

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**PAULA MCCOY,  
Grievant,**

**v.**

**Docket No. 2017-2137-WVSU**

**WEST VIRGINIA STATE UNIVERSITY,  
Respondent.**

## **DECISION**

Dr. Paula McCoy, Grievant, is employed by Respondent, West Virginia State University ("WVSU") as an Associate Professor of Psychology. Dr. McCoy filed a level one grievance form dated April 28, 2017, alleging:

On or about April 10, 2017, Grievant received notice from the Provost and VPAA that she would not be promoted to the rank of full professor in the academic year 2017/2018. Respondent's denial of Grievant's promotion was arbitrary & capricious and without factual basis. Moreover, based upon the Faculty Handbook, policies/procedures related to the review of applicants for promotion in rank were violated and the process was flawed.

As relief, Dr. McCoy seeks, "To be promoted to the rank of full professor in the academic year 2017/2018; to be made whole; and any other relief the grievance evaluator deems appropriate."

A level one hearing was concluded on July 13, 2017. By letter dated August 17, 2017, WVSU President, Anthony Jenkins, Ph.D., affirmed the decision of the appointed hearing examiner and denied the grievance. Grievant appealed to level two on August

23, 2017. A mediation was conducted on February 9, 2018, and Grievant appealed to level three the same day.<sup>1</sup>

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board over three separate days: January 18, 2019, September 11, 2019, and September 13, 2019. Grievant appeared in person and was represented by Jeffrey G. Blaydes, Esquire, Blaydes Law, PLLC. Respondent WVSU appeared through WVSU Interim Provost and Vice President of Academic Affairs, Dr. R. Charles Byers and was represented by Dawn E. George, Esquire, Assistant Attorney General. This matter became mature for decision on November 21, 2019, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.<sup>2</sup>

### **Sylloopsis**

Respondent denied Grievant a promotion to full professor based upon the then provost's view that Grievant had failed to demonstrate "scholarly achievement" in her portfolio. Grievant proved that she had received a positive recommendation for promotion from her faculty chair, the interview committee, and the dean. The present interim provost also believes Grievant met the criteria set out in the faculty handbook for promotion to full professor. Grievant proved that the reasons for the denial were not supported by the faculty handbook and the decision to deny her promotion was arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

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<sup>1</sup> Grievant amended her relief to include "retro-active & prospective wages and benefits."

<sup>2</sup> The Grievance Board relocated during the period between the last day of hearing and the due date for the post-hearing submissions. Respondent's proposal was initially mailed to the old address which caused nearly a month delay before it was received by the Grievance Board.

## **Findings of Fact**

1. Grievant Dr. Paula McCoy holds a bachelor's degree from West Virginia University, a master's degree in Professional Clinical Psychology from Marshall University, and a PhD in Clinical Psychology and Behavioral Medicine from the University of North Texas. Dr. McCoy has been licensed by the West Virginia Board of Examiners in Psychology for sixteen years.

2. After receiving her master's degree and before pursuing her doctorate, Grievant was a practicing clinical psychologist for approximately ten years as an adult outpatient therapist for Pretera and Pathways, and as a staff psychologist for Huntington State Hospital (now Mildred Mitchell-Bateman Hospital).

3. In 2001, Grievant McCoy applied for an assistant professor position with WVSU in its psychology department. She interviewed with the Chair of the Department and the Assistant Provost, John Taweson. During the interview, Respondent informed Grievant that it wanted the successful applicant to create a field practicum or field study program for its students.<sup>1</sup> If Grievant was the successful applicant, she would be required to develop and maintain a clinical field study program in psychology and that this would be a "main thrust" of her time. She would also be required to teach a full load of courses.

4. Grievant was selected for the position and was hired at the rank of assistant professor in August of 2001.

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<sup>1</sup> Respondent had recently been evaluated by its regional accrediting agency, North Central Association for Colleges and Schools of the Higher Learning Commission, as deficient because it did not offer undergraduate field study.

5. Immediately upon assuming the position, Grievant began creating the field practicum program from the ground up. Without receiving any release time and while teaching a full, four-course load, Grievant visited agencies throughout the Kanawha Valley to determine if they would be willing to accept Respondent's undergraduate students in a field study program.<sup>2</sup> Over a three-to-four year period, she established approximately 30 to 40 sites for WVSU students to participate in field study.

6. This practicum in psychology (also called "field study") has remained a major part of required duties throughout her employment with the WVSU. This practicum program requires a major time and effort commitment that requires Grievant to; teach an upper level practicum class (Psych 398); supervise all students during their field study; review student work product for at least four hours per week; designate three to four weeks each year maintaining participating work sites and recruiting new ones; visit all psychology classes to pass out evaluations for eligible applicants and review the GPS's for each applicant; and meet with faculty members about students who she does not know to determine the students qualify for the program and will represent WVSU well in their assignments.

7. From 2001 to 2007, Dr. McCoy was consistently rated as "excellent" in teaching and at no time was she ever informed that she was deficient in scholarly activity or service. Consequently, in 2007, she was promoted to associate professor and received tenure.

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<sup>2</sup> In particular, Grievant visited the prosecuting attorney's office, juvenile probation, mental health centers, and other service providers. She noted that several providers initially declined to participate because they had an unsuccessful experience with criminal justice undergraduate students who had participated in a different program in the past.

8. Upon receiving tenure and the rank of associate professor in 2007, Grievant was on track to seek promotion to full professor in 2012. However, in 2009, Dr. McCoy was diagnosed with breast cancer. She had a lumpectomy and radiation treatment but continued to teach. Grievant had a recurrence of breast cancer in 2011 and 2012 and eventually underwent a bilateral mastectomy. She was required to have several more follow up surgeries.

9. Due to her serious medical conditions, Grievant could not apply for full professor in 2012. At that time, she discussed her medical condition with then-Provost Dr. R. Charles Byers. Provost Byers informed Grievant that the delay caused by illness would not adversely impact her efforts to seek promotion to full professor. He further advised her that she was on track for promotion. Additionally, he awarded Grievant with a merit pay increase in 2013 reflecting her continuing notable job performance.

10. The area of Scholarly Activity was in the Self Report evaluation document which Grievant was required to complete annually. "Direction and supervision of student research" was included as a criterion as an indication of acceptable scholarly activity toward promotion.

11. Grievant McCoy's Program Coordinator, Department Chair, and the Promotion and Tenure Committee as a whole, confirmed that the Annual Self Report was part of the promotion process. The Annual Self Reports were to be included in the promotion portfolio that each candidate for promotion compiled.

12. Each year, Grievant met with her program coordinator and/or department chair after her Annual Self Report was completed. The Annual Self Report goes the dean or department chair to allow them to give counseling if the faculty member is not on track

to meet the promotion criteria. Grievant McCoy always asked if there was anything that she needed to improve upon. She was always told to keep doing what she had been doing and was never informed of any deficiencies.

13. In preparation for applying for promotion to full professor, Grievant held separate meetings with her Program Coordinator, Charles Purdue, the Psychology Department Chair, Frank Vaughan, and members of the Promotion and Tenure Committee, Dr. Reddy K. Umesh, Dr. Gail Mosby, and Dr. Raphael Mutepa. Grievant wanted to make sure that she had not missed any requirements during her illness. Everyone Grievant met with indicated that the direction of student research had consistently been considered scholarly activity for purposes of promotion, under the heading “other verifiable contribution to the discipline.”

14. Additionally, Grievant met with then-Provost Dr. Kumara Jayasuriya about her concerns related to the promotion requirements. Dr. Jayasuriya informed Grievant that the policy including direction of student research as a scholarly activity remained in place. He assured Grievant that she was doing good work, and had nothing to worry about regarding future promotion.

15. The criteria for promotion in rank (including full professor) are located in the “West Virginia State University Faculty Handbook” (“Handbook”).

The Handbook provides:

**Evaluation Criteria/Procedures**

(Revised August, 2003)

There are three general criteria for the valuation of faculty members:

### ***Teaching Excellence***

Teaching excellence is the most important of the three criteria and excellence in other areas cannot compensate for a deficiency in teaching. . .

### ***Scholarly Activities***

Scholarly activities fall into three basic categories: research/creative activities, recognized activity in professional and/or learned societies, and professional growth.

1. **Research/Creative Activities:** Research is broadly defined as the organized, deliberate efforts to collect, analyze, and evaluate information. This may be accomplished through a variety of methods including, but not limited to, the historic method, the survey method, *the field study* and the experimental method. (Emphasis added)

Research should result in a tangible product such as a peer-reviewed journal article, book, proceedings abstract, presentation at a professional conference, *or some other verifiable contribution to the discipline.* (Emphasis added)

Studies in the areas of art, music, theatre, film, etc. may involve research activities as described above. These disciplines are often characterized by creative endeavors such as the composition of a musical score or the production of a film that are considered to be scholarly activities that contribute to the discipline.

2. **Recognized Activity in Professional and/or Learned Societies:** Most academic disciplines are affiliated with one or more professional societies or organizations on a national, regional and/or state level. Activities within these societies that are considered significant include chairing a panel, acting as a respondent on a panel, working as an officer or board member and/or *working as a conference or convention organizer.* (Emphasis added)

3. **Professional Growth:** Assessment of professional growth involves a judgment based on concrete experience and evidence. Some indications of professional growth include the following:

- An appropriate degree and/or continuing study.
- Participation in conferences.
- Presentation on a discipline-related topic.
- Other indications of potential for growth, such as development of courses that could lead to further research.

***Service to the University and Community***

Valued service to the University and community may take many forms: . . .

(Grievant's Ex. 3). This is the sole criteria to be used to determine whether an applicant should be promoted to full professor.<sup>3</sup>

16. It is undisputed that Grievant met the requirements for promotion to full professor set out in the criteria of "Teaching Excellence" and "Professional Growth."

17. In the Criteria of "Scholarly Activity" the policy does not require an applicant to have activity under each of the three subsections, nor does the policy place greater weight on any of the three. An applicant could conceivably be promoted with only "Creative Activities" or "Professional Growth" or "Research." Nothing in the Handbook limited "Scholarly Activity" to publication of a book or article to be promoted at any level.

18. As it relates to promotion to full professor,<sup>4</sup> a candidate must also demonstrate that he or she has a terminal degree in an appropriate field and demonstrated excellence in teaching over at least three of five years at the rank of Associate Professor. The Handbook specifically states:

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<sup>3</sup> All witnesses agreed that the *Evaluation Criteria/Procedures* set out on pages 14 and 15 of the Handbook were the only criteria by which an applicant for a promotion to professor could be judged.

<sup>4</sup> The terms "professor" and "full professor" are used interchangeably in academia. Both indicate the highest level of academic rank for a professor.



**Promotion to Professor:** For promotion to Professor, the candidate must have met the following criteria: terminal degree in a field appropriate to the faculty member's appointment plus five years of teaching in a full-time appointment at the rank of Associate Professor, three of which must be "excellent" teaching experience at West Virginia State University.

(Grievant's Exhibit 3).

19. The Handbook also sets out in detail the general procedure for seeking promotion in rank for faculty on pages 17 and 18. It is undisputed that Grievant complied with all the procedures set out therein.

(Grievant's Exhibit 3).

20. Pursuant to the Handbook procedure, and consistent with the guidance provided to her Program Coordinator, Department Chair and the Provost and Tenure ("P&T") Committee, Grievant assembled her portfolio, which included evidence relating to teaching excellence, scholarly activity, and service.

21. Grievant McCoy presented a nearly 450-page portfolio including the following examples of "scholarly activity."

(a) **Research/Creative Activity:** Supervision of student research including the theses of 41 senior students and an example of the work generated entitled "Post Traumatic Stress Disorder in Children Exposed to Interpersonal Victimization." (Grievant Exhibit 1, p. 291-314)

(b) **Research/Creative Activity:** Supervision of student research from Honors students, all of which led to presentations including "Dementia of the Alzheimer's Type." Grievant Exhibit 1, p. 316-365)

(c) **Research/Creative Activity:** Supervision of student research involving McNair Scholars, during which she helped determine a topic of research; collected data; chose assessment instruments; and ultimately presented the research product at the Undergraduate Research Day at the Capitol. (Grievant Exhibit 1, p. 248, 249, 252-282)

(d) **Research/Creative Activity:** Performed doctoral level research with Davidson University – in particular, collecting data.

(e) **Research/Creative Activity** Presented research at the Midwestern Psychological Association (regional professional organization) meeting in Chicago and,

although there were several authors on the paper, she was the only one to attend the meeting and make the presentation;

(f) **Research/Creative Activity**: Participated in graduate research for a student at the University of South Florida, who was completing a dissertation relating to contamination of the Elk River. (Grievant Exhibit 1, p. 283)

(g) **Research/Creative Activity**: Completed an invited book review;

(h) **Research/Creative Activity**: Directed, supervised, and maintained a field practicum or field study that produces data to be collected, analyzed, and evaluated, and may exist by virtue of her licensure with the State;

(i) **Recognized Activity in Professional and/or Learned Societies**: Participated in the recognized professional society, Psi Chi (international learned society) as its advisor;

(j) **Recognized Activity in Professional and/or Learned Societies**: Holds a license with the West Virginia Board of Examiners of Psychologists;

(k) **Recognized Activity in Professional and/or Learned Societies**: Organized a conference – held on Respondent's campus – for the West Virginia Board of Examiners of Psychologists (a State professional organization) (Grievant Exhibit. 1, p. 437);

(l) **Recognized Activity in Professional and/or Learned Societies**: Selected as a supervising psychologist by the West Virginia Board of Examiners of Psychologists;

(m) **Professional Growth**: Demonstrated professional growth by attending professional conferences every year (except when she was ill) with the American Psychiatric Association (a national professional organization) wherein she is a voting member;

(n) **Professional Growth**: Demonstrated additional professional growth by completing 57 hours of continuing education to maintain her license;

(o) **Professional Growth**: Demonstrated further professional growth as a member of the advisory board for the Victims' Service Center/Kanawha County Prosecuting Attorney's Office, St. Francis Hospital, Clinical Pastoral Education Program, and the Peace and Social Justice Committee for the Diocese of Wheeling-Charleston;

(p) **Professional Growth**: Demonstrated professional growth by the development of courses that could lead to research, including Honors Abnormal Psychology; physiological psychology; and health psychology.

22. To initiate the application process for full professor, Grievant took her completed portfolio and promotion application to her Program Coordinator, Dr. Charles

Perdue.<sup>21</sup> Dr. Perdue, as a member of the Psychology Department, is the evaluator most familiar with Grievant's professional and personal activities in her discipline.

23. Dr. Perdue wrote a detailed letter expressing his support for Grievant's promotion to full professor. He generally followed the three criteria for promotion listed in the Faculty Handbook to frame his letter.

24. In the area of Teaching Excellence, Dr. Perdue noted that Grievant teaches both core clinical classes as well as higher-level courses, which are not only very popular but "are crucial for many psychology students who foresee careers as clinicians or in associated professions. He found that Grievant "has developed a reputation as a rigorous and respected instructor with high standards for academic performance. . ." and "has mentored some of our most accomplished psychology majors..."

25. Dr. Perdue also found that Dr. McCoy's scholarly activity justified promotion. He observed that Dr. McCoy had directed student research including a presentation at the Mid-Western Psychological Association. He further noted that Dr. McCoy had guided student research that resulted in research presentations at Undergraduate Research Day at the West Virginia State Capitol. He testified that the inclusion of "directing student research" within the research section of the Self Report informed faculty that this type of research was, in fact, a scholarly activity for promotion purposes. He highlighted the fact that the policy states that research "may be accomplished through a variety of methods

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<sup>21</sup> The Psychology Department has since been merged into the Department of Social and Behavioral Sciences. Rather than a chair, the Psychology Department has a "Program Coordinator" who evaluates promotion applications and supporting portfolio at the initial level. Prior to the merger, a promotion portfolio was submitted to the Psychology Department Chair.

including, but not limited to, the historic method, the survey method, the field study, and the experimental method.” Finally, he noted that, in addition to publications, presentations, abstracts, journals, and books, a faculty member may also demonstrate research with “some other verifiable contribution to the discipline.” Dr. Perdue emphasized the importance of the field study program “which continues to be a remarkably successful of the curriculum.” He noted that this program was extremely time consuming and necessary to meet an area in which WVSU had been found to be lacking. Dr. Perdue specifically noted that this program met the “field study” method for faculty to demonstrate research to meet the “Scholarly Activity” criteria.<sup>5</sup>

26. Continuing with scholarly activity, Dr. Perdue found, in the subcategory of “Recognized Activity in Professional and/or Learned Societies,” that Grievant McCoy was the only member of the faculty who is a licensed clinical psychologist and has 30 years of practice. She is a member of the American Psychology Association, the Midwestern Psychological Association, is licensed by the West Virginia Board of Examiners of Psychology and is the faculty representative for Psi Chi, the international society for undergraduate psychology students.<sup>6</sup> To maintain her license, she is required to complete at least ten hours of approved continuing education per year, which results in her attending “a variety of workshops, conferences and symposia to secure these CEUs.” (Grievant Exhibit 1, pp. 9-11).

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<sup>5</sup> These findings are based upon Dr. Perdue’s letter of recommendation and his level three testimony.

<sup>6</sup> Dr. Perdue emphasized that WVSU’s chapter of Psi Chi has been designated a Model Chapter by its parent organization.

27. The next level of review in the promotion process was the chair of the merged Department of Social and Behavioral Sciences, Dr. Frank Vaughan.

28. Dr. Vaughan enthusiastically recommended Dr. McCoy for promotion. He wrote that “Dr. McCoy not only meets but exceeds the criteria outlined in the Faculty Handbook for promotion to the rank of Full Professor. I therefore offer my unqualified support that she be granted promotion.” (Grievant Exhibit 1, p. 245).

29. In the area of “Scholarly Activity” Dr. Vaughan cited Grievant’s direction of student research, including the McNair Scholars Program;<sup>7</sup> guiding the research of forty students; directing the research for and presenting at the Undergraduate Research Day at the State Capitol; and co-authoring and presenting a paper at the Midwestern Psychological Association. He agreed with Dr. McCoy that “research” includes “field study” and “other verifiable contributions to the discipline.”

30. Regarding scholarly activity arising from “professional growth,” Dr. Vaughan noted that Grievant had participated in professional conferences; made presentations on discipline-related topics; and developed several courses that could lead to further research. Further, Grievant took continuing education classes to maintain her psychology license and is the only faculty member at the university to hold this credential.

31. The direction of student research was a Scholarly and Research Activity under the Self Report utilized by Grievant and all other faculty members during her evaluation period at issue, was a “commonly accepted practice on campus.”<sup>8</sup>

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<sup>7</sup> The McNair Scholars program is a significant program for undergraduate students to perform graduate level research.

<sup>8</sup> Testimony of Department Chair Vaughan.

32. Dr. Jayasuriya was promoted to full professor based upon a conference paper and several reports to the National Science Foundation for a grant. He did not have a peer reviewed article or book. Dr. Gale Mosby and Dr. Mahmoodle Islam were also promoted to full professor without peer reviewed publications.<sup>9</sup>

33. The next level of review for promotion was to the Dean, David Bejou. By letter dated December 9, 2016, Dean Bejou wrote, "I strongly recommend that Dr. McCoy be promoted to the rank of full professor." Like all the evaluators, Dean Bejou found Grievant to be an excellent teacher and "fully committed to her students."

34. As it relates to scholarly activity, Dean Bejou noted that Grievant keeps "an active research agenda," specifically noting the following:

She has co-authored and presented a paper entitled, "The Effect of Parenting Styles on Personality Development" at the 2016 Midwestern Psychological Association with two of her students. In addition, Dr. McCoy supervises students to work collaboratively with colleagues at USF. Further, she supervises several senior research projects. Dr. McCoy is the only faculty member in the Psychology Department with professional licensure and a practicing Psychologist with the "Supervisor" designation. In WV, maintaining this licensure necessitates extensive education and research. This type of activity is referred to as Professional Qualifications which is rigorous (if not higher) than Academic Qualifications. As such, Dr. McCoy is dedicated to her research agenda and is passionate about the research topic areas in Psychology. She meets research requirement to be promoted to the rank of full Professor.

(Grievant Exhibit 1, p. 242)

35. Dean Bejou also cited Grievant's successful field study program and her direction of student research as a way she met the criteria of scholarly research, and specifically mentioned the Midwestern Psychological Association presentations, as well

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<sup>9</sup> *Id.*

as the Undergraduate Research Day at the State Capitol and her participation in the McNair Scholars Program.

36. The next level of review for promotion was to the Promotion and Tenure Committee ("P&T"). Dr. Reddy K. Umesh was the committee chair. Dr. Gail Mosby, and Dr. Raphael Mutepa were the other P&T Committee members. The committee met and collaboratively reviewed Grievant's Portfolio. Dr. Mosby provided input as to how the Scholarly Activity of Dr. McCoy should be viewed because they are in the same department and utilize similar, if not identical, research methods.

37. By letter dated February 13, 2017, signed by Dr. Umesh, the committee made the following decision.

Regarding your application for promotion to Professor, the Promotion and Tenure Committee will recommend to the Provost that you be promoted to Professor. The committee takes seriously the responsibility of serving the University in this capacity. We have recognized your teaching excellence, scholarly activities and significant service you have provided to the University. We found your portfolio, and your corresponding accomplishments, sufficient to make this recommendation.

(Grievant Exhibit 1).

38. Dr. Charles Byers<sup>10</sup> wrote a strong letter recommending that Grievant be promoted which was included in the portfolio. Dr. Byers has a long and successful employment history with WVSU. He has been employed with the University for 54 years. He started as an instructor and advanced to an associate professor before moving into administration. Dr. Byers served in the position of Provost and Vice President of

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<sup>10</sup> Dr. Charles not only testified at the hearing. For the last two days he appeared as the agency representative to assist Respondent's legal counsel.

Academic Affairs for five years. He then retired and became Provost and Vice President of Academic Affairs Emeritus. Dr. Byers has since returned to the role of Provost and Vice President of Academic Affairs in an interim capacity.

39. During his administrative service for WVSU, Dr. Byers was involved in drafting Respondent's promotion policy and the categories for promotion that appear in the Faculty Handbook. He has specific insight as to the intent of the criteria Scholarly Activity. He has applied and administered the promotion policy for decades concerning a plethora of faculty applicants.

40. During the tenure of Dr. Byers, the criterion of scholarly activity was amended to broaden the activities which would qualify to include more than research and writing. Dr. Byers reiterated that scholarly activity now encompasses; Research/Creative Activities, Activity in Professional and Learned Societies, and Professional Growth. It is not limited to classic research and writing.

41. Dr. Byers concluded that the following accomplishments by Dr. McCoy are "Scholarly Activity" as defined by the Handbook:

- The field practicum is "field study" under "Research/Creative Activities"<sup>28</sup>;
- Presentations at the State Capitol and Midwestern Psychological Association constitute research activities;
- Psi Chi (international learned society), the Midwestern Psychological Association (regional professional organization), American Psychology Association (national professional organization) are learned societies;
- Organizing a conference for the West Virginia Board of Examiners for Psychology (regional professional organization) is an activity in a professional society;

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<sup>28</sup>Dr. Byers elaborated on this conclusion stating that Dr. McCoy's field practicum involved collection and analysis of data and firmly concluded that the field practicum is a scholarly activity under the category of "field study."



- Developing new courses, including Health Psychology and Honors Abnormal Psychology, constitute professional growth;
- Student direct research conducted by Grievant constituted “other verifiable contributions to the discipline.”

Dr. Byers also noted Grievant’s “value and service to the University with her leadership and participation on the Education Policy Committee (6 years), Academic Leaders Committee (4 years), and the Retention Committee (6 years).” He concluded by stating, “I offer my highest recommendation for Dr. Paula McCoy. She is a personable individual dedicated to helping others.” (Grievant Exhibit 1, p 12)

42. After the P&T Committee, the portfolio application was sent to Dr. Kumara Jayasuriya<sup>11</sup> who was the Provost and Vice President of Academic Affairs at that time. Notwithstanding the exuberant recommendations Grievant received from her Coordinator, Department Head, and the Promotion and Tenure Committee.

43. Dr. Jayasuriya found that Grievant met the criteria for Teaching Excellence and Service to the University and Community. Grievant also met the specific criteria for promotion to full professor of holding a terminal degree in her discipline as well as “five years of teaching in a full-time appointment at the rank of Associate Professor, three of which must be “excellent” teaching experience at West Virginia State University.”

44. Dr. Jayasuriya concluded that Grievant needed to strengthen her portfolio in the area of scholarly activity. Ultimately, he found that Grievant did not meet the standard for scholarly activity because she had not produced a published peer-reviewed

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<sup>11</sup> Dr. Jayasuriya left WVSU in 2019 and is now employed at Southwest Minnesota University.

article or book. It was his determination that she should only be promoted to full professor if she produced research which was published.<sup>12</sup>

45. There is nothing in the criteria for promotion set out in the Handbook on pages 14 and 15, nor in the specific additional criteria for promotion to professor found on page 19 of the Handbook which requires publication for promotion to that rank.

46. Dr. Jayasuriya discounted all Grievant's activities in "student directed research."<sup>13</sup> He opined that this constituted "teaching" not "scholarly activity." (See FOF 21 *supra*, a, b, & c.

47. Dr. Jayasuriya conceded that Psi Chi is a "Learned Society" for purposes of scholarly activity as defined in the policy, (*Id.* Example j.) and found that Grievant's collection of data to support doctorate level research at Davison College constituted scholarly activity. (*Id.* Example d.). He found that the presentation of undergraduate research at the Capitol during the legislature would qualify as scholarly activity if Grievant actually made the presentation.<sup>14</sup>

48. Dr. Jayasuriya stated that Grievant's presentation at the Midwestern Psychological Association (regional professional organization) meeting in Chicago was scholarly activity if she performed the research. Grievant was one of several authors of the article but was the only author present at the conference to make the presentation.

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<sup>12</sup> The Provost specifically testified: "For the highest level of promotion I look for some kind of publication."

<sup>13</sup> For example: 41 Senior Student Thesis which lead to specific presentations, McNair Scholarship and research with three honor students which all resulted in presentations; one specifically entitled "Dementia of the Alzheimer's Type."

<sup>14</sup> Dr. Jayasuriya opined that Grievant did not make that presentation even though he was not present at the event and offered no basis for reaching that conclusion.

49. In the scholarly activity subsection of “Professional Growth,” Dr. Jayasuriya testified that Grievant met the listed example of; “Participation in Conferences,” “Presentation on a discipline-related topic,” and “Other indications of potential for growth, such as development of courses that could lead to further research.”<sup>15</sup>

50. Provost Jayasuriya opined that the creation and supervision of the successful field study internship program was commendable but not scholarly activity because it did not involve research. All other evaluator concluded that this activity was a strong example of “verifiable contribution to the discipline” under the scholarly activity heading of “Research/Creative Activities.”<sup>16</sup>

51. Prior to her application for promotion and while acting as the Chair of the Retention Committee, Grievant participated in the evaluation of an English professor. She noted that the letter from the Chairman of English was not included in the packet. Dr. McCoy inquired to the Dean who ultimately indicated that Dr. Jayasuriya had directed that the Chair’s letter be removed and that the packet should be forwarded to the committee members without it.

52. Concerned that the letter was not included in the packet, and aware that it was a letter very favorable to the English professor, Grievant inquired to the Faculty Senate as to whether Dr. Jayasuriya was permitted to alter the packet in this way. She was informed that a provost did not have this authority. Nevertheless, Dr. Jayasuriya refused to place the letter back in the packet. As a result, the Committee determined that it could not take action on this employee because his packet was incomplete.

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<sup>15</sup> The provost stated he was not certain that the advanced courses developed by Grievant would lead to further research, but he conceded that they could.

<sup>16</sup> Provost Jayasuriya, opined that “Creative activity applied only to the arts disciplines.”

53. Dr. Jayasuriya was unhappy about the position taken by Dr. McCoy; that he wanted to dismiss the English professor; and that he had a complaint about the employee. He stopped answering Grievant's emails and he refused to place her on a committee that she had requested.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The review of an institution of higher learning's 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 v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (April 11, 1995). "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." *Sui v. Johnson*, 784 F.2d 238 (4<sup>th</sup> Cir. 1984). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational

basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his or her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

"In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service." *Baker, supra*; *Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996). However, "[p]romotion and tenure are paramount professional and economic goals of a teacher." *State ex. rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978)." *Finver v. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997). See also, *Rankin v. Board of Trustees/Marshall University*, Docket No. 99-BOT-421.

Several matters in this case are not in dispute. First, the criteria for promotion to full professor is set forth in the Handbook relied upon by Respondent's faculty and provides that an applicant must demonstrate "teaching excellence" and "continuing achievement" in scholarly activity and community service. Of these criteria, "teaching excellence is paramount. The Handbook specifically states, "Teaching Excellence is the most important of the three criteria, and excellence in other areas cannot compensate for deficiency in teaching."

Second, an applicant for full professor must have a terminal degree in her discipline and at least five years in the rank of associate professor, in at least three of which excellent teaching was demonstrated.

Third, Grievant McCoy holds a terminal degree in her discipline (Psychology). She has served more than five years in the rank of associate professor and there is not dispute that throughout her tenure at WVSU her teaching has been excellent. Moreover, all agree that Grievant McCoy amply demonstrated that continuing achievement is "service to the University and the community."

Finally, it is undisputed that Program Coordinator Charles Perdue, Chairman Frank Vaughan, Dean David Bejou, the P&T Committee chaired by Dr. Reddy Ummesh, and Dr. Charles Byers who previously served as Provost and who is now Interim Provost agree: Dr. McCoy's portfolio warranted promotion. Indeed, each spoke and/or wrote favorably of her credentials and value to Respondent. More specifically each of them found that Grievant's scholarly activity met the Handbook standard for promotion to full professor. Each of these evaluators had worked with Grievant and were very familiar with her work. Only Dr. Jayasuriya found Dr. McCoy's scholarly activity to be wanting.

Consequently, the sole issue remaining is whether the conclusion of then-Provost Jayasuriya that Grievant McCoy did not demonstrate continuing achievement in scholarly activity was supported by the fact and the Handbook requirements or was arbitrary and capricious. Dr. Jayasuriya's stated reason for concluding Grievant's scholarly activity was inadequate for promotion was his belief that for promotion to full professor some form of publication is required to meet that criteria. He generally discounted all of the other activities the other evaluators identified as meeting scholarly activity.

A review of the section entitled "Scholarly Activities" in the Handbook demonstrates that such activity is not limited to the publication of a book or article. Rather, it is a broad collection of activities that falls within three sub-categories: "Research/Creative Activities;" "Recognized Activity in Professional and/or Learned Societies;" and "Professional Growth."

Interim Provost and Vice President Charles Byers was involved in drafting Respondent's promotion policy and the categories for promotion that appear in the Faculty Handbook. He has specific insight as to the intent of the criteria scholarly activity. He has applied and administered the promotion policy for decades concerning a plethora of faculty applicants. During the tenure of Dr. Byers, the criterion of Scholarly Activity was amended specifically to broaden the activities which would qualify to include more than research and writing. Dr. Byers reiterated that scholarly activity now encompasses; Research/Creative Activities, Activity in Professional and Learned Societies, and Professional Growth. It is not limited to classic research and writing. Dr. Byers stated that

WVSU has traditionally placed the greatest emphasis upon teaching. Indeed, with his lengthy institutional memory, Dr. Byers recalled a time when only teaching was evaluated for promotion and that service and scholarly activity were added more recently.

Regarding the additional methods for meeting scholarly activity requirement, Grievant contends that her presentations at the Midwestern Psychological Association and at the Undergraduate Research Day constitute such work. Dr. Jayasuriya agreed that these activities would qualify as scholarly activity if Grievant had authored the article leading to the Midwestern presentation and if Grievant had made the presentation at the Capitol on Research Day. The clear implication was that she had done neither. Yet, Grievant credibly testified that she was one of the authors for the Midwestern study and she did indeed make the presentation at WVSU's day at the State Capital.

In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge 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' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant was present at the Capital for the presentation of undergraduate research. Throughout her testimony she exhibited an appropriate forthright and respectful attitude and was not argumentative. She obviously has an interest in the outcome of this matter, but her testimony was consistent with events and with the testimony of all other witnesses save Dr. Jayasuriya. Her testimony that she made the presentation at the capital and that she shared authorship of the material presented to Midwestern Psychological Association conference was credible.

On the other hand, Dr. Jayasuriya was not present at either event. He offered no explanation of his inference that Grievant did not make the Capital presentation or participate in authoring the Midwestern presentation. His testimony was taken telephonically but he was appropriate if somewhat haughty in his responses. However, his testimony regarding these two events was self-serving and inconsistent with the facts and testimony of the remaining witnesses. He had a definite interest in supporting his decision to deny Grievant's promotion in the face of uniform decent by other evaluators. Dr. Jayasuriya's inferences regarding Grievant's Capital presentation and authorship of the Midwestern material are not credible.

Dr. Jayasuriya concluded these two activities would qualify as scholarly activities if she made the Capital presentation and participated in authoring the Midwestern presentation material, if Grievant actually made the presentation and co-authored the Midwestern material. Given that the evidence demonstrates that it is more likely than not that Grievant did these things, the activities are scholarly activity, even by Dr. Jayasuriya's interpretation and should have been considered in her promotion. Additionally, in the scholarly activity subsection of "Professional Growth," Dr. Jayasuriya testified that Grievant met the listed example of; "Participation in Conferences," "Presentation on a discipline-related topic," and "Other indications of potential for growth, such as development of courses that could lead to further research." His only concern was whether the advanced course created by Grievant would lead to additional research. He stated that he did not know if this was the case, but the other evaluators had no such concern.

Additionally, Grievant supervised 41 senior theses, four honors students who also gave presentations, a McNair Scholar. She performed doctoral-level research with a student at Davidson University, and participated in graduate research for a student at the University of South Florida. Interim Provost Byers found all the activities qualified under the heading of scholarly activity. All the remaining evaluator's including Dr. Byer concluded that Grievant's field practicum constituted "field study" within this subset because it involved data collection, analysis, and evaluation. Moreover, Grievant had completed an invited book review.

The direction of student research was a Scholarly and Research Activity under the Self Report utilized by Grievant and all other faculty members during her evaluation period

at issue, was a “commonly accepted practice on campus.” Dr. Jayasuriya claimed that the Self Report has no bearing on promotion and that the Handbook does not specifically mention the direction of student research. He therefore discounted all Grievant’s activities. However, Grievant was specifically instructed to place these documents in her promotion portfolio. Dr. Byers and the remaining evaluators believed that the Self Report form is utilized to inform faculty whether they were meeting the appropriate standards for promotion. This point is underscored in an instance where an employee already has tenure and is at the rank of associate professor. There is simply no other purpose for the form.

Grievant regularly and consistently asked her supervisors if she was meeting all standards and was on track for promotion. Based upon her Self Report forms and personal observations she was consistently assured that she was. She was never given notice of any deficiencies she needed to address to meet the promotion standard. The denial of notice of such a potential change in the types of work considered “Scholarly Activity” at the last moment is, of course, not only completely unfair, but is also arbitrary and capricious. The Grievance Board’s decision in *Petersen v. West Virginia University/Potomac State College*, Docket No. 2014-1625-PSCWVU, is on point. In *Petersen*, a faculty member grieved his denial of promotion and tenure. In that case, the faculty member had been routinely evaluated as acceptable in the area of service. However, the college conducted a completely new review of his service in the year he sought promotion and found that he did not have satisfactory service – although he had been told for years that he had. The Grievance Board in *Petersen* rejected the actions of the school, stating, in pertinent part:

The . . . issue presented is essentially whether Respondent can completely disregard the ratings by those designated to evaluate Grievant each year and conduct a completely new review in the critical year of all of Grievant's service activities over the years, thereby providing Grievant with absolutely no notice that his service activities were not acceptable.

*Id.* at p. 23. The Grievance Board went on to state that the grievant's superiors had:

specifically noted that these types of activities in their annual evaluations of Grievant, and by all appearances saw them as acceptable service, as did the three long-time faculty members who testified at the level three hearing. The undersigned is truly amazed that Respondent finds it acceptable to disregard the annual evaluations Grievant received for five years and award him a terminal contract when he was told the preceding year that his service activities were excellent.

*Id.* at p. 23.

In this case, Grievant was clearly led to believe that based upon her Self Reports she was performing well and on track for promotion. Failure to consider the criteria set out in those reports in the evaluation process would be unfair and arbitrary and capricious since it is the very criteria by which she was judged on a year-to-year basis.

The issue comes down to whose interpretation of the promotion standard is correct. Dr. Jayasuriya's view is that publication is required for promotion to professor and that student directed research and field study do not meet the criterion of scholarly activity. Interim Provost Byer and the program coordinator, faculty chair and the Promotion and Tenure Committee members conclude that the scholarly activity criterion was specifically created to cover a broader array of activities than classic research and publication.

Dr. Jayasuriya based his interpretation that publication is required upon the Handbook subsection of Research/Creative Activity which states:

Research should result in a tangible product such as a peer-reviewed journal article, book, proceedings abstract,

presentation at a professional conference, or some other verifiable contribution to the discipline.

He also believes that student directed research and field study are solely teaching activities and not scholarly activities.

The other evaluators point out that student directed research has been included in the Self Report form as scholarly activity and has served as a guide for faculty as to whether they are meeting promotion standards. They note that these activities have been counted in the promotion process for years as scholarly activity.

Regarding publication as a requirement for promotion to full professor, Dr. Byers has served in faculty and administrative positions for decades. He participated in the creation of the scholarly activity criterion and has often participated in utilizing Handbook the promotion criteria for promotion applications. As stated herein Dr. Byers noted the criterion of scholarly activity was amended to broaden the activities which would qualify to include more than research and writing. Dr. Byers reiterated that scholarly activity now encompasses; Research/Creative Activities, Activity in Professional and Learned Societies, and Professional Growth. It is not limited to classic research and writing. Interim Provosts Byers interpretation is supported by the inclusion of the subsets Learned Societies and Professional Growth in the scholarly activity criterion. Dr. Jayasuriya conceded that Grievant exhibited scholarly activity in these subsets but discounted them because they did not lead to publication.

The grievance board has been faced with a similar situation in the past. In *Gall v. West Liberty University*, Docket No. 2011-1649-WLU, the Grievance Board addressed somewhat similar circumstances. It stated:

In this case, the undersigned is presented with a situation where four faculty members and the Department Chair, who had the most familiarity with Grievant's teaching and the standards of discipline, came to the conclusion that he met the standards set by [the university], while three administrators did not. So the question is, which group got it right? Having heard the explanations offered by various individuals, and having reviewed the somewhat scathing letters written denying Grievant's applications, the undersigned must conclude that it is the conclusions of the Committee and the Department Chair which should be given deference, while the opinions of the three higher level administrators should be discounted.

*Id.* at p. 21. In reaching this decision, the Grievance Board emphasized that those who knew the professor's work best received the greatest weight. The Grievance Board further highlighted the fact that the professor lacked notice of certain changes and the evaluators that knew him best evaluated him under the proper criteria.

In this case, Dr. Byers, the program coordinator, faculty chair and P&T committee members all knew Grievant and her work very well. Moreover, Interim Provost Byers had extensive knowledge regarding the creation and intent of the promotion criteria and how they had been routinely applied. There is simply no basis in the Handbook for Dr. Jayasuriya's conclusion that Grievant could not be promoted without a published article or book.

Grievant proved by a preponderance of the evidence that she met and exceeded the WVSU Handbook criteria for promotion to full professor. Grievant also proved by a preponderance of the evidence that Dr. Jayasuriya ignored or discounted many activities other than publication, which clearly fit the criteria for scholarly research, rendering his decision to deny Grievant's promotion arbitrary and capricious. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Accordingly, the grievance is **GRANTED**.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichtliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The review of an institution of higher learning's 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 v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (Ap. 11, 1995). "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." *Sui v. Johnson*, 784 F.2d 238 (4<sup>th</sup> Cir. 1984).

3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

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

5. "In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service." *Baker, supra; Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar.6, 1996). However, "[p]romotion and tenure are paramount professional and economic goals of a teacher." *State ex. rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978)." *Finver v. Bd. of Trustees*, Docket No. 97-BOT-271 (Oct. 15, 1997). See also, *Rankin v. Board of Trustees/Marshall University*, Docket No. 99-BOT-421.

6. Grievant proved by a preponderance of the evidence that she met and exceeded the WVSU Handbook criteria for promotion to full professor.

7. Grievant proved by a preponderance of the evidence that Dr. Jayasuriya ignored or discounted many activities other than publication, which clearly fit the criteria for scholarly research, rendering his decision to deny Grievant's promotion arbitrary and capricious. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to immediately promote Grievant to the rank of Professor, and pay Grievant back pay in the amount of the difference in what she has earned and the amount she would have earned as a Professor, from fifteen days before



the filing of this grievance to the date of her promotion to the rank with statutory interest and all other benefits she would have received from her promotion.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

**DATE: January 10, 2020.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**