tenure in writing by either his chair, the committee, or the dean, Grievant never received this written notification.

35. The only notification of his progress towards promotion and tenure were discussions the division chair, Dr. Asad Salem, had with Grievant during the annual review process. During these discussions, although Dr. Salem encouraged Grievant to continue to seek funding, he did not state that Grievant would be required to secure a certain amount of funding, and he emphasized instead that Grievant pursue involvement in student research and theses. This involvement would later be discounted by reviewers in the promotion and tenure evaluation process.

36. At the same time the unapproved CITE policies were being proposed, on April 18, 2017, three members of the CITE personnel committee, Dr. Paulus Wahjudi, Dr. Andrew Nichols, and Dr. Richard Begley, conducted a pre-tenure review of Grievant's

portfolio. The other two members of the committee, Dr. Eldon Larsen and Dr. Jim McIntosh, were absent.

37. Dr. Salem, although he was not part of the pre-tenure review committee, provided a detailed written summary of the same by letter dated May 15, 2017. The committee did not find evidence of exemplary performance in any of the three areas. Dr. Salem reminded Grievant that the composite annual report ratings do not carry any weight for tenure and promotion. The letter is detailed and provides specific direction regarding deficiencies in the presentation of the portfolio itself and in each area of responsibility. For his chosen area of responsibility, research/scholarship, the committee specifically stated that Grievant would need to develop other collaborative relationships, increase his publication rate, particularly in journals, that he should consider targeting grant funding in lower amounts as large grants are rarely awarded for first projects, and that Grievant should provide copies of the grant proposals and feedback to demonstrate the quality/validity of the research even if the project was not funded.

38. In its 2017-2018 *Final Statement of Accreditation*, the Engineering Accreditation Commission expressed concern that the mechanical engineering program's teaching loads were high with three to four courses per semester, which may make it "challenging" to retain faculty due to the concurrent research and service expectations for tenure.

39. By letter dated August 14, 2018, Grievant notified Dr. Salem of his intention to submit his application for promotion and tenure during academic year 2018-2019.

40. In preparing his application, Grievant solicited a recommendation letter from Dr. Wait. In response, by email dated December 24, 2018, Dr. Wait replied that the new

“CITE Policy #3” prohibits including letters of recommendation. Dr. Wait acknowledged that, as the policy had not yet been approved, the old policy was still in force. However, Dr. Wait further stated, “the fact that the new policy explicitly prohibits recommendation letters reinforces in my mind that they are not appreciated by the people who review the portfolios. So, even though it might still technically be ‘allowed’ for you to include a letter of recommendations, my feeling is it would probably be better to follow the intent of the more recently expressed guidelines.” Dr. Wait then declined to provide a letter to Grievant, citing a possible conflict of interest as he was on the CITE committee, and stated that he did not plan to include recommendation letters in his own application for promotion.

41. Grievant applied for promotion and tenure on January 18, 2019, selecting “Research/Scholarly Activity” as his area of exemplary performance. Regarding his research and scholarly activity, Grievant’s portfolio demonstrated that while employed by Respondent Grievant had published eight peer-reviewed papers; four in journals and four in conference proceedings. As proof of quality, one paper had been nominated for the best paper award of the ASME [American Society of Mechanical Engineers] Energy Sustainability Conference and was selected for publication in a special issue of the ASME Journal of Energy Resources Technology. As evidence of his continuing effort, Grievant provided proof of the acceptance of two abstracts for papers regarding continuing research he was conducting with two of his thesis students and asserted he had two other drafts in preparation. Of his published papers, three had been in collaboration with his master’s thesis students. Including the year for which Grievant had been given credit in his contract, Grievant had published an additional three peer reviewed published papers;

one journal and two conference proceedings. As evidence regarding his grant activities, Grievant provided that he had been awarded as a co-PI [co-principal investigator], in collaboration with several other disciplines, a \$400k grant from the National Science Foundation for a Scanning Electron Microscope, to be used in the division's research. He also provided that he was the PI on a \$24k grant from the NASA WV Space Grant Consortium for one of his master's thesis students and had received a \$1k grant to present at conference.

42. During the same time, Dr. Wait, who was already tenured, also submitted his application for promotion to full professor.

43. In separate emails, Dr. Salem notified all members of the division that Grievant and Dr. Wait's portfolios were available for review from January 25, 2019 through February 1, 2019. Unlike in 2017, when Dr. Salem had notified the division about other applications for promotion, Dr. Salem did not specifically say division faculty could provide written feedback on the applications.

44. Three division members emailed Dr. Salem expressing support for Grievant's application; Dr. Gang Chen, Dr. Yousef Sardahi, and Dr. Roozbeh Salary, although their emails were late per the guidelines, which required feedback to be given by February 1, 2019.

45. Dr. Salem discounted the feedback, despite the guidelines requiring he consider the same, as he believed the creation of the division committee replaced the need for feedback.

46. The role of the feedback per the guidelines is limited. While the division chair is required to consider the feedback, they are not included in the portfolio and, while the college committee and dean may review the feedback, they are not required to do so.

47. Grievant confused the portfolio feedback, which results from the portfolio review process, with letters of support that he was permitted to solicit himself and submit with his portfolio.

48. On February 8, 2019, Dr. Salem forwarded Grievant's application to the WDoE Promotion and Tenure Committee. As per the new bylaws, the committee was comprised of all tenured faculty in the division: Dr. Richard Begley, Dr. Ronald Bieniek, Dr. Gang Chen, Dr. Eldon Larsen, and Dr. Isaac Wait. Dr. Bieniek chaired the committee.

49. Dr. Salem also forwarded Dr. Wait's application to the committee.

50. Prior to receiving the applications, the committee had some email discussions regarding procedures as this was the first year the committee was in operation.

51. On January 27, 2019, Dr. Bieniek requested the committee vote on whether to request the offer letters of Grievant and Dr. Wait, which were not included in the portfolios stating, "we do not have their offer letters – or the corresponding addendums – to see what the Dean expected of them. I think it is important that we have them to see what the picture is. This does not mean that we have to necessarily adhere to what the Dean set out, for we did not supply the letter or addendum. But I think it would help give us information about what challenges our applicants have faced."

52. This statement presents a fundamental misunderstanding of the review process as review of the professional qualifications of the applicant includes “performance specific to the candidate’s contractual responsibilities and duties.”

53. On January 28, 2019, Dr. Bieniek emailed the committee only the new university policy, which was inapplicable to Grievant’s review. Dr. Bieniek did not provide or mention the CITE guidelines.

54. Despite the fact that Dr. Larsen “helped write the BOG policy and shepherd it through all the negotiations” he did not challenge that Dr. Bieniek sent the wrong policy and communicated a statement to the committee that was against policy.

55. The committee met on February 1, 2019, to vote on the applications of Grievant and Dr. Wait.

56. On February 1, 2019, Dr. Bieniek emailed Dr. Chen, copying the remainder of the committee, stating that “one of our members discovered an issue regarding Hijazi’s portfolio and the rules of the Board of Governors and the CITE Guidelines. Although you had already left, the rest of us gathered to discuss what to do. . . . Because of the importance of the issue the four of us unanimously voted to reconvene . . . to reconsider the Major Vote regarding Hijazi . . . I hope you will be there to participate actively again in the dialog.”

57. The committee reconvened on February 4, 2019, at 11:00 am although Dr. Larsen stated he would need to leave at 11:20 am for another meeting.

58. Ultimately, the committee vote was split, with Drs. Chen and Bieniek voting in favor, Drs. Wait and Larsen voting against, and Dr. Begley abstaining.

59. Dr. Wait volunteered to draft the committee letter.

60. Dr. Wait drafted the letter and Dr. Bieniek sent the letter to all committee members for feedback. Slight changes were made for wording, but no committee member objected to the letter or suggested that it did not accurately reflect the committee's discussion.

61. Aside from the letter, protracted discussions were held regarding whether the committee was required to provide Grievant a copy of the letter as the committee was "NOT not recommending" him. During these discussions, and despite having abstained from voting, Dr. Begley inexplicably stated, "This committee made it clear that there was no evidence in the pre-tenure portfolio that the potential for exemplary performance in research or teaching was not recognizable at that time."

62. On February 6, 2019, Dr. Bieniek, sent the letter under his signature to Dr. Salem notifying him that there was a spit vote in the committee on Grievant's application for promotion and tenure. The letter summarizes that, "The Committee's vote indicates a split within the Committee concerning the strength and impact of Dr. Hijazi's activity and productivity in research/scholarship, his selected area for Exemplary Performance. We concluded that his teaching and advising were within the professional range. Although we agreed he is quite personable, his level of engagement in service and university citizenship had some characteristics of concern." The letter goes on to discuss each area of evaluation: research/scholarship, teaching/advising, service, and university citizenship. Under each area of evaluation, the letter begins with a positive statement but then details only the negative considerations raised by the committee.

63. Regarding research and scholarly activity, the letter states that Grievant published four peer-reviewed journal articles since his arrival at Marshall, which was

considered acceptable to some committee members given teaching loads and marginal by others. It goes on to express the supposed committee concern that, of the four articles, three had not been externally cited at all, and the other cited only once, which calls into question the impact of Grievant's research. The letter states that the committee found commendable a \$400,000 grant Grievant had secured as one of five co-Primary Investigators ("PI") but found it "difficult to ascertain what fraction of that award might be applicable to Dr. Hijazi's contribution." The committee also expressed concern that two of Grievant's grant proposals were returned without review, which "may raise the question about whether a faculty member is exhibiting exemplary performance with respect to their efforts to carefully submit quality proposals to attract funding support for research."

64. Regarding service, the letter states regarding Grievant's service on the University Functions Committee that, "contrary to Dr. Hijazi's claim that he continues to serve on that committee, it no longer exists."

65. University citizenship, which was discussed significantly and somewhat negatively in the letter, is included only in the inapplicable new MUBG Policy No. AA-28 and unapproved CITE policies and not the old policy and guidelines, under which the committee was supposed to evaluate Grievant.

66. Although the letter was drafted by Dr. Wait, it is signed by Dr. Bieniek as the chair and purports to be written by Dr. Bieniek. While the committee bylaws state that the chair will designate a member of the committee to produce the recommendation letter, it does not state that such letter would be signed only by the chair.

67. On the whole, while acknowledging the tie vote and acknowledging a few positive factors, the letter emphasizes the negative. The letter also did not accurately

reflect the committee's views in several instances but appear to reflect the concerns of Dr. Wait specifically.

68. Dr. Wait and Dr. Larsen in testimony claimed that the letter did not imply deceit on Grievant's part regarding his committee service. If the committee was disbanded, and there was some evidence it was not, pursuant to the testimony of Dr. Larsen, it would not have been unusual or unreasonable that Grievant would not know given the nature of the committee. Yet the wording of the letter clearly implies deceit and Dr. Wait chose to include this very negative factor when excluding other positive factors.

69. Dr. Wait claimed that the committee was concerned about the lack of external citation, but Dr. Larsen, the only other non-recommending vote, testified that he did not consider citations, nor did he consider the impact factor of the journals.

70. As the vote was a tie, Dr. Bieniek did not sign the application form as either recommending or not recommending, instead, signing in the middle.

71. By letter dated February 8, 2019, Dr. Salem recommended Grievant's application for promotion and tenure to Dr. Wait, Chair of the CITE Personnel Committee. In making his recommendation, Dr. Salem provided a detailed analysis of over two pages. Dr. Salem determined Grievant had demonstrated exemplary performance in Research/Scholarship. Dr. Salem specifically noted that Grievant's achievements were accomplished with a high teaching load and that such had been a concern of the Accreditation Board for Engineering and Technology ("ABET") accreditation team. Dr. Salem cited Grievant's publication of four peer-reviewed journal papers in "quality journals" and four peer-reviewed proceedings in "ASME [American Society of Mechanical Engineers] renowned conferences" one of which was nominated for the best paper award

and selected for a special issue of the ASME journal. Dr. Salem also noted that Grievant had two additional accepted peer-reviewed proceedings that would be presented later that year. Dr. Salem found that Grievant was “instrumental” in securing the \$400,000 NSF [National Science Foundation] equipment grant quoting one of Grievant’s co-PI’s who stated, “without Dr. Hijazi’s contributions to this proposal, there is a good chance that it would not have been funded.” He notes that the grant Grievant had secured to support one of his graduate students was the first in the division and possibly the college. Dr. Salem points out that Grievant was the first faculty in the Division “to promote, encourage, recruit, and advise graduate students to select [the] thesis option to complete their graduate degrees,” that he had successfully mentored two masters students in their theses, was currently advising three graduate students on their theses, and had advised or co-advised 20 more graduate students. Dr. Salem also found Grievant’s teaching and advising and service to be at a professional level. Dr. Salem points to Grievant’s service to the university through Grievant’s “valuable efforts” in the creation of two new programs and his contribution to the successful accreditation of one program.

72. In review of Dr. Wait’s application, although Dr. Begley had abstained from voting on Grievant’s application, Dr. Begley voted with the other members in favor of Dr. Wait’s promotion to full professor.

73. By letter dated February 11, 2019, Dr. Bieniek notified Grievant of the committee’s report and that it had been given to the division chair, Dr. Salem.

74. On February 17, 2019, Grievant wrote a letter to Dr. Salem expressing concern over the division committee’s letter and confusion regarding how he could

respond as he asserted the letter was not covered by the Guidelines, was not either support or non-support, and was late.

75. This letter reflects Grievant's misunderstanding of the procedure and role of the new division committee and its letter, which was authorized by university policy and was not late. It appears Grievant confused the committee with the guidelines' feedback process.

76. Over the course of several correspondences, Dr. Salem confirmed that the committee's letter would be included in Grievant's application portfolio and denied Grievant's request to have the letter removed.

77. Beginning on February 15, 2019, Dr. Chen began a series of emails in which he expressed concern to Dr. Salem and the members of the committee regarding the role of the committee and the use of the letter.

78. Grievant also provided to Dr. Salem and the members of the committee an email from Cammy Holley, CITE Administrative Assistant, Senior, on February 18, 2019, which stated that according to her records Grievant was still CITE's representative on the University Functions Committee, that she had confirmed on the website that his term ends 2019, and that, as far as she knew, the committee was still active.

79. On February 19, 2019, in response to Dr. Chen's emails expressing concern regarding the contents and use of the committee's letter, Dr. Bieniek responded with providing the section of the bylaws that allowed "a way out of serving" on the committee and Dr. Larsen appears to accuse Dr. Chen of unethical behavior.

80. After his attempts to clarify that he did not understand the nature of the committee and that he would not have approved the letter if he had understood it would

be placed in the portfolio were rebuffed, Dr. Chen attempted to communicate his concerns to the college level.

81. By email dated February 20, 2019, Dr. Chen emailed administrative staff, copying Dr. Salem and the other committee members, asking her to forward a memorandum to the college. In the memorandum, Dr. Chen explains that, although he did agree to the committee's letter at the time, it was because he thought the letter was only to be used by Dr. Salem in making his recommendation and that he did not understand the letter would be part of the portfolio. However, Dr. Chen also states that the letter was written because Grievant's portfolio had a "number of inconsistencies" and that he would now disagree with the letter as he had "learnt best practices and viewed new evidences." These "new evidences" appear to refer to Grievant's emailed proof that Dr. Larsen's statement that the University Functions Committee was disbanded was false. It is unclear if this memorandum was actually sent to anyone at the college level, other than to the members of the CITE committee who were also members of the division committee, or if it was given any consideration by the college-level reviewers.

82. On February 24, 2019, Grievant wrote a second letter to Dr. Salem rebutting Dr. Bieniek's letter, asserting that the letter was "very biased" and did not reflect the opinions of the committee members who voted in favor of Grievant's application. The letter provided detailed rebuttal of the committee's evaluation of Grievant's application. Grievant requested the letter be placed in his portfolio.

83. As rebuttal of a recommendation/non-recommendation is not permitted under the policy or guidelines and the inclusion of the committee letter was required by the policy, Dr. Salem informed Grievant by email that he could not remove the letter but

that he would forward Grievant's requests to the chairpersons of the division and CITE committees.

84. The CITE committee was comprised of the following: Dr. Begley, Jim McIntosh, Dr. Scott Simonton, Dr. Paulus Wahjudi, and Dr. Wait. Dr. Wait was chair of the committee. Dr. Wait and Dr. Begley had both also served on the division committee.

85. The committee reviewed the promotion and tenure applications of Grievant and Dr. Wook-Sung Yoo and reviewed the promotion applications of committee members Drs. Wait and Wahjudi.

86. Drs. Wait and Wahjudi did not participate in evaluating their own portfolios and each left the room during discussions regarding their own portfolio.

87. By letter dated February 28, 2019, the CITE Personnel Committee notified Dr. Zatar, CITE Dean, that it did not recommend Grievant for promotion and tenure. In stark contrast to Dr. Salem's detailed recommendation letter, the CITE committee letter was less than a page and offered no discussion of Grievant's actual qualifications. Instead, it stated only, "[t]he quantity, quality, and significance of publications, presentations, and funding were taken into account in the holistic evaluation of the portfolio. The committee found that Dr. Hijazi's productivity in this area of responsibility does not exhibit exemplary level of achievement, sustained effort and positive trajectory." Tellingly, this language is almost a verbatim quote of the unapproved CITE policy requirements. CITE Policy No. 2 § 3.2. The letter is signed by all committee members.

88. In contrast to Grievant's letter, the letters for Drs. Wait, Wahjudi, and Yoo contained lists of specific criteria upon which the decision was based.

89. For Dr. Yoo, it listed the following:

- Receiving the Faculty Mentored Internship Program (FMIP grant, totaling \$146,300
- Several peer-reviewed journal and conference papers
- The successful ABET accreditation of the BS in Computer Science program
- Development and creation of the BS in Computer and Information Security
- A new MS degree in Cybersecurity
- Developing several online courses in for graduate and undergraduate students

90. Dr. Wahjudi's letter was even more detailed and twice the length of Dr. Yoo's and Dr. Wait's letters. Of relevance to comparison to Grievant, the letter recognized that Dr. Wahjudi had the strong support of his chair, that he developed new course and curriculum, that he mentored two undergraduate research assistants, and that he was heavily involved in the ABET accreditation of his program. These were all things that Grievant also displayed.

91. The difference in the letters was purposeful and despite Dr. Begley's specific assertion that the letter should include specifics of what the committee considered.

92. According to Dr. Begley's February 24, 2019 email, the number of publications was "the key parameter for making this assessment."

93. In response to Dr. Begley's email suggesting details, Dr. Wait replied that the committee had agreed to keep it "short." Dr. Wait stated, "I am concerned that if the letter includes too many additional details, then the additional details provided will merely be used to nit-pick and complain against the overall decision, rather than being used to understand the decision. As I note in the margin comments, that's what's happening right now with Dr. Hijazi's reaction to the Division letter; he has emailed multiple complaints and rebuttals to Dr. Salem and to the Division Committee (in contravention to any written

description of the tenure process).” He further stated, “if it was noted that the equipment grant funds were awarded to “X” number of faculty members, then in a rebuttal Dr. Hijazi could get someone to vaguely say how they ‘couldn’t have done it without him’.” He disagreed with Dr. Begley’s assessment of the decision not to recommend stating, “For the people who voted “no”, I believe the decision was based on the aggregate of all the factors related to research, and not based on a particular threshold not being met. And so I would be anxious about mentioning a number of publications that should have been achieved particularly since we didn’t discuss such a specific number during our meeting, and because publication numbers wasn’t itself the sole factor upon which the yes/no decision hinged.”

94. In the margins of the draft letter, Dr. Wait commented, “As written, I believe someone could get the impression that Dr. Hijazi had a higher teaching load than other faculty members in the Division or College. In fact, if you look at the course history, his teaching load may be somewhat lighter than average.” He again commented regarding the division-level issues stating, “The reason why I suggest that [all sign the letter] is so that Dr. Hijazi doesn’t single out for complaint, arguing, rebuttal the sole person signing the document. (That’s what he’s doing right now to Ron Bieniek, who signed the Division decision letter.)”

95. Dr. Wahjudi responded, “I think we should make it simple since the current P&T policy left the definition of exemplary, professional, etc up to individual interpretation.”

96. Dr. Wait notified Grievant of the decision by letter dated March 5, 2019.

97. On March 22, 2019, Dean Zatar notified Provost Jaime Taylor that he did not recommend Grievant for promotion and tenure. Dean Zatar provided no reasons for his determination, stating only that he agreed with “the comments and observations” in the CITE committee letter, of which there were none.

98. On March 28, 2019, Dean Zatar notified Grievant that he did not recommend Grievant for promotion and tenure.

99. On April 22, 2019, Provost Taylor notified Grievant he would not recommend Grievant for tenure stating that he concurred with the college committee and dean that Grievant did not meet the criteria for tenure.

100. By letter dated April 26, 2019, President Gilbert notified Grievant his application for tenure had been denied as he did not “meet all the criteria for tenure as set forth in *The Greenbook*.”

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

“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).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human 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 his application was denied due to violation of his contract and addendum and misapplication of policies by the division and college. Grievant asserts

that he was exemplary in all categories and that it was improper for the committees to fail to recommend him based on failure to meet specific number expectations when his contract did not specify specific numbers. Respondent asserts Grievant failed to demonstrate the decision was discriminatory as Grievant failed to prove he was similarly situated to the compared employees and that Grievant failed to prove the decision was otherwise arbitrary and capricious or contrary to law, policy, or regulation. Respondent admits there was a procedural error in the application of a policy that was inapplicable but asserts that error caused Grievant no significant harm.

Although Grievant did not specifically discuss discrimination in his PFFCL, as he specified discrimination in his grievance filing and made arguments in his PFFCL consistent with an allegation of discrimination, discrimination will be addressed. For grievance purposes, “[d]iscrimination’ 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). “[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).

Grievant compares himself to Dr. Wait, Dr. Wahjudi, and several other newly-hired faculty, stating that he was treated differently than Drs. Wait and Wahjudi in the application process and that the newly-hired faculty received specific tenure criteria in their offer letters. None of these faculty members are similarly situated to Grievant. Drs. Wait and Wahjudi were tenured faculty applying for promotion to full professor and not for tenure. The newly-hired faculty were hired under different policies. Therefore, Grievant cannot prove discrimination.

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.

Analysis next turns to the determination of whether the process conformed to applicable policy or was otherwise arbitrary and capricious. "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).

Grievant argues both fundamental errors that he alleges impacted the entire review process and errors specific to each level of the review process. The allegations of

fundamental errors will be addressed first and then the alleged errors at each level of the review process will be discussed.

Respondent was required to follow the proper procedures and policies at all levels. This case was complicated by changes to Respondent's procedures and policies that occurred following Grievant's hire. Respondent's promotion and tenure policy was revised after Grievant's hire and faculty hired prior to the revision are given the option to choose under which policy version they will be evaluated. Grievant chose the old policy. Further, at the college level, CITE had attempted to change their promotion and tenure guidelines to policies, CITE Policy No. 2 and 3, but those policies were not approved because they did not meet university policy. Therefore, at the division and college levels, Respondent was required to evaluate Grievant under the old university policies and under the CITE guidelines.

Grievant initially argues that the applicable CITE guidelines are themselves improper in that the university policy requires each college to develop "written performance criteria," which are not contained in the guidelines. Grievant is correct. Although the procedures prescribed by the guidelines are comprehensive, including clear instructions on what the applicant is to include in the portfolio, the Guidelines provide no specific performance criteria by which an applicant will be judged by the reviewers. While it can be assumed that the Guidelines indicate what things the reviewers may properly consider in the decision by stating what should be included in the portfolio, they provide no guidance to applicants or reviewers on how those things should be judged.

Grievant argues that the division committee letter was improperly included in his portfolio, citing the CITE Guidelines. While it is true that the CITE guidelines specifically

state that nothing can be added to the portfolio after the applicant's submission to the chair, except for the chair, CITE committee, and dean's recommendation letters, the Guidelines also acknowledge that CITE did not have division personnel committees at the time. The university policy makes clear that division personnel committees are proper and that the division committee's letter is to be included. Policy No. AA-26x and Policy No. AA-28x both state that the applicant will submit the application to the "chairperson/division head" who will forward the application to the "intradepartmental promotion committee," that the committee will "prepare a written recommendation," and that the "chairperson/division head" will forward "materials received from" the committee to the dean, and continues to state that all materials be sent to the next level of review. Dr. Salem is the chair of the division and the division committee is the "intradepartmental promotion committee." University policy thus required the division committee to make a written recommendation and that recommendation be passed on to the dean and beyond. While it is true that the university policies state that no items may be added or deleted from the portfolio before it states that the intradepartmental committee is to make a written recommendation, reading the policies as a whole indicates that it refers to the information provided by the applicant and not the written recommendations that are required to be made at each level and included in the material passed to the next level. The division committee's letter was properly included in the portfolio.

Grievant asserts it was a conflict of interest to allow the same people to serve on multiple committees and vote twice. The bylaws of the division committee include on the committee all tenured faculty. CITE committee membership is determined by CITE Policy No. 1, *Faculty Personnel Committee Composition*, which does not address the effect, if

any, of service on a division committee. The university policy does not address the makeup of either the college or division committee. Besides arguing that it is unfair, Grievant cites no law, policy, or procedure Respondent violated in allowing Dr. Wait and Dr. Begley to serve on both the division and college committees. Therefore, it was not a conflict of interest or improper for Dr. Wait and Dr. Begley to serve on both committees. However, the specifics of their service and the impact on the decision-making process due to their dual service will be further discussed below.

Grievant last asserts that Respondent erred at all levels in evaluating the specific number of publications, conference proceedings, conference presentations, or specific grant amount because his contract did not specify the same. It is not error for Respondent to consider numbers in evaluating promotion and tenure. University policy specifies that faculty are to be evaluated on the “number, quality and importance of publications” and the CITE Guidelines require the evaluation of “grant activities,” which would properly include the consideration of the number of grant activities. However, reviewers in looking at numbers must do so through the lens of the applicant’s contract, as Policy No. AA-26x includes “performance specific to the candidate’s contractual responsibilities and duties.” While Grievant’s argument that numbers cannot be considered at all fails, whether the individual reviewer’s determinations regarding numbers complied with policy or were arbitrary and capricious will be more fully discussed below.

As for evaluation of the propriety of individual levels of review, the undersigned must give deference to the subjective determination of the reviewers while analyzing whether the process of decision making conformed to policy and procedure and whether the decisions had a rational basis or were supported by substantial evidence. In this

case, the subjective determinations of the reviewers were split, with some reviewers recommending promotion and tenure and some reviewers not recommending so the review must also encompass which reviewers are entitled to deference.

As there are disputed facts and determinations, credibility determinations must be made. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant’s demeanor is difficult to assess. Although he was properly respectful of the process and polite, he repeatedly failed to follow the undersigned’s instructions regarding questioning witnesses and the proper presentation of evidence. While this can be partially ascribed to Grievant’s unfamiliarity with the process and attempts to represent himself in a very complex matter, the repeated failure is troublesome. Otherwise,

Grievant's manner was forthright and he appeared to have good memory of events during his limited testimony.

Dr. Wait is the central figure in this matter due to his involvement prior to the review, in the division committee, and as the chair of the CITE committee. Although Dr. Wait's demeanor during his testimony was good, presenting as calm, quiet, and professional, his written communications, procedural decisions, and explanations of the same in his testimony call into question his credibility. While there is no evidence of actual ill-will toward Grievant, every questionable decision Dr. Wait made in this matter was a negative one for Grievant. While Dr. Wait seemed to take his role in the review process seriously, he appeared to misunderstand or discount important procedural considerations and his decisions regarding such considerations appear internally inconsistent.

Of paramount importance is Dr. Wait's denial that he and the committees used the unapproved CITE policies to evaluate Grievant's application. His denial is not supported by the evidence. First, he cited the policies in his email to Grievant stating that he should not include letters of support in his portfolio as they were not appreciated by reviewers. As the chair of the CITE committee when he wrote this email, Dr. Wait was speaking of himself and his own attitude towards the use of new policy criteria in the evaluation. Dr. Wait then used specific CITE policy criteria in the division letter. Finally, Dr. Wait approved of the CITE committee letter that directly quoted the unapproved CITE policy. Thus, his denial he applied the unapproved CITE policy criteria is not credible.

Dr. Wait's decisions regarding his dual committee role also call into question his credibility. Dr. Wait refused to provide a letter of support for Grievant supposedly due to concern of a potential conflict of interest with his role as chair of the committee. Yet, he

had no concerns about a conflict of interest in volunteering to draft the division letter, despite his role as chair of the CITE committee, and in his improper discussion of Grievant's protests of the division level process with the CITE committee. This provides the appearance that he was only concerned about a conflict if it was beneficial to Grievant.

Also of concern was the assertion that the division letter was not a non-recommendation and that it merely reflected the committee's discussion. After questioning at level three, Dr. Wait eventually stated that positive things were left out of the letter because the committee concluded it would not make sense to highlight all Grievant's achievements when they were saying "no." Not only are these assertions inconsistent, it also indicates that the letter was written from the perspective of the two members who voted no when the vote was actually a tie. Dr. Wait's testimony was also inconsistent when he testified initially that he had evaluated Grievant for University Citizenship under the inapplicable new university policy because he assumed that was what Grievant had chosen, and when he included that in the division letter, but later testified that citizenship was not part of the evaluation.

Dr. Bieniek's demeanor was fair. His attitude towards the proceeding appeared appropriate overall, although he did require instruction to stop interrupting multiple times. His testimony was somewhat brief but he did appear to demonstrate an acceptable level of memory of the events. Dr. Bieniek is credible.

Dr. Chen's demeanor was good. He had an appropriate attitude towards the proceeding and took questions seriously. His answers to questions were forthright and he appeared to have a good memory of events. His testimony was consistent with his prior written statements. Dr. Chen's concern regarding the fairness of the division letter

and its possible impact on later levels of review appeared genuine. Dr. Chen's opinion does not appear motivated by personal positive feelings towards Grievant as he also acknowledge some of the questionable aspects of Grievant's portfolio.

Dr. Begley's demeanor was good. He had an appropriate attitude towards the proceeding and appeared to take questions seriously. Although there were a few questions to which he did not recall the answers, this appears to be, in his case, due to length of time since the events rather than evasiveness. Dr. Begley was credible.

Dr. Larsen's demeanor was questionable. While he had an otherwise appropriate attitude towards the proceeding, he repeatedly interrupted. At times he gave only general answers to specific important questions. Several times he became oddly hostile to politely-asked and seemingly uncontroversial questions and he was, at times, evasive in his answers. However, most of his answers were thorough and he did appear to have an acceptable memory of the events. Dr. Larsen was mostly credible.

Dr. Salem's demeanor was very good. He was forthright, thorough, and thoughtful in his answers to questions. His memory of events was good. Although Dr. Salem's review of Grievant was positive, this did not appear due to any bias as he also readily acknowledged negative considerations. His testimony was consistent with the documentary evidence. He also acknowledged areas in which he had made mistakes and did not attempt to deny or diminish them. He was able to thoroughly explain why he viewed certain aspects of Grievant's portfolio differently than other reviewers.

Dr. Wahjudi's demeanor was appropriate. He had an appropriate attitude towards the proceeding. However, Dr. Wahjudi's testimony on two key points was directly contradicted by the documentary evidence. Dr. Wahjudi testified that Grievant was not

evaluated on the unapproved CITE policies but Dr. Wahjudi, who drafted the committee letter, directly and extensively quoted the CITE policy language. When asked why he did not include any specific information in the letter, Dr. Wahjudi's answer was general and evasive and indicates that the committee's letters denying promotion and tenure never include specifics. In fact, the committee's emails clearly show that the decision to not give any specific reasons for the denial was at Dr. Wait's urging due to the controversy with the division committee's letter and was made despite Dr. Begley's urging to include specifics. Dr. Wahjudi is not credible.

Mr. McIntosh's demeanor was appropriate. Although his testimony was brief, he appeared to have an appropriate attitude towards the proceeding and attempted to answer questions fully. However, it was clear that Mr. McIntosh had little memory of the review of Grievant's portfolio. He could not recall under which policy Grievant was evaluated and stated he could not recall details of Grievant's publication. Mr. McIntosh was credible, but his testimony was of little value.

Dean Zatar's demeanor was somewhat poor. Dean Zatar's answers to questions was evasive or unresponsive at times. His answers were not thorough. He did not appear to have a good memory of the events. When asked important questions, for example, whether he took Dr. Salem's recommendation into account, he only answered generally that he reviewed every document in the portfolio. Dean Zatar's insistence that the committee letter's verbatim language from the unapproved CITE policy was just "usual" language is not credible. Dean Zatar's assertion that Grievant was not evaluated on University Citizenship is not credible as the division letter specifically evaluates Grievant on University Citizenship. His testimony left the overall impression that he made little

personal review of the portfolio and rather relied on the determination of the committee. Dean Zatar was not credible.

The credibility of President Gilbert, Provost Taylor, and Dr. Esmaelpour is not at issue.

What would become a litany of failure to follow proper procedure and policy began at the commencement of Grievant's employment and immediately impaired Grievant's ability to be fairly considered for promotion and tenure. Policy required Grievant be notified in writing every year of his progress towards promotion and tenure, including notification of specific areas needed for improvement. Although this was clearly required by university policy neither Dr. Salem, the college committee, nor Dean Zatar ever provided Grievant notification. This was particularly important in Grievant's case wherein Respondent had begun to shift its priorities and expectations of faculty. It provided him no opportunity to course-correct to focus on the things the negative reviewers eventually found most persuasive.

Dr. Salem did have some discussions with Grievant regarding his promotion and tenure progress during Grievant's annual reviews but that did not comply with the procedural requirement that it be in writing. More importantly, in these discussions, Dr. Salem urged Grievant to spend his time on duties that were of great benefit to the new program: assisting with the accreditation process, recruiting and supervising graduate students in the program, and specifically encouraging and supervising students on theses, that ultimately did not benefit Grievant in the review process. In the past, graduate students chose to pursue their masters through projects or exams rather than theses. Dr. Salem consistently urged Grievant to encourage students to undertake and to advise on

student masters' thesis, which he viewed to be key for the division. Grievant complied with this direction admirably. Grievant was the first to mentor graduate students to pursue theses, two of whom had already successfully defended and been published, and three of whom he was chairing at the time of his application. Grievant involved his students in his research, had published with one of them, and was embarking on collaborative research with another and the College of Science involving the Scanning Electron Microscope for which he had helped obtain the grant. Dr. Salem believed the thesis activities to count toward research and scholarly activity and cited that activity as part of why he considered Grievant to be exemplary. However, the other reviewers considered that to be a teaching activity so Grievant was penalized in research for having spent his time on the activity his chair encouraged him to do which had taken critical time away from Grievant's ability to pursue independent research, publishing, and grants. As will be discussed later, it appears Dr. Salem was ultimately correct in his view, but that did not prevent the harm that occurred from the negative reviewers.

Dr. Salem also failed to allow for proper faculty feedback under the college guidelines. The guidelines require the chair to notify the division faculty of the opportunity to review the portfolio. The Guidelines state that faculty members are to submit their feedback in writing by the last day of the review period. Dr. Salem did notify faculty of the opportunity to review Grievant's portfolio but provided no information regarding faculty feedback. While the Guidelines do not specifically require the chair to inform faculty that the point of the review is to submit written feedback and by when they must do so, it is obviously the intent of the Guidelines as that feedback is required to be considered by the division chair. Further, in sending out notifications on prior applications, Dr. Salem did

specify the review was for feedback and provide information about how to submit the same. Also, testimony revealed that, because of the creation of the division committee, Dr. Salem was mistakenly under the impression that faculty feedback no longer mattered, which was against the Guidelines. This omission appears to have had little practical effect as Dr. Salem recommended Grievant regardless and the division and college committee's improper refusal to consider recommendation letters indicates they would not have reviewed them and further were not required to do so by the guidelines. However, it does mark another point in what would be repeated failure to abide by proper procedures and policies.

The failure to follow proper procedures and policy continued in both committees and in the college dean's review of Grievant's portfolio. The review process at these levels was chaotic. This was the first year that the division committee was in existence. In the prior year, the college had attempted to make significant changes to its promotion and tenure procedure and criteria by drafting a new policy. As a result of the proposed new college policy, the determination was made to create the division committee. However, that formation was fatally flawed when the division committee's bylaws referenced the draft college policy that was ultimately never approved. Importantly, Dean Zatar testified that the draft college policy was not approved because it did not comply with university policy.

The problematic nature of the formation of the committee was illustrated by the fundamental misunderstanding of the role of the division committee by at least one member, Dr. Chen, who did not understand that the division's decision was counted as a separate recommendation in the promotion and tenure process and that the division's

letter would be included in the portfolio. Dr. Chen specifically stated that he would not have approved the letter as written if he had understood its role in the review process.

Therefore, the division committee's deliberations were flawed at the outset by Dr. Chen's misunderstandings and became more flawed as the division committee went on to evaluate Grievant under the wrong university policy and college-level criteria. Per university policy, Grievant was permitted to choose either the old university policy or the new. He chose the old. The text of the letter, committee emails, and Dr. Wait's testimony show the committee completely disregarded Grievant's choice and evaluated him under the new university policy. The committee compounded this error by also evaluating Grievant under the unapproved draft CITE policies as discussed above, rather than the proper criteria, the CITE Guidelines. Committee emails and Dr. Wait's testimony also show the committee failed to consider Grievant's contract requirements. In addition, although it is unclear exactly what happened as there was no testimony on the matter, it is highly irregular that the committee voted, additional discussion was had after a committee member departed, and then they reconvened and took another vote.

This is particularly problematic when the new criteria was based on the requirement to secure grant funding when Grievant's contract and the old criteria did not. This is a difficult issue because obtaining grant funding is a proper consideration and was one of the reasons Dr. Salem recommended Grievant. It is a question of weight and perspective. Under the new university policy and college criteria securing grant funding is of clearly more importance than under the old. While some consideration of grant funding is warranted under even the old, it appears that most of the negative reviewers were holding Grievant to the new standards. Of other procedural concern is the decisions

of Dr. Begley to abstain from voting and of Dr. Wait to not abstain from voting on Grievant's application and Dr. Begley's contrary decision to vote on Dr. Wait's application. Policy does not provide a clear answer of whether abstention can be proper, but Grievant was clearly harmed by the inconsistent decision. If Dr. Begley was correct to abstain, then it was improper for Dr. Wait to vote. Either way, but for the abstention issue, given Dr. Begley's vote in the college committee, the division committee vote would have been in Grievant's favor because if both had voted Grievant would have had three votes in favor and two against and if neither had voted Grievant would have had two votes in favor and one against.

The division committee's errors in deliberation and voting were compounded by their letter, which was certainly unreasonable, if not actually improper. Although the letter includes some positive statements regarding Grievant's application, the letter only clearly explains non-recommending reasoning and Dr. Wait's testimony shows this was intentional. The letter also appears to reflect Dr. Wait's personal view rather than the committee's view at times, for example with the lack of citation of Grievant's work. Not that the committee followed the correct policies and procedures, but neither the university policy nor the CITE guidelines explained what to do with a tie vote. However, given what the CITE guidelines do say and that it was a tie vote, the reasonable thing to do would be to clearly explain both the justifications for recommending or not recommending, especially given the email communications of the committee insisting that they were neither recommending or not recommending.

If one removed the statements explaining that it was a tie vote and read only the discussion of Grievant's qualifications in the letter, one would think the committee voted

not to recommend Grievant. Further, the letter in discussing the supposedly disbanded committee, clearly implies deceit on Grievant's part when Dr. Larsen testified they did not believe that Grievant was deceitful and that it would not be unreasonable for Grievant not to have been aware the committee was disbanded due to the nature of the committee. Although Respondent argues that the letter was approved by all committee members, this is only technically true. While Dr. Chen approved the letter at the time, he only did so because he did not understand the role of the letter in the review process and he clarified both at the time and in his level three testimony that he would not have approved the letter if he had understood. The letter also follows the improper deliberations in applying the wrong policy and criteria to Grievant.

The CITE committee deliberations and letter were likewise flawed. Again, the committee applied the wrong policy and guidelines. The committee did not appear to discuss the strong recommendation from the division chair. It appears Dr. Wait negatively influenced the committee against Grievant by disclosing Grievant's objections to the division committee's letter. Dr. Wait discusses the same in email exchanges with the committee and specifically advised that the letter not include specific reasons for the recommendation because of Grievant's objection at the division level.

Due to Dr. Wait's improper urging, and despite Dr. Begley's assertion that they should include specific explanation, the CITE committee letter violated CITE Guidelines, which requires the committee to submit a letter "giving clear explanation and justification" for declining to recommend Grievant. The letter gives no actual explanation of the committee's evaluation and rather used almost verbatim the language from the unapproved CITE policy regarding how a candidate is to be evaluated. In contrast, the

committee's letters recommending Dr. Wait, Wahjudi, and Yoo comply with CITE Guidelines by providing details regarding their recommendation.

Dean Zatar's letter was likewise wholly deficient and clearly shows that he relied on the flawed determination of the CITE committee. Dean Zatar was also required by the CITE Guidelines to give "clear explanation and justification" for his determination. He gives none, other than to state that he agrees with the explanation of the CITE committee, which did not actually give any explanation. In fact, Dr. Zatar's testimony calls into question how much he reviewed the application at all. His testimony that a mechanical engineer would be more qualified to evaluate another mechanical engineer calls into question why Dr. Salem's strong recommendation did not persuade him. He denied knowing whether Grievant had chaired theses, although that was clearly included in Grievant's portfolio and was a basis for Dr. Salem's recommendation. His assertion that there are no differences between the guidelines and the draft policy is absolutely false and shows an appalling lack of concern with the evaluation process.

Provost Tayler and President Gilbert likewise provided no reasons for the denial of promotion and tenure but university policy did not require them to do so. However, President Gilbert appeared to err in his deliberation in that his letter states only that Grievant failed to meet the requirements of the university's handbook, *The Greenbook*. University policy requires that the promotion and tenure decision be made according to the contract, university policy, and college-specific criteria. Although President Gilbert did not testify, his letter indicates he failed to consider the applicable criteria.

While an isolated procedural error may cause little harm, this litany of errors obviously caused significant harm to Grievant. He was not afforded the considerations

of his contract or rightful policies and procedures. Errors early in the process denied him the opportunity to align his work with Respondent's expectations. The inconsistency in university policies directly contributed to the negative reviewer's determination that he did not meet the criteria for research and scholarly activity. While Respondent asserts the difference in the university policies were slight, they were real differences that had larger implications. In addition to adding an entirely new area for review, "University Citizenship," it changed "scholarly and creative" to "research, scholarly and creative" and it did away with the language that colleges should provide flexibility in the weighing of functions. Further, it was the improper application of the very different unapproved CITE policies that caused the most harm. Applying that improper criteria to his review held him to a higher standard than was proper. This is especially important in this case where, not only were there split votes, even the non-recommending reviewers acknowledged it was a close decision. As will be further discussed below, in giving deference to the approving reviewers it appears Grievant did meet the applicable criteria, meaning that the denial of his promotion and tenure was a direct result of negative reviewers' evaluation of him under the wrong criteria.

Review now turns to consideration of the subjective determinations themselves. While the subjective determinations of the reviewers must be given deference, in this case there was a split in the subjective determinations, with some voting for promotion and tenure and some voting against. It must therefore be determined if this was merely a difference of opinion or if the determination of certain reviewers was arbitrary and capricious and to whom deference should be given.

There are several main areas of conflict between the recommending and non-

recommending reviewers: funding, number and quality of publications, effort considering teaching load, and Grievant's role in supervision of student research and theses. Preliminarily, the determination of the non-recommending reviewers is suspect because of the above-discussed failures to follow policy and procedure.

Perhaps the most important difference in the determination of the reviewers was the evaluation of Grievant's efforts in supervising student research and theses, as this was a significant portion of Grievant's effort for which he was given no consideration in "research, scholarly, and creative activity" by most non-recommending reviewers and was considered of major importance in the same by Dr. Salem.

Dr. Salem consistently told Grievant to focus on encouraging and supervising students to complete master's theses because it would be "good" for the division and he included it as an important part of his recommendation of Grievant for research and scholarly activity. The non-recommending reviewers appeared to consider it as much less important, and, to the extent they considered it at all, they counted it towards Grievant's teaching effort. This appears to be the result of a conflict in university policy and the historic lack of theses in the college. The university promotion and tenure policies do not specifically mention either supervision of student research or serving on thesis committees. The CITE Guidelines do not address the same but do list projects and capstones under teaching. However, the university's Policy No. AA-22, *Annual Evaluation of Faculty*, lists "[s]upervising student research (undergraduate or graduate); serving on thesis and dissertation committees" as a scholarly activity and "[d]irection of student research, creative activities, thesis and dissertations" and "[d]irection of or service on thesis or dissertation committees" as a teaching activity. MUBG Policy No. AA-22 §§

10.1.1.1.1.3, 12.1.1.1.6, and 12.1.1.2.5.

Importantly, the policy appears to draw a clear distinction between theses and capstone/projects as capstones and projects are only listed as teaching whereas theses are listed under both teaching and scholarly. Consequently, although all who testified admitted that they knew Grievant was the first faculty in the college to chair student theses, of which two had already successfully defended their theses, and was then advising or chairing three more, they discounted this contribution as teaching. It is unclear if they were failure to understand or whether they discounted that Grievant was not merely advising these students in their theses but had actively included them in his own research and had published both peer-reviewed journal articles and conference proceedings with them. Considering the previous instruction of Dr. Salem to Grievant to focus on this area, Dr. Salem's estimation of the value of this activity as the chair and as a colleague in the same discipline, and with the support of Policy No. AA-22, Dr. Salem's evaluation should receive deference.

In finding Grievant was not exemplary in research and scholarship, the non-recommending reviewers appeared to place particular importance on Grievant's alleged lack of grant funding. There are a multitude of problems with this view. Importantly, neither Grievant's contract, the university policy, nor the CITE guidelines require Grievant to secure funding. The emphasis on grant funding is a paradigm shift in the college and university that occurred after Grievant's hire that is not even reflected in the new university policies. The university's shift is illustrated by the testimony of Provost Taylor that acquiring external funding is paramount, the changes to the contracts of more recently hired faculty that require a dollar amount of grant funding for promotion and tenure but

also give significantly more seed money, and the attempted adoption of the college policy. Grievant's contract only requires he "actively pursue grant funding" and the Guidelines only state he is to list "Federal/State Grant Activities." The record shows that, not only did Grievant actively pursue grant funding, he did, in fact, secure funding.

Although Grievant as a co-PI had secured a \$400k National Science Foundation grant, the negative reviewers discounted the importance of this grant and Grievant's contribution to the same. Although university policy explicitly encourages collaboration and service to the university, and Grievant's pretenure review specifically instructed him to collaborate, Grievant's contribution to securing this valuable equipment was completely discounted because Dr. Wait asserted he could not reduce Grievant's contribution to a percentage. This is completely unreasonable. Grievant collaborated across disciplines to secure a very expensive and necessary piece of equipment for the benefit of multiple colleges and his contribution to the effort was recognized as key. Grievant provided evidence of his contribution by including in his portfolio two letters that vouch for his key contributions to securing the grant. Contrary to Dr. Wait and others' assertions that the grant was not sufficiently related to research because it was for equipment, Grievant's co-PI stated that Grievant's research project was "instrumental for the success of this grant proposal," and opined, "without Dr. Hijazi's contributions to this proposal, there is a good chance that it would not have been funded." Dr. Wait's unreasonableness on this issue, and his failure to fully review Grievant's portfolio, is demonstrated by his email communications with the CITE committee in which he derisively states, "if it was noted that the equipment grant funds were awarded to "X" number of faculty members, then in a rebuttal Dr. Hijazi could get someone to vaguely say how they 'couldn't have done it

without him'." Grievant's letters of support from his Co-PI's were extant and not vague and Dr. Wait's dismissal of the opinions of colleagues with direct knowledge of an issue is disrespectful.

Grievant otherwise applied for ten other grants. Of those, he received a \$24k grant from the NASA WV Space Grant Consortium as PI and a \$1k award to present at conference. Although Grievant was the listed PI on the NASA grant, it also was discounted by negative reviewers as associated with his research student and the division letter questioned if there were other co-PI's although Grievant's portfolio clearly states that he was the only PI. Two of the remaining grants were returned without review, which indicates a serious flaw in the application. The concerns some reviewers expressed about the two grants that were returned without review are reasonable, especially as the pre-tenure review committee had encouraged Grievant to provide explanation in his portfolio for the returns, which he failed to do. However, this legitimate concern was overshadowed by the negative reviewers' refusal to credit Grievant's contribution to the \$400k grant.

The non-recommending reviewers and recommending reviewers also viewed Grievant's teaching load and its impact on research and scholarly activity very differently. Although Grievant's load was at times quite high compared to the universities' recommendations in policy, and although the accreditation committee had expressed concerns about retention of mechanical engineering faculty specifically due to the high load, the non-recommending reviewers who testified stated that Grievant's load was in line with the other members of the college. They did not appear to consider that, in addition to the flat numbers of the load Grievant carried, as one of the few members of a

new program he was creating new curriculum and teaching fewer repeated courses. Dr. Salem, in contrast, did take these things into account and it was his opinion that Grievant's teaching load was high.

Although most of the non-recommending reviewers denied making their determination based on bare numbers of publications, given Dr. Salem's opinion of the quality of Grievant's publishing, it appears likely the non-recommending reviewers were more swayed in their view by numbers than they state. This too, is problematic. Whether it should have applied to Grievant or not, the draft CITE policy was applied by some reviewers and can also be viewed as instructive for what the CITE committee had considered exemplary publishing. The draft CITE policy, which had been approved by the CITE committee, defines as exemplary publication of at least eight total peer-reviewed journal articles and peer-reviewed conference proceedings, with at least four being peer-reviewed journal articles. Even though the policy had ultimately not been approved by the college, it calls into question the committee's stance that Grievant had not published enough when he had published the same amount they had previously determined to be exemplary.

Some non-recommending reviewers also found persuasive the lack of citation of Grievant's work, as only one of his journal articles had been cited. This view appears arbitrary for several reasons. Dr. Salem credibly testified that citation should not be a primary consideration in reviewing promotion and tenure for an associate professor because of the short amount of time available for publishing. That a newly-hired faculty member would not be able to publish immediately and therefore, given how long it takes to publish a paper, there would not be enough time for others to cite the research in their

own papers. In fact, two of Grievant's papers had only been published in 2018, leaving little, if any opportunity for citation. As discussed above, although it was presented as a concern of the committee, it appears only Dr. Wait was concerned about citation at the division level. While Grievant and Dr. Wait cannot be directly compared, Dr. Wait's research had a similar lack of citation considering that Dr. Wait was an established faculty member with presumptively established research. Although three of Dr. Wait's seven publications had not been cited, and three had only been cited once, it illustrates the arbitrary nature of the review how differently the division committee discussed their research, lauding Dr. Wait's research while discrediting Grievant's even though there was a similar lack of citation.

As for the upper levels of review, the record is limited. Provost Taylor testified but his testimony was brief. Grievant's application was among the first Provost Taylor reviewed in his new appointment as provost. Of concern was that Provost Taylor did not recognize the procedural errors that had been made during the other levels of review and that he indicated that Grievant's "failure" to secure external funding was the primary consideration in his non-recommendation. As discussed above, while the university may more highly value securing outside funding now, it cannot judge those faculty hired prior to that switch to the same standards. They were not notified on hire that there would be that expectation, and the university has still not made clear this importance in its current policies, which still do not specifically mention grant activity, much less impose a requirement of external funding. Holding Grievant to the same expectation of newer hires, who have a specific dollar amount of funding expectation and a greater amount of seed money is unreasonable. Also, for the same reasons as discussed above, Provost Taylor's

refusal to value Grievant's contribution to the \$400k grant is unreasonable.

President Gilbert was not called to testify and did not choose to include specific reasoning in his letter for why he denied Grievant promotion and tenure. As discussed above, President Gilbert policy does not require him to provide reasoning in his letter, but because there is no record of his reasoning there is no way to analyze whether it was arbitrary and capricious. However, there is a concern with his statement in the letter that Grievant did not "meet all the criteria for tenure as set forth in *The Greenbook*," which is Respondent's handbook. Although Respondent argued that the handbook, along with the HEPC procedural rules, the university policies, and the college guidelines, control the decision, the record does not support this assertion. Only a one page excerpt of the handbook was entered into evidence, which concerns only the pre-tenure review. If the handbook contains a provision that makes it applicable, that was not entered into the record. The university policies, which are controlling, make no mention of the handbook, only the HEPC procedural rules and college-level procedures and criteria and the HEPC procedural rules specify that institutions must develop policy, not handbook provisions. That President Gilbert mentioned only the handbook, and not the controlling procedural rules and policies calls into question whether he reviewed the appropriate criteria. Regardless, the President's bare determination is not sufficient to rebut the proof Grievant has presented of failure to follow policy and arbitrary and capricious decision-making.

It appears clear that deference should be extended to Dr. Salem. Although Dr. Salem had committed previous errors, in the end, he is the only reviewer through the college level who actually followed policy in his review and letter. He evaluated Grievant under the proper policy version and college guidelines and provided clear explanation

and justification in his letter for why he recommended Grievant for promotion and tenure. Unlike the non-recommending reviewers who, despite denying doing so, focused on bean-counting, Dr. Salem focused on Grievant's worth to the university in securing the equipment grant, recruiting and encouraging graduate students in research, providing valuable service during the accreditation process, and developing new curricula for the new program.

Dr. Salem properly took into account Grievant's position in a new program and the additional work this entailed as well as considering the limitations imposed by Grievant's teaching load when reviewing his number of journal publications and grant activity. Dr. Salem considered the quality of the journals in which Grievant had published and the renowned nature of the conferences, and the nomination for best paper and publication in a special journal issue. Dr. Salem was familiar with Grievant's work on the \$400k NSF grant and highly valued the same. As the chair of Grievant's division and a member of Grievant's specific discipline, Dr. Salem's recommendation should have been given significant weight by the other reviewers. However, it appears only Dr. Begley gave it weight and the college committee refused to consider it despite Dr. Begley's urging. Although the reasoning for their votes were not presented in the committee letters, the support of Drs. Chen, Bieniek, and Begley align with the recommendation of Dr. Salem, taking into account the same factors that informed Dr. Salem's recommendation. Dr. Salem's recommendation had a rational basis and was supported by substantial evidence and must receive deference.

In sum, the cumulative effect of many errors combined with the weight of the option of the reviewers that did recommend Grievant for promotion and tenure compels that

award. Grievant was denied his right by policy and contract to be notified of his progress so he could align his work with Respondent's expectations. To the extent he was orally provided notice he complied with Dr. Salem's instructions and completed work with his master's students that was of significant benefit to Respondent but was discounted by other reviewers. The division committee, college committee, and the dean, in using the wrong policy and college guidelines did not rely on the criteria that were intended to be considered. Analyzing their determinations under the lens of the appropriate criteria, considering their credibility, and considering Dr. Salem's recommendation, it further appears those reviewers reached the decision not to recommend Grievant contrary to the evidence before them. Therefore, deference should be granted to Dr. Salem, whose role as department chair and a colleague within the same discipline placed him in a unique position to determine Grievant's worth to the university, and whose view was also supported by Drs. Chen, Bieniek, and Begley. To the extent that other reviewers expressed some reasonable concerns, given the significant and consistent errors in the review process, those concerns must be resolved in Grievant's favor.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993),

aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “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).

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

5. “The 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).

6. “‘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). “[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 failed to prove the denial of his promotion and tenure application was discrimination.

8. "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).

9. Grievant proved the decisional process by the non-recommending reviewers through the college level did not conform with applicable policy and procedure and that he suffered significant harm as a result.

10. Grievant proved that the decisions of the non-recommending reviewers were arbitrary and capricious.

11. Deference must be extended to the recommendation of Grievant's department chair, whose review and recommendation letter complied with policy and procedure and whose recommendation had a rational basis and was supported by substantial evidence.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant, promote him to the rank of Associate Professor, and award him tenure. Grievant's promotion and tenure shall be made effective as if his application for promotion and tenure had been approved by Respondent in April 2019, with back pay, interest, and any and all other benefits to which he would have been entitled effective from the same.

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 (2018).

DATE: September 23, 2020

Billie Thacker Catlett
Chief Administrative Law Judge