

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

**SLAV GRATCHEV,**  
**Grievant,**

**v.**

**Docket No. 2020-1422-MU**

**MARSHALL UNIVERSITY,**  
**Respondent.**

## **DECISION**

Grievant, Slav Gratchev, is employed by Respondent, Marshall University, as an Associate Professor in the Department of Modern Languages. Dr. Gratchev filed a level one grievance form dated April 23, 2020, alleging the following:

My promotion to Full Professor has been denied. This denial was based on the insufficient, inadequate, and superficial evaluation of my teaching performance. All provided evidence was overlooked, or ignored, or not taken into consideration.

As relief, Grievant seeks promoting to full Professor status and compensation.

A level one hearing was conducted on June 18, 2020. The grievance evaluator issued a recommended decision denying the grievance on June 22, 2020 and the decision was upheld by F. Layton Cottrill, Jr. as designated representative for the Chief Administrator, the President of Marshall University. Grievant filed an appeal to level two dated June 26, 2020. A mediation was conducted on August 7, 2020, and Grievant filed an appeal to level three dated August 13, 2020.

A level three hearing was conducted on December 2, 2020, at the Charleston office of the West Virginia Public Employees Grievance Board via the Zoom video platform. Grievant appeared *pro se*. Respondent was represented by Dawn George, Esquire, Assistant Attorney General. This matter became mature for decision on February 8,

2021, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant is contesting the denial of a promotion to the rank of Professor at Marshall University. He asserts that his teaching performance was not properly assessed causing him to receive a lower ranking in that criteria. The consequence of that ranking was that Grievant did not qualify for the promotion to Professor. To be promoted a candidate must be ranked "exemplary" in two of the three areas of performance; Research and Scholarship, Teaching and Advising, and Service. His performance was rated as "exemplary" in the area of Research and Scholarship but only "professional" in the areas of Teaching and Advising and Service. Grievant did not contest the rating in the Service category but disagreed with the rating of his teaching performance. He argues that the rating was arbitrary and capricious because the Committees either ignored or did not fully appreciate his performance in that area. While reasonable people might disagree with the rating Grievant received in Teaching, Respondent demonstrated that the rating committees fully reviewed all of the materials submitted by Grievant and used the appropriate criteria for judging his application. Grievant did not prove that Respondent's decision was arbitrary or 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.

## Findings of Fact

1. Grievant, Slav Gratchev, is employed by Respondent, Marshall University ("MU"), as an Associate Professor in the Department of Modern Languages ("DML"). The DML is one of the departments within the MU College of Liberal Arts ("COLA").

2. Dr. Gratchev has earned tenure at MU and has worked his way through the promotion process to the rank of Associate Professor. He has held the rank of Associate Professor for more than four years and applied for a promotion to the rank of Professor at or near the beginning of 2020.

3. There are six steps to the MU promotion process with designated committees and university officials reviewing the application and making a recommendation at each step. The final determination is made by the MU President. The candidate prepares a detailed portfolio pursuant to the department and college guidelines and submits it to the various steps for consideration. The six steps of review for Grievant's portfolio were the following:

- The Promotion and Tenure Committee ("P&T Committee") for the Department of Modern Languages.
- The Chair of the Department of Modern Languages.
- The P&T Committee for the College of Liberal Arts.
- The Dean of the College of Liberal Arts.
- The Marshall University Provost.
- The Marshall University President.

4. *Board of Governors Policy No. AA-28, Faculty Tenure* requires that to be promoted to the rank of professor, a candidate must have:

- Earned the doctoral degree in a discipline appropriate to the teaching field or have been awarded the terminal degree in a discipline appropriate to the teaching field.
- Must have had at least four complete academic years of experience in the rank of associate professor.

- Must have demonstrated “exemplary” performance in at least two areas of responsibility and “professional” performance and achievement in all other areas of responsibility. These areas include but are not limited to: 1) Teaching and Advising; 2) Research, Scholarship and Creative Activities; and 3) Service and Professional Development.

(Grievant Exhibit 18)

5. The *Tenure and Promotion Guidelines, Department of Modern Languages* also require that a candidate for the rank of Professor must “. . . demonstrate ‘professional’ performance in all of the candidate’s areas of major responsibility and ‘exemplary’ performance in at least two areas from among Teaching, Research (defined as Scholarly and/or creative Achievements), and Service.” (Grievant Exhibit 3, pp 4-5)

6. The *Tenure and Promotion Guidelines, Department of Modern Languages* also requires the following:

“The candidate must present a complete, well-organized, well-documented, and clear Portfolio arranged according to a Table of Contents, and each section of the application should be clearly separated and marked.”

“An explanatory narrative must accompany all the above-mentioned documents when claiming exemplary in the teaching category.”

(Grievant Exhibit 3, p 6)

7. Grievant holds a Doctorate in his field and had been in the rank of Associate Professor for more than four years at the time of his application. The only issues to be determined were whether his portfolio met University standards and his performance was found to be exemplary in two of the three areas of responsibility set out in the University, College, and Department Guidelines.<sup>1</sup>

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<sup>1</sup> The three areas were the same in all the guidelines: Research; Teaching and Advising; and Service.

8. Grievant submitted his portfolio to the DML P&T Committee for review in January 2020. The Committee met to review and discuss the portfolio as well as make their recommendation to the Department Chair.

9. By letter dated January 23, 2020, the DML P&T Committee Chair, Dr. Maria Christina Burgueno, submitted the committee's findings and recommendation to the DML Chair Dr. Matsuki Fukunaga Anderson. (Grievant Exhibit 20)

10. The DML P&T Committee found that Grievant's performance was "exemplary" in the areas of Research and Service, and "professional" in the area of Teaching and Advising. The committee's findings in the areas of Teaching and Research were unanimous. However, some members of the committee believed that Grievant's performance in the Service area fell short of "exemplary" and should have been rated "professional." The DML recommended that the promotion be granted but expressed reservations. *Id.*

11. Dr. Burgueno outlined the committee's reservations and corrections that needed to be made to the portfolio as follows:

The majority of the committee supports the category 'exemplary' in two areas (Research and Service). However, the full committee agrees that this assessment stands provided that the candidate will make suggested changes related to narrative, organization of the dossier, and self-evaluation of his role. The required modifications are described below.

Dr. Burgueno also noted that any changes to the portfolio must be made before it was submitted to the Department Chair for consideration. *Id.*

12. The suggested changes included that:

The display of the portfolio's contents must have a better organization to provide simplicity and accuracy to the reading.

An explanatory narrative for the three areas is needed.

The documentation presented does not have a clarifying account for any of them; thus, it doesn't show the scope of work.

Support materials must be placed in the proper categories. The portfolio had a significant amount of material in the Teaching category which should have been in the Service area.

*Id.*

13. The DML P&T Committee attached a chart to the letter which set out committee findings and concerns in each area. Those concerns were set out as follows:

**Research:** Why exemplary:

DASA Award Winner and many more articles and presentations than required by the DML (Dept. of Modern Lang) and COLA (Coll of Lib Arts) guidelines. Co-edited 6 books from 2017-2019 and has 9 Category One publications.

**Teaching:** Why professional:

Student and Peer evaluations are exemplary but;

- Portfolio is missing an earnest self-evaluation of teaching. Self-evaluation letter submitted is full of platitudes and empty of specifics. This letter is required by both DML and COLA guidelines.
- Submitted multiple activities in this section that were clearly service, not teaching or advising.
- **Advice:** Do an earnest self-assessment of teaching that examines real deficiencies.

**Service:** Why split between exemplary and professional:

- Dept. requirements mandate five committees. Except for chairing the COLA Conference, most of the committees are very light
- Many one-day or one-time committees (three-year review committee, Green and White Day) listed under department/college service.
- No real University service: commencement usher and newspaper interview don't cut it.

- No real professional service: those listed are all article/book reviews which should count under research.
- Community Service: things such as Judo do not count.
- **Advice:** Could use much more department, college, but especially university service for an Exemplary rating.

*Id.*

14. Grievant Gratchev made no changes to his portfolio prior to submitting it to the Chair of the Department of Modern Languages, Dr. Matsuki Fukunaga Anderson.

15. Department Chair Dr. Anderson reviewed Grievant's portfolio and detailed her findings and recommendations in a letter to the College of Liberal Arts P&T Committee, dated February 4, 2020. Dr. Anderson agreed with the findings of the DML P&T Committee that Grievant's performance was "exemplary" in the areas of Research and Service but was "professional" in the Teaching area. Consequently, she supported the promotion.

16. Regarding the "professional" rating in Teaching, Dr. Anderson noted:

[E]ach section should have a more in-depth narrative and data providing more specifics as evidence such as the average mean scale for student evaluation in a chart, a list of courses Dr. Gratchev taught since fall of 2016, a number of students he advised as a faculty advisor each semester, etc.

Dr. Anderson also found that the positive evaluations from students for Grievant were below the average for the DML and there were large gaps between students who really liked Grievant's courses and those who did not. She also noted that Grievant needed to be more collegial with his colleagues and not be dismissive of anyone who disagreed with him.<sup>2</sup>

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<sup>2</sup> Level three testimony of Dr. Matsuki Fukunaga Anderson.

17. Several female students had made complaints to Dr. Anderson that Grievant used harsh language toward females and was biased against women. She brought these complaints to Grievant's attention and he was dismissive of them or accused the students of lying. There was a constant tension between Grievant and female students. *Id.*

18. Step three of the process was a review of the portfolio by the College of Liberal Arts P&T Committee. The College of Liberal Arts *Promotion and Tenure Guideline* state:

[An applicant must submit] a letter of application for Tenure/Promotion in which the candidate describes how his or her achievements meet the Department (where appropriate), College of Liberal Arts, and *Greenbook* evaluation criteria." ... [The letter] "should also clearly indicate the areas of Exemplary performance and the Profile for which the candidate is applying."... "[It] is incumbent upon the candidates for Tenure and/or Promotion to provide comprehensive and representative evidence of the candidate's responsibilities and achievements.

19. The COLA P&T Committee was chaired by Nicholas Freidin, DPhil who is a Professor in the Department of Sociology and Anthropology. While all members of the committee read the portfolio, it was first assigned to Dr. Shawn Schulenberg, Professor and Chair of Political Science, to perform a complete evaluation of the portfolio and lead the committee discussion of Grievant's application.

20. Dr. Schulenberg did not believe that Grievant's application met the requirement to submit sufficient evidence in the portfolio for adequate review. Dr. Schulenberg specifically stated that Grievant's self-narrative was one of the shortest and contained the least amount of introspection he ever saw in a portfolio. Dr. Schulenberg identified three issues he had with the portfolio: 1) It was poorly organized and placed



evidence of achievement in the wrong areas; 2) The self-assessment was too short and inadequate; 3) the portfolio lacked required thorough discussion of areas, there was nothing specific on any issues.<sup>3</sup>

21. By letter dated February 26, 2020, Dr. Freidin notified the Dean of the College of Liberal Arts, Dr. Robert Bookwalter, of the findings and recommendations of the COLA P&T Committee. The committee “found that Dr. Gratchev did not meet the criteria for promotion to the rank in question, being ‘exemplary in only one area (research) and ‘professional’ in the remaining two (teaching and service), according to the COLA P&T Guidelines.”<sup>4</sup> (Grievant Exhibit 21)

22. Dr. Freidin laid out the committee’s findings in each area as follows:

- **Teaching/Advising:** The candidate claimed ‘exemplary’, and his department committee and chair claimed ‘professional’. Our committee found Dr. Gratchev borderline ‘professional’. Although his student evaluations were most favorable (we place very little importance on these), and his peer review letters were glowing, we were most troubled by his self-assessment of teaching, frankly sub-standard. It was brief, full of platitudes and empty of specifics. We expected more reflection and depth, as demonstrated by others seeking the same rank this year. Also, the application submitted activities in this section, work on department and college committees, better suited in the category of service.
- **Research:** “We concur with Dr. Gratchev’s claim, supported by his departmental committee and the chair, that he demonstrates and ‘exemplary’ performance in this area. He exceeded the minimal requirement as a winner of the DASA Award with some seven Category One publications and six Category One presentations. Dr. Gratchev is a productive contributor to his discipline.

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<sup>3</sup> Level three testimony of Dr. Shawn Schulenberg.

<sup>4</sup> The COLA P&T Guidelines were admitted into the record as Grievant Exhibit 2.

- **Service:** The candidate claimed 'exemplary' in this area, as did the departmental committee (although split), and the chair. Our committee found his service only 'professional'. Indeed, chairing the COLA Research and Creativity Conference in 2016 was an onerous responsibility. However, we viewed Dr. Gratchev's other service on the light side, many involving a one-day or one-time commitment. His contributions at the university, professional and community levels were also found to be lacking. Articles and book reviews, supportive materials listed by the applicant in this section, are more appropriate in the area of 'research'.

*Id.*

23. Dr. Freidin concluded that "[t]he committee found Dr. Gratchev's portfolio ill prepared and confusing, somewhat dismissive, even arrogant in places." He encouraged Dr. Gratchev to "reapply for promotion with a better prepared and more thoughtful dossier" and noted the decision was unanimous. *Id.*

24. Dean Robert Bookwalter's review of Grievant's portfolio was the fourth step in the promotion process. Dean Bookwalter agreed with the conclusions reached by the COLA P&T Committee. He found Grievant's performance 'exemplary' in Research but 'professional' in the Teaching/Advising and Service areas. He wrote that "evidence in the portfolio supports ... a rating of professional in teaching and advising." He noted that, "While Grievant's student evaluations were on par with his colleagues, there was also evidence that the evaluations are slightly below others in the Spanish faculty and the Department of Modern Languages."

25. Dean Bookwalter had three specific areas of concern which kept Grievant from reaching the 'exemplary' rating: 1) Grievant did not provide detailed summaries of student evaluations, with actual specific data; 2) five of the seven semester student

evaluations were below average for the department; and 3) there was no discussion or data regarding the quality of Grievant's advising.<sup>5</sup>

26. Grievant's portfolio and the recommendations from the initial four steps were forwarded to Dr. Jaime Taylor, MU Provost and Senior Vice President for Academic Affairs. His role is mostly to review the assessments at the previous levels as well as issues of process and fairness. He looks for consistency at the levels and whether the rules, regulations and guidelines were followed. Provost Taylor does not second guess lower level judgements if proper procedures are followed. He focused on areas where previous reviewers disagreed to see if they are reasonable. Provost Taylor found that the MU policies and guidelines related to promotion and tenure were followed and there was nothing inappropriate in the ratings. He then passed the recommendation of Dean Bookwalter and the COLA P&T Committee that the promotion be denied to the MU President.

27. At the sixth and final level, MU President, Jerome A. Gilbert, Ph.D., adopted the recommendation of Provost and Senior Vice President for Academic Affairs, Dr. Jaime Taylor. Grievant's application for promotion to Professor was denied.

28. Dr. Victor Fet, Professor of Biology, wrote a peer review letter in support of Grievant's promotion. (Grievant Exhibit 16) He independently reviewed Grievant's Portfolio and found it was well organized and well prepared. He noted that it was better than some he had reviewed in his own department.<sup>6</sup>

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<sup>5</sup> Level three testimony of Dean of the College of Liberal Arts, Dr. Robert Bookwalter.

<sup>6</sup> Level three testimony of Dr. Victor Fet.

29. Larry Sheret, Scholarly Communication Education Research Librarian, also wrote a peer review letter in support of Grievant's application. (Grievant Exhibit 16) He believed Grievant's application exceeded all the applicable Marshall University requirements for promotion to full professor. Mr. Sheret visited Grievant's classes and was impressed with the amount of student involvement and that students willingly participated in the class discussions.<sup>7</sup>

30. Dr. Caroline Perkins is retired from position of Chair of the Department of Modern Languages. She visited Grievant's classes on two occasions. She noted that the students only spoke Spanish in the classes she observed, and the students seemed impressed with themselves. Grievant taught honors courses and developed e-courses titled WV Rocks. Grievant incorporated his own research teaching his honors classes and has served as a guest lecturer in courses at MU. Dr. Perkins opined that Grievant's performance in Teaching and Advising was "exemplary".<sup>8</sup>

31. Dr. Perkins did not participate in the formal review process for Grievant's promotion application, however she had participated in such reviews prior to her retirement. She could not remember if she ever rated an applicate as less than 'exemplary' in Teaching and Advising.

### **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

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<sup>7</sup> Level three testimony of Larry Sheret. Mr. Sheret has not participated on a P&T Committee and his opinions related to the promotion guidelines were based upon his knowledge of the *MU Greenbook*.

<sup>8</sup> Level three testimony of Dr. Caroline Perkins, retired.

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 (4<sup>th</sup> 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.

Grievant challenges Respondent's decision that he did not meet Marshall University's requirement for promotion to Professor. *Board of Governors Policy No. AA-28, Faculty Tenure* requires that to be promoted to the rank of professor under a candidate must have earned a doctoral degree in their discipline, served in the rank of Associate Professor for four or more academic years, and demonstrated 'exemplary' performance in at least two areas of responsibility and 'professional' performance in all other areas of responsibility. The three areas for consideration are Research, Teaching and Advising,

and Service. *Id.*<sup>9</sup> The *Tenure and Promotion Guidelines* for the Department of Modern Languages and the College of Liberal Arts echo these requirements.

All the reviewers found Grievant's Research performance to be exemplary. Indeed, Grievant has produced a prodigious number of books and peer reviewed articles in his field. Grievant does not contest the conclusion of the College of Liberal Arts P&T Committee and Dean that his performance in the Service area is 'professional' rather than 'exemplary'. The only issue remaining is whether the finding at all six stages that in the Teaching and Education area, Grievant's performance was only 'professional', was arbitrary and capricious or clearly wrong.

Grievant, and the witnesses who appeared on his behalf, believe that his teaching was exemplary as evidenced by the documentation in his portfolio. They also opined that his portfolio was well organized and complete. On the other hand, the members of the DML P&T Committee, the DML Chairperson, the COLA P&T Committee, and Dean, as well as the Provost, unanimously agreed that Grievant's portfolio was poorly organized, lacked sufficient detail and introspection, and did not support a finding of 'exemplary' pursuant to the MU P&T guidelines. All the witnesses appeared to be earnest in their opinions and beliefs about Grievant's application and the portfolio in support thereof.

The fact that reasonable professionals honestly disagree on these findings is not decisive. To prevail Grievant must prove by a preponderance of the evidence that the decision of the reviewers did not conform to applicable college promotion policies and guidelines or was otherwise arbitrary and capricious. *Harrison v. W. Va. Bd. of Directors*, Docket No. 93-BOD-400 (April 11, 1995). There was no evidence that the various

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<sup>9</sup> See FOF 4, *supra*.

committees and officials did not review Grievant's portfolio in conformance with *Board of Governors Policy No. AA-28, Faculty Tenure* and the accompanying Promotion and Tenure Guidelines of the College and Departments. The issue is whether the conclusions they reached were arbitrary and capricious based upon the application of these guidelines to the evidence Grievant provided in his portfolio.

When judging Grievant's portfolio, virtually all the reviewers found that Grievant's portfolio was generally poorly organized. For example, some of the documents submitted for the Teaching area were applicable to research. Dr. Freidin stated that "[t]he [COLA P&T] committee found Dr. Gratchev's portfolio ill prepared and confusing, somewhat dismissive, even arrogant in places." While they did not state it so bluntly, the majority of reviewers generally agreed with that assessment. They all agreed that Grievant's self-assessment was far short of their expectations. It lacked any specifics, consisted mainly of platitudes, and did not contain any of the introspection which was required for a proper portfolio. As D., Shulenberg noted, the portfolio lacked required thorough discussion of areas as required by the guidelines.<sup>10</sup> For example, in the area of Advising there was only a copy of Grievant's advising log without any explanation of problems or trends Grievant found and assisted with.

Most of the reviewers acknowledged that the peer reviews and student statements included in the portfolio were very positive and strong. However, the student evaluations of Grievant as a whole, were below average when compared to the other instructors in his Department. Additionally, several female students had complained to the DML Chair

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<sup>10</sup> "An explanatory narrative must accompany all the above-mentioned documents when claiming exemplary in the teaching category," DML *Promotion and Tenure Guidelines*. FOF 6 *supra*.



that Grievant was harsh and biased toward women in his classes. When Dr. Anderson shared these complaints with Grievant, he was either dismissive or alleged that the students were lying. These were not isolated incidents and are a valid concern when someone is seeking an exemplary rating in Teaching and Advising.

Grievant clearly disagrees with the decision of the reviewers and points to the evidence he provided in his portfolio to argue that he met the exemplary standard for Teaching and Advising. He argues that the reviewers must have ignored or overlooked this evidence in reaching their decision. However, there is no evidence the committees ignored or overlooked the materials in Grievant's portfolio. Each level discussed the various parts of Grievant's submissions and unlike Grievant, all levels unanimously found Grievant's performance fell short of the standard. There is no evidence that the reviewers relied on factors that were not intended to be considered, entirely ignored important aspects of the application, or explained their decision in a manner contrary to the evidence before them. The decision of the committees and officials were supported by substantial evidence and were rationally explained. In these circumstances such decision is presumed to be valid and not arbitrary and capricious. *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)).

Grievant did not prove by a preponderance of the evidence that Respondent's decision to deny his application for promotion to the rank of Professor was arbitrary and capricious. Accordingly, the grievance is **DENIED**.

## 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." *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.*

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. The decision of the committees and officials were supported by substantial evidence and were rationally explained. In these circumstances such decision is presumed to be valid and not arbitrary and capricious. *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)).

7. Grievant did not prove by a preponderance of the evidence that Respondent’s decision to deny his application for promotion to the rank of Professor was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA.

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

**DATE: FEBRUARY 23, 2021**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**