KERRY KILBURN,

Grievant,

v. **Docket No. 94-BOD-1046**

BOARD OF DIRECTORS/WEST

VIRGINIA STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Kerry Kilburn, grieves West Virginia State College's ("State") decision to deny her tenure and promotion. (See footnote 1) This case has a lengthy and convoluted history. Grievant filed this grievance in early June after requesting and receiving President Hazo Carter's list of reasons for denial of tenure. The grievance was denied at Levels I and II. Level III hearings were conducted on August 8, 1994, August 23, 1994, and October 6, 1994. Throughout these hearings, Respondent repeatedly requested Grievant clarify her Statement of Grievance which stated:

On 13 May 1994, grievant was notified that she had been denied tenure, that she would not be retained as a faculty member and that she was being placed on a terminal appointment for FY 1995. Grievant's request for promotion was not ruled upon. The decisions adverse to grievant were based upon violations, misapplications, or misrepresentations of institutional rules, regulations and policies.

Initially, the Level III Hearing Examiner, Dr. Douglas Call, allowed the hearings to proceed, but on October 6, 1994, he expressed concern about his ability to formulate properly a Level II decision when specific grievable events were not identified. Dr. Call ordered Grievant to file an amended Statement of Grievance within one week or face dismissal of her case. Instead of complying with this request Grievant filed a Writ of Prohibition in Kanawha County Circuit Court to prevent dismissal of the case. On October 25, 1994, Judge Herman Canady denied the Writ and advised Grievant she could progress to Level IV of the grievance procedure. On October 28, 1994, Dr. Call's Level II decision upheld State's denial of tenure.

In reaching this decision, Dr. Call utilized the broad Statement of Grievance cited above due to

Grievant's refusal to clarify the grievance. He found no violations, misapplications, or misinterpretations of any statutes, rules, or policies. Dr. Call held State's decision to deny tenure was not arbitrary and capricious.

Grievant appealed to Level IV on November 7, 1994. On January 27, 1995, after receiving and reviewing the file, the undersigned ordered Grievant to amend and clarify her grievance as the Statement of Grievance did not then allege a grievable event or events as required by statute. On February 9, 1995, Grievant complied with this request and filed the following Amended Statement of Grievance, the pertinent sections of which are represented below:

At the time she was denied tenure, Dr. Kilburn had demonstrated sufficient evidence of eligibility for tenure in the following specific areas as outlined in WVSCR §131-36-1 et seq.: excellence in teaching, accessibility to students; professional and scholarly activity and recognition; significant service to the college community;experience at the institution; possession of the highest earned degree in the field; publications and research; potential for continued professional growth; and service to the people of West Virginia.

In denying tenure to Dr. Kilburn, respondent violated or misapplied the criteria set forth in the applicable regulations and substituted in their stead criteria outside of the regulations and arising, in part, from the personal preferences of the department chair. Use of criteria different from the regulations additionally caused grievant to be denied due process of law, as protected by Article III, §10 of the Constitution of West Virginia.

In denying tenure to Dr. Kilburn, respondent violated principles of academic freedom, as set forth in §131-36-2.1 et seq., by denying tenure on the basis of the contents of courses taught by Dr. Kilburn.

In denying tenure to Dr. Kilburn, a motivating or determining factor in respondent's decision was Dr. Kilburn's active participation in the faculty senate and her exercise of her right to free speech as protected by Article III, §7 of the Constitution of West Virginia.

Respondent's denial of tenure of Dr. Kilburn violated her right to due process of law, as protected by Article III, §10 of the Constitution of West Virginia, to the extent that her evaluations and renewal of contract letters did not adequately inform her of her alleged performance deficiencies and/or did

not inform her of the criteria to be applied in determining her tenure application.

Respondent discriminated against Dr. Kilburn by considering as a factor in the denial of tenure her performance and absences during a time that she was seriously ill and disabled.

Dr. Kilburn met the criteria for promotion to the rank of assistant professor, and respondent violated or misapplied the applicable regulations when it implicitly denied her application for promotion.

On January 3, 1995, Grievant requested a pre-hearing ruling on whether this Grievance Board had subject matter jurisdiction over her claim she was denied tenure in retaliation of her exercise of her right to freedom of speech. After the parties submitted Memorandum of Law of this issue, the undersigned ruled on this issue on March 1,1995, at the beginning of the Level IV hearing. (See footnote 2) The undersigned ruled the issue of denial of tenure was properly before this Board and would be examined in light of the statutes governing grievances and the policies governing tenure. The failure to grant tenure is a grievable event and as such is properly under the purview of the Grievance Board.

Five days of hearing were conducted on March 1, 1995, March 10, 1995, April 10, 1995, May 1, 1995, and June 16, 1995. This case became mature for decision on August 31, 1995, the deadline for the submission of proposed findings of fact and conclusions of law.

Some background information may be helpful before discussing the issues in this case. A typical tenure track employee "goes up" for tenure and promotion the sixth year of their employment. If tenure is not granted they receive a one year terminal contract. If a faculty member intends to seek tenure she must notify her Department Chairperson and prepare a portfolio detailing her accomplishments and duties. The tenure process at State involves having a professor's portfolio reviewed and evaluated by multiple individuals in succession. Grievant's review started with the Biology Department Chairperson, Dr. Bonnie Dean, who recommended denial of tenure. Grievant's portfolio was next reviewed by Dr. Kathy Harper-Morris, the Division of Natural Science and Mathematics Chairperson, and then the Promotion and Tenure Committee. These two reviews resulted in negative recommendations. Next, all these written recommendations andthe portfolio are forwarded to Dr. Barbara Oden, Vice President of Academic Affairs, who recommended denial of tenure to President Carter.

President Carter, on the basis of all the lower level recommendations and his own review, denied Grievant tenure and informed her of this decision by letter dated May 13, 1994. (See footnote 3) Grievant then requested a formal statement of reasons for her non-retention. Dr. Carter's reply, dated May 25, 1994, listed the following reasons for his decision.

1.

Failure to demonstrate the broad training in zoology shown and explained to you at the time of your hiring to be a requirement for the person filling that position in biology;

2.

failure, as a biology faculty member, to participate at an acceptable level in helping the department to develop an undergraduate research program for biology majors; and

3.

failure to participate in departmental planning, management, and extracurricular activities at a level expected of a biology faculty member.

You were employed in 1988 in a tenure track position as assistant professor of biology: zoology. The position announcement outlined the expectations and, I have been assured, those expectations were explained to you by your department chairs over the last six years. Reviews of your performance of those job responsibilities were conducted by your department and division chairpersons, the Faculty Senate Promotion and Tenure Committee, and the vicepresident for academic affairs. Each recommended that you not receive tenure.

Among the factors that I must consider in granting tenure under Procedural Rule 36 are the current and projected mission of the biology department and the specific competencies a probationary faculty member has displayed in helping that department accomplish its mission. From the conclusions reached after each review, denial of tenure is in order.

Tenure Guidelines

Section 9 of Policy Bulletin 36 states the requirements and guidelines for tenure. The pertinent sections are reproduced below.

SECTION 9 TENURE

9.1

Tenure is designed to ensure academic freedom and to provide professional stability for the experienced faculty member. It is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community. Continuous self-evaluation, as well s regular evaluation by peer and administrative personnel, is essential to the viability of the tenure system. Tenure should never be permitted to mask irresponsibility, mediocrity, or deliberate refusal to meet academic requirements or professional responsibilities. Tenure applies to those faculty members who qualify for it and is a means of making the teaching and research professional attractive to persons of ability. There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; accessibility to students; professional and scholarly activity and recognition; significant service to the college community; experience in higher education and at the institution; possession of the earned doctorate or the highest earned degree appropriate to the teaching field, granted by a regionally accredited institution, or special competence that is deemed to be equivalent to such academic credentials; publications and research; potential for continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to tenure shall rest with the institution.

9.2

In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. The institution, while not maintaining "Tenure Quotas," shall be mindful of the dangers of losing internal flexibility and institutional accountability to the citizens of the state as the result of an overly tenured faculty. Tenure may be granted only to people in positions funded by monies under the control of the State College System Board.

9.3

Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution following consultation with appropriate academic units.

Title 130, Procedural Rules, State College System of W. Va.; Board of Directors, Series 36.

Issues

Grievant argues 1) that she met all the requirements for tenure and promotion identified in Policy Bulletin 36; 2) that different criteria were applied to her, rising in part from Dr. Dean's personal preference; 3) that she was not put on notice, prior to her non-retention, that her performance was deficient and must be corrected or tenure would be denied; 4) denial of tenure violated her academic freedom, because it was based on the content of the courses she taught; 5) she was discriminated against because her performance and absences due to illness were considered in this denial; and 6) a determining factor in her non-retention was consideration of her right to free speech through her active participation in the Faculty Senate.

Respondent states Grievant's denial of tenure was based on her inability or unwillingness to perform the duties she was hired toperform. Respondent also responds that Grievant was informed of her duties and deficiencies and attempts to communicate and offers of help were rebuffed by Grievant and disregarded. Respondent further argues neither Grievant's academic freedom nor her free speech rights were violated in any way, and that in fact Grievant was encouraged to grow and become an active participant in the Biology Department. (See footnote 4)

In this case the issue of witness credibility is of paramount importance since much of Grievant's testimony either directly contradicts Respondent's witnesses or her view of events diametrically opposes their's. In assessing the witnesses' credibility the undersigned utilized the guidelines and factors set out in the United States Merit System Protection Board Handbook ("MSPB Handbook"). Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Some identified factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, an 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's information. Id.

Standard of Review

In cases involving the denial of tenure the Grievant has the burden of proving her case by a preponderance of the evidence, and this Grievance Board's review of an institution of higher learning tenure decision is "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 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 Fed. 2d 238 (4th Cir. 1984); see also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official administering the process." Harrison, supra; Gardener v. Bd. of Trustees, Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, a grievant, attempting to prove wrongful denial of tenure, must demonstrate the action was arbitrary and capricious, clearly wrong, or a violation of college policy.

Discussion

I. Whether Grievant met all the requirements of promotion and tenure or whether a different set of criteria was used in assessing Grievant's performance?

In 1988, Grievant applied for a tenure track appointment as an assistant professor in Biology at State pursuant to the following position announcement.

POSITION: Biology: Zoologist, Assistant Professor, tenure track.

RESPONSIBILITIES:

1.

Teach introductory zoology course and advanced courses to biology majors.

2.

Develop a program of undergraduate research for biology majors.

3.

Participate in teaching introductory biology courses for non-majors.

4.

Participate in departmental planning, management, and extra-curricular activities.

5.

Maintain an active schedule of relevant professional activities.

6.

Accept assignment on appropriate departmental, divisional, and institutional committees.

7.

Advise students in academic, career, and professional matters.

QUALIFICATIONS:

1.

Completed PhD desired. Master's plus 30 hours acceptable.

2.

Broad training in zoology. Training in developmental biology will be considered a plus.

3.

Commitment to undergraduate teaching and research.

4.

Commitment to teaching at an institution with a large community population of first generation, non-advantaged students.

5.

Concern for the intellectual, psychic, and physical well being of all students.

6.

Commitment to equal opportunity and affirmative action regarding race, gender, and handicap.

Following an interview and review of her recommendations, State hired Grievant because of her broad-based zoology background and involvement in research. Grievant replaced Dr. Oden, who had been the Department's only zoologist. Grievant, as the only zoologist, was expected to teach all the subjects Dr. Oden had taught, including both vertebrate and invertebrate courses, as well as organizing and developing undergraduate student research.

In reviewing Grievant's application for tenure, her performance of the previous six years was compared with what was required of her by her position announcement and examined in light of Policy Bulletin 36, supra, which generally outlines requirements for tenure.

There was much testimony during the hearing about whether Grievant performed the duties expected of her as identified in the position announcement. A key issue was Grievant's failure to teach the invertebrate courses. She states she never knew, until 1993, that teaching these courses was one of her expected duties, and that no one ever told her these courses were her responsibility. Grievant further states, even after she was told these courses were her responsibility, no one ever directed or ordered her to teach them. Grievant further testified she was not qualified to teach these courses, but could do so if ordered, if she was given either release time or an extended period to prepare, i.e., a year. Grievant testified that the course would then still be only acceptable, not the kind of quality learning experience she usually offered her students. Even after being told these courses were her responsibility, Grievant made no efforts to plan, schedule, or prepare these courses for later semesters.

Dr. Thomas Hutto was Chairperson at the time of Grievant's hiring. He testified he informed

Grievant during several phone calls and her interview that she was expected to teach all zoology classes including the vertebrate and invertebrate courses just as the prior faculty member had. During her interview Grievant did not state she was unqualified to teach any of the courses. She did express some unspecified concern about being fully prepared to teach all of thecourses, but Dr. Hutto told her she would not be expected to teach them her first year with the college.

Dr. Dean testified Grievant knew these courses were her responsibility because both she and Dr. Hutto had told Grievant so. Dr. Dean agreed she never ordered Grievant to teach these courses, but also stated she did not order any of the professionals in her Department to do anything. Usually, she either told people what was needed, or asked them to do things, and they cooperated. She noted cooperation was essential in a department as small as their's. She also stated professors at State were expected to know their duties and perform them.

Apparently, although Dr. Dean expected Grievant to eventually teach these courses, she did not tell her for several years to do so. She finally became more directive about these courses and told her in 1993 she must teach them. Grievant, in an angry confrontation, told Dr. Dean she was not going to teach the invertebrate courses because she was not qualified to do so. She also told Dr. Harper-Morris and Dr. Hutto she could not teach these courses because she was not qualified. She later modified this statement somewhat, stating she could teach them, but not well, if she either received release time or one year prior notice. She also briefly discussed with Dr. Dean, Dr. Hutto, and Dr. Harper-Morris at separate times about a combined vertebrate/invertebrate course, but never committed this proposal to paper as required for submission to the faculty.

Dr. Harper-Morris also testified Grievant knew she was to teach the invertebrate courses and was upset about this because she felt shewas not qualified to teach them. Dr. Harper-Morris directed Grievant to talk to Dr. Dean.

Grievant's statement that she did not know until 1993 that she was responsible for all the zoology courses, including both vertebrate and invertebrate, is further rebutted by the faculty minutes of September 15, 1989. In that department meeting Grievant made numerous proposals to the department for many of the zoology courses. The recommendations included elevation of two vertebrate and one invertebrate course, changes in current courses, addition of a new course in animal physiology, and dropping two invertebrate courses. The elevations and changes in the courses were approved, the motion on the added course was tabled, and the motions to drop the two

invertebrate courses were dropped after faculty discussion revealed they would fail. Grievant, as the department's only zoologist, had obviously reviewed the course offerings and saw a need for change. Also, it does not make sense that a professor, who did not expect to be involved in the invertebrate courses, would recommend elevation of one course and the dropping of two others. It is noted Grievant's recommendations took place in September 1989 - four years before Grievant testified she learned she was expected to teach the invertebrate courses.

The undersigned finds Grievant knew she was responsible for teaching the invertebrate courses prior to accepting the positions, and took no steps to plan or teach any of these courses. Apparently, Grievant was either waiting for someone to order her to teach thesecourses or hoping something would happen so she would not have to teach them.

Another identified problem area in Grievant's performance of her duties was the planning and teaching of her laboratory exercises and experiments. All witnesses agreed Grievant was an excellent lecturer, and her classes were well organized, dynamic, and interesting. (See footnote 5) Grievant stated it took her ten to eleven hours of preparation for each hour of lecture time. However, Dr. Dean, Dr. Harper-Morris, and Dr. Hutto all testified Grievant had difficulty planning and conducting student laboratory assignments. Grievant agreed there were some difficulties in this area, but stated she either had corrected or was going to correct these problems, or the identified problems were not as bad as stated by these three biology department members.

Identified laboratory problems were: 1) deficient number of dissections; 2) utilization of lab time for papers and videos as opposed to "hands-on" experience; 3) failure to plan labs of sufficient length and complexity to use the scheduled time; 4) inability or refusal to correct identified lab problems; 5) inability or refusal to discuss lab problem areas with Dr. Dean, even after Dr. Dean had offered her help and guidance; 6) statements that she was not qualified to plan lab experiences in embryology; and 7) failure to follow department-identified guidelines in the core courses' lab experiences.

Most of the courses Grievant taught had a lab component. (See footnote 6) These courses had three hours of lecture and three hours of lab to equal four credit hours. Grievant testified she had only two dissections in Biology 206, a worm and a fetal pig. When Dr. Dean found out, she told Grievant to add more dissections, offered to help plan the additions, and reminded her this was a core course with certain department requirements. Grievant did add additional dissections, but stated these were not really needed and did not add anything to the course.

Grievant admitted she had a problem with the lab component in another course, Embryology. The first year Grievant taught Embryology she spent a lot of time developing the lecture portion and only a small amount of time on the lab component. Dr. Harper-Morris helped Grievant design some of the few lab experiences the students had during the year. Because the labs did not have enough content, they were frequently let out early. Dr. Dean discussed this problem with Grievant. The second time Grievant taught this course she again did not have time to work on the labs because she spent a large amount of time redoing the lecture portion. Again, few labs were planned and these did not last the proper length of time. Additionally, as with Biology 206, Grievant was criticized for the number of "wet labs" or labs with "hands-on" experience as opposed to ones with videos andvisual experiences. Dr. Dean told Grievant this was not acceptable. When Grievant was again scheduled to teach the course, Dr. Dean did not allow her to teach it because Grievant still had not demonstrated to her she had properly developed the lab component. Further, both Dr. Hutto and Dr. Harper-Morris testified Grievant told them after she had tenure she would never teach embryology again, and that she was not qualified to develop the lab portion of this course. Grievant denied making the tenure statement, and stated she could develop the embryology labs.

Dr. Dean documented Grievant's failure to maintain regular class hours during academic year 1990-91. Level IV Trans. - Resp. Exh. 12. This document demonstrates Grievant repeatedly either canceled classes and labs or did not hold them for the proper length of time. Sometimes a three-hour lab would be released 2-1/2 hours early. Dr. Dean testified this behavior continued throughout Grievant's career at State, but that she did not continue to keep a written record. Dr. Dean pointed this problem out to Grievant, and some improvement was noted, but Grievant continued to have problems with some of her labs.

A review of the evidence on this issue indicates Grievant frequently did not properly conduct lab experiences for her students. Although there was some improvement over time in some courses, Grievant continued to have problems in this area. Since the lab experience constitutes one quarter of a student's credit, financial investment, and the only "hands on" learning experience in these courses, this failure is significant.

The next issue is whether Grievant developed a program of undergraduate research for biology majors. All parties testified Grievant was actively involved with research her first two years at State, and Grievant involved students as well. After that time Grievant's involvement with student research

and her own research was limited. Grievant continued to be actively involved in professional development by attending meetings, presenting papers and posters, serving on the Faculty Senate, writing articles, and starting a text on mammalogy, but she ceased to be consistently involved in "a program of undergraduate research for biology majors." Grievant testified she still did some limited research after 1989 and points to some recent work in 1993. Grievant also excused the lack of student research by stating Dr. Dean had recommended she decrease her professional development and focus on her primary responsibility, teaching.

Dr. Dean testified she never directed Grievant to stop or decrease her involvement in research, (See footnote 7) but did recommend Grievant decrease her other activities such as her time-consuming involvement in Faculty Senate and focus on her department responsibilities, if she was unable to manage her time more efficiently. Dr. Hutto and Dr. Harper-Morris also told Grievant the department should be her primary focus and questioned Grievant about her using such a large portion of her time on non-department activities, especially since she was a new, non-tenured faculty member.

Grievant did not meet Responsibility number 2 on a consistent basis, and failed to institute an on-going program of studentresearch. While it is commendable that Grievant was so actively involved in the Faculty Senate and other professional development activities, these activities do not compensate for her failure to perform one of her primary departmental responsibilities.

The question also arose about Grievant's participation in "departmental planning, management, and extracurricular activities" as required by Responsibility number 3. Grievant repeatedly refused Dr. Dean's request to co-sponsor the DNA Club with Dr. Dean, because she did not have enough time. Grievant also refused to take departmental minutes until the year she went up for tenure.

Grievant also repeatedly refused to teach night courses, even though she knew all members of the faculty including Dr. Dean and Dr. Harper-Morris did so. The reasons Grievant gave for this failure were: 1) she could not leave her six year old daughter at night; 2) she could not drive at night; 3) she was not going to spend her pay raise on baby sitters; and 4) night classes would interfere with her daughter's dance classes. Grievant did teach a night course in Fall 1992 when required to do so by a directive from Dr. Oden, and as a part of her negotiations for her two semesters of release time to write her book. Level IV Trans. - Jnt. Exh. 5 (Sept. 6, 1991 letter).

Dr. Dean also complained Grievant did not give her proper notice before going out-of-town during the work week, especially providing information about how her classes were being covered. This

testimony is conflicting because Grievant states she, after not following proper procedure the first time and being reprimanded, always gave Dr. Dean verbal notice she was going at least one week ahead, gave her writtennotice one day before, and Dr. Dean told her the notice she received was satisfactory. Dr. Dean stated Grievant frequently failed to give her advance verbal notice, one day written notice was unsatisfactory, and information provided on class coverage was insufficient.

Testimony is clear that Grievant also gave an exam outside the stated exam schedule without prior permission, and in Fall 1993 wanted to close her grade book on November 24th without giving any finals, because she was going to have surgery. When Dr. Dean told Grievant this would not be allowed, Grievant complied with Dr. Dean's directive.

On the other hand, Grievant did attend departmental meetings, (See footnote 8) gave speeches to the DNA Club and participated in some of their activities, and worked with Dr. Hutto to develop a lab manual which they subsequently published. Dr. Hutto testified the driving impetus behind this publication was Grievant.

The undersigned finds Grievant did participate in some departmental activities, but did not participate or cooperate at the level expected of a non-tenured faculty member. Some of Grievant's behavior involving exam issues and refusal to teach night classes created or would have created a hardship on other faculty, students and Dr. Dean.

Little evidence was presented on responsibilities 5, 6, and 7 and the undersigned notes Grievant met the requirements, perhaps to the detriment of her departmental responsibilities.

On the second half of the issue, Grievant argues she was not judged by the same criteria used to assess Dr. Harper-Morris, who was granted tenure the year before Grievant. Thus, Grievant makes a claim of discrimination. W. Va. Code §18-29-3(m) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

Dr. Harper-Morris went up for tenure her fifth year in a tenure track position. (See footnote 9) Both Dr. Dean, her Chair, and Dr. Oden supported Dr. Harper-Morris's tenure. The Promotion and Tenure Committee recommended promotion, but did not support her for tenure as part of their on-going policy to not recommend faculty for early, prior to the sixth year, tenure. The Committee indicated this recommendation was tied to the policy and stated "the committee feels quite certain that we will recommend Dr. Harper-Morris for tenure next year." After reviewing all the recommendations Dr.

Carter granted Dr. Harper-Morris tenure.

Dr. Harper-Morris was hired as an Assistant Professor in Microbiology, one year prior to Grievant's arrival. The duties and responsibilities listed in her position announcement were similar to those identified in Grievant's. In 1991, Dr. Harper-Morris was asked to serve as Chairperson of the Division of Natural Sciences and Mathematics. She accepted. The numerous duties associated with this position were enumerated during the hearing. Level IV - Resp. Exh.12, test. Dr. Harper-Morris. In this position Dr. Harper-Morris received a decreased teaching load (See footnote 10) and her time for research related activities was severely limited. Under her Responsibility number 1, Dr. Harper-Morris taught all courses she was expected or requested to teach, and even changed her schedule to accommodate Dr. Dean when asked. Although Dr. Harper-Morris has not taught all the courses she was originally hired to teach, she has taught whatever was needed. Her evaluations were excellent and her student evaluations were satisfactory. She conducted all her labs appropriately and for the correct length of time. She serves on numerous committees.

Dr. Harper-Morris, the mother of two young children, also taught night classes and assisted Grievant in developing her labs in embryology. She actively participates in the General Education courses.

As a department member, Dr. Harper-Morris cooperated fully with Dr. Dean, and participated and assisted in department activities, as time would allow, given her Division duties and responsibilities. Dr. Harper-Morris helped in DNA and DKA, another science society. While it is true, Dr. Harper-Morris' research activities (See footnote 11) were severely decreased the first years she assumed the Chair of the Division, it is also clear she continues to maintain effectively all other duties and responsibilities under her original Position Announcement.

To prove a case of discrimination a grievant must first make a prima facie showing which requires establishing:

> (a) that [s]he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that [s]he has, to [her] detriment, been treated by [her] employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated actual job responsibilities of the grievant and/or the other employees, and were not agreed to by the grievant in writing.

If a grievant can demonstrate a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for its action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

In this instance Grievant has failed to establish a prima facie case of discrimination. Although both Grievant and Dr. Harper-Morris were hired as assistant professors one year apart, Grievant did not perform her teaching and departmental duties while Dr. Harper-Morris did. Teaching has been identified as the primary responsibility of a State faculty member, and without evidence that this is being accomplished, a faculty member will not be tenured. Although both failed to develop an adequate program of student-based research, Dr. Harper-Morris's failure to do so is easily explained by the dramatic increase in her administrative duties and responsibilities; therefore, any difference in treatment is related to her job duties.

II. Whether Grievant received adequate notice that her performance was deficient and must be corrected to receive tenure.

As previously stated, Grievant knew what duties were expected of her when she was hired. The Position Announcement clearly identified her professional responsibilities. While it is true many of Grievant's evaluations for the years of 1989, 1990, and 1991, are mostly positive, it is also true that deficiencies were pointed out in the evaluations, as well as in other written messages to Grievant and verbal conversations Grievant had with Dr. Dean, Dr. Harper-Morris, and Dr. Hutto.

When questioned about these positive evaluations, Dr. Dean stated that Grievant was an excellent lecturer, she wanted to encourage a young faculty member's growth with positive comments, and that during several of those early years Grievant was looking for a position elsewhere, and she did not wish to harm her chances. Dr. Dean also testified that Grievant's evaluations, while good, were not as strong as other faculty in the department. Dr. Hutto, when questioned about a positive letter of recommendation he wrote on November 4, 1991, stated Grievant was an excellent lecturer, had great potential and he had hopes that with encouragement,

she could return to her performance level of her first years at State. Dr. Hutto also told Grievant she needed to discuss her concerns with Dr. Dean, that Dr. Dean was "not the enemy." Level IV Test. - Dr. Hutto. Dr. Hutto was concerned that Grievant was continually redefining and limiting her abilities and qualifications and told her she could not be tenured if she could not fulfill the position for which she was hired.

Both sides presented lengthy testimony about a letter Grievant was to have received in early April 1991. On April 4, 1991, Dr. Dean wrote a brief note to Grievant informing Grievant she would shortly receive a formal letter identifying deficiencies in her performance. A three-page letter by Dr. Dean was submitted into evidence and discussed at length Grievant's multiple problem areas. Grievant testified she did not receive this letter and Dr. Dean testified she thought she had sent it, but had found an extra copy of the letter in her files, while preparing for this hearing. Dr. Dean also stated that if Grievant said she did not receive it, she would not disbelieve her.

Even though Grievant did not receive this formal letter which she had been told was forthcoming, she did not ask Dr. Dean about its whereabouts.

On May 17, 1991, after the semester was over, Grievant asked to meet with Dr. Dean to discuss problem areas. Dr. Dean arranged her schedule to meet with Grievant, drove fifty miles for the scheduled conference, and Grievant did not appear, having called the office to say her daughter was ill. On May 23, 1991, Dr. Dean wrote Grievant expressing her displeasure with the short-notice cancellation and requested Grievant select another date for conference.

Grievant did not follow up on Dr. Dean's request and did not ask for another meeting with Dr. Dean until Spring 1992. Level IV Test. - Dr. Dean, Grievant.

Although Grievant may have received mixed messages occasionally in her yearly evaluations, she knew she was to teach all the zoologycourses just as the previous zoology faculty member had, and she knew that she had not done so. She also knew she was to develop a program of undergraduate student research and knew that she had not. Given the clearly defined goals and objectives that Grievant was given at the outset of her employment, it is difficult to understand Grievant's argument that she did not know her performance was deficient. Further, Dr. Dean had told Grievant several times that she must conduct class for the full amount of time, strengthen her labs, a key component of her teaching duties, and that she needed to prioritize her goals and direct more time to the department. Further, Grievant's evaluations of 1991 and 1992 indicated problem areas

that needed correcting, and her evaluation of 1993 clearly states improvement must be made or a recommendation for tenure would not be forthcoming. It was later that same year Grievant was told the invertebrate courses must be taught, and that they were her responsibility. Grievant refused to accept this responsibility, saying she was not qualified to do so. Grievant also stated she decreased her student research when Dr. Dean told her it was necessary for Grievant to manage her time more effectively and recommended decreasing her professional development. This interpretation of Dr. Dean's suggestion is nonsensical, as research and professional development are two different areas, especially since Dr. Dean directed Grievant to increase student research activity in her 1992 and 1993 retention letters.

Although the undersigned agrees with the Promotion and Tenure Committee, that notice to Grievant could have been clearer and earlierthat does not mean the notice was insufficient. Within the academic areas, professionals are expected to read and understand their job description and perform these duties without reminding or ordering. Further, while professionals within the academic area understand that their total performance will be considered, they are fully cognizant that the key to the granting or denial of tenure is the performance of their major duties. Accordingly, the undersigned finds Grievant received adequate notice that failure to perform the duties identified in her Position Announcement would result in the denial of tenure.

III. Whether Respondent violated principles of academic freedom if it denied Grievant tenure based on the content of her courses.

Academic freedom is defined as "liberty to pursue and teach relevant knowledge and to discuss it freely without restriction from school or public officials or from sources of influence." The American Heritage Dictionary at 70. State recognizes that "[f]aculty members and students must always remain free to inquire, study, and evaluate" and "members of the academic community [may] freely study, discuss, investigate, teach, conduct research, and publish, depending upon their particular role at the institution." Policy Bulletin 36, §§2.1 and 2.2. With academic freedom comes commensurate responsibility, and faculty are "entitled to freedom in the classroom in discussing the subject taught" and "entitled to full freedom in research" as long as the performance of their academic duties is adequate. Id. at §2.2. At State, the concept of academic freedom is equated with academic responsibility. Id. at §2.3.

Apparently, Grievant argues, Respondent should not have considered the content of her courses

when making its tenure consideration. The undersigned finds the content of Grievant's courses was not an issue in the denial of tenure. All witnesses noted Grievant's excellent lecturing abilities, and, indeed, she was repeatedly praised in this area on all her evaluations. If Grievant is contending that Dr. Dean's insistence that she add more "wet labs" to a core course or conduct proper labs in embryology as infringement of her academic freedom, that argument must fail. It is the responsibility of the Department Chair to assess course content and the manner in which it is taught to assure that department goals and objectives are met. Grievant's failure to conduct the Biology 206 and Embryology labs in a proper manner is a deficiency in teaching. Dr. Dean's directions to correct this deficiency cannot be interpreted as an infringement of academic freedom, rather it is appropriate behavior for a department chair. Thus, Respondent did not deny Grievant tenure based on the content of her courses, but did take into consideration her failure to conduct her labs properly when assessing her teaching abilities.

IV. Whether State discriminated against Grievant by assessing her performance during a time she was ill, and then using this assessment as a factor in her denial of tenure.

Grievant testified that she was sick on some of the days she did not have class or lab during the 1990-91 academic year. It is unclear when Dr. Dean learned illness played a part in Grievant's failure to meet her class and lab schedule. Certainly Dr. Dean was not awareduring the observation period, and it would appear if a faculty member is frequently so sick that she cannot conduct classes or labs, she should notify the Department Dean to work out alternate arrangements. This, Grievant did not do. Although Grievant was aware of this complaint about her meeting class schedules during this period, the record appears to reflect the first time Grievant defended her actions on these grounds was at the Level IV hearing. Since illness accounted for only a small portion of the time Grievant did not hold classes during this period, and since Grievant did not inform her Dean of these absences, Dr. Dean's utilizing Grievant's failure to meet classes as one reason for recommending denial of tenure cannot be viewed as an arbitrary and capricious act. (See footnote 12)

Grievant was ill part of the Spring 1993 and Fall 1993 semester with "female troubles." During this time she had bouts of severe pain and two, one-day surgeries. Her condition continued to worsen to the point where her elective surgery, scheduled for the 1993 Christmas break, was moved up to November 24, 1993, the Monday after Thanksgiving. Throughout this period, multiple faculty, including Dr. Dean, Dr. Harper-Morris, and Dr. Hutto covered Grievant's classes. At her request,

Grievant's in-class evaluation had been set for this time period. Dr. Dean did question whether Grievant had moved her surgery to avoid evaluation. (See footnote 13)

Dr. Dean found Grievant's suggestion that she close her record book with the grades already received and without giving her students the opportunity to take a final exam as planned and required by her course to be inappropriate. Dr. Dean obviously thought this proposed plan from a sixth year faculty member was incorrect and not in keeping with College policy. This behavior was one of the many factors considered in denying Grievant tenure. Utilizing this as one minor factor in denying Grievant tenure cannot be seen as an abuse of discretion or an arbitrary and capricious act.

V. Whether Grievant's exercise of her free speech rights by active participation in the Faculty Senate was a determining factor in her non-retention.

This argument is without merit. The testimony in the record is clear. Grievant was initially encouraged to participate in Faculty Senate by Dr. Hutto as he thought this involvement was healthy and appropriate for a new faculty member. The department, under Dr. Dean's recommendation, changed their meeting time to accommodate Grievant's Faculty Senate schedule. The problem was not Grievant's active participation in Faculty Senate; it was her failure to perform her teaching, student research, and departmental duties. Both Dr. Hutto and Dr. Dean were concerned about this failure, and thought Grievant had "too many irons in the fire." Both suggested to Grievant she learn to manage her time and recommended she decrease the level of her Faculty Senate activities. In fact, during one exchange with Dr. Hutto when he told her that by being elected as Vice President ofthe Faculty Senate she could end up as President, and this would be very time-consuming, Grievant stated, "Oh, don't worry. I'm too smart for that." (See footnote 14) Dr. Hutto repeated this conversation to Dr. Dean. When Dr. Hutto later found out Grievant had accepted the Chairpersonship of the Faculty Senate, he was shocked. (See footnote 15) Obviously, Grievant is a very talented professional, but, for her, like everyone else, time is finite, and she apparently was unable to do all the things she wanted and at the same time do all the things she was required to do. Given this choice, Grievant's priority needed to be with the department.

A review of this decision at this point demonstrates several things. One, Grievant has failed to meet her burden of proof on each issue she has raised. Two, the reason given by Dr. Carter for Grievant's non-retention have been proven and State's decision to deny Grievant tenure was not an arbitrary and capricious act, clearly wrong, or a violation of college policy. Three, in a comparison

with the duties listed in her Position Announcement, the undersigned finds Grievant did not perform the first three listed duties in a satisfactory or professional manner.

Further, a review of the tenure guidelines listed in Policy Bulletin 36, reveals that while Grievant's performance demonstrated a significant amount of service to the community and the college, andGrievant engaged in significant professional development and publication as required for tenure; she failed to demonstrate excellence in teaching, the top priority at State. Grievant also failed to develop the scholarly activity of research involving students. Id. at §9.1. Tenure may "not be granted automatically" or "permitted to mask irresponsibility, mediocrity, or deliberate refusal to meet academic requirements or professional responsibilities." Id. at §9.3 and 9.1. In making tenure decisions the "staffing needs of the institution" and "specific academic competence of the faculty member" must be considered. Id. at §9.2. Grievant did not meet the criteria for tenure as outlined in Policy Bulletin 36. Further, Grievant's refusal to meet professional responsibilities cannot be allowed. Finally, the staffing needs for the Biology Department are for a broad-based zoologist willing to teach both vertebrate and invertebrate courses. Since Grievant would not or could not meet the staffing needs of the institution, either because of her academic incompetence in the required areas or lack of desire to perform these duties, State had no choice, but to deny Grievant tenure based on the criteria stated in Policy Bulletin 36.

As the reader can see, when Grievant's testimony and interpretation conflicted with that of multiple, credible witnesses the undersigned has found Grievant's version and interpretation of the events to be less credible. This is especially true of the testimony of Dr. Hutto, who truly liked and respected Grievant, continues to wish her well, and is assisting her in looking for other employment. While details may vary, the record as a whole demonstrate Grievant's failure to perform her duties adequately.

This ruling also does not reflect on Grievant's potential or her multiple abilities. A paraphrased statement from Dr. Hutto clarifies this statement. Faculty are hired on the basis of abilities and credentials, they are tenured on the basis of performance. The reason the tenuring process is so lengthy is because faculty members develop in different ways. Some professionals start out with a big bang and then fizzle. Some start slowly and gain strength as time goes on. Grievant began her employment at State well and was highly praised, but then something happened and she never got back on track. Level IV Test. - Dr. Hutto.

The above discussion will be supplemented with the following findings of fact and conclusions of law.

Findings of Fact

1. State hired Grievant in the tenured-track position of Assistant Professor of Zoology. Grievant's duties and responsibilities were identified in the Position Announcement.

2. Grievant is an excellent lecturer and spent an extensive amount of time preparing her class presentations; approximately one hour for each five minutes of class time. Grievant also received excellent student evaluations.

3. Grievant knew her responsibilities included teaching all the zoology courses, both vertebrate and invertebrate courses, just as this had been the responsibility of the previous faculty in this position. Grievant did not teach or make plans to teach anyinvertebrate course. Grievant stated she was not qualified to teach these courses.

4. Grievant had multiple difficulties in providing the proper laboratory experiences for her students. Grievant consistently released labs early, used lab time for paper research, provided insufficient numbers of "hands-on", "wet lab" experiences, and provided only a limited lab experience in embryology, both times she taught the course.

5. During the six years prior to going up for tenure, Grievant worked with approximately nine students in the area of research. Grievant worked with three students in the Summer of 1988, three students in 1989 and three students in 1993. This activity does not constitute an ongoing program of student-directed research.

6. Grievant participated in multiple college committees and activities, including being Chairperson of the Faculty Senate for three semesters. These activities, especially those related to the Faculty Senate, were time-consuming.

7. Grievant did not participate actively in her department, citing lack of time as her rationale.

8. Both Dr. Dean, Grievant's Department Chair, and Dr. Hutto, Grievant's former Department Chair and mentor, advised Grievant repeatedly to work on her time-management skills and to increase her involvement in her teaching, research, and departmental activities.

9. Grievant's multiple illnesses were not considered against her in the denial of tenure.

Conclusions of Law

1. Grievant must prove all of her allegations constituting her grievance by a preponderance of the evidence. Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. "The Grievance Board's review in cases involving the denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

3. "The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong." Sui v. Johnson, 784 Fed. 2d 238 (4th Cir. 1984). See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994).

4. Grievant has not met her burden of proving that her denial of tenure was arbitrary and capricious, clearly wrong, or a violation of Policy Bulletin 36.

5. Grievant did not prove Respondent violated her rights of Academic Freedom in any way.

6. Grievant did not prove that a determining factor in her denial of tenure was consideration of her right to free speech through her active participation in the Faculty Senate.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 29, 1995

Footnote: 1As the issue of tenure was decided in the negative, the issue of promotion was not addressed.

Footnote: 2The undersigned had previously indicated to the parties during a telephone conference, that this would be the formal ruling at hearing, barring some unforseen circumstances.

Footnote: 3During this process several additional things occurred, which are not required, but are permitted by the process. One, Dr. Dean consulted with the tenured faculty of the Biology Department before making her recommendation; two, the Chairperson of the Promotion and Tenure Committee, Dr. Alan Harstein, talked to several tenured faculty members of the Biology Department before the Promotion and Tenure Committee voted; and three, Grievant wrote several letters to rebut the negative recommendations of Dr. Dean and Dr. Harper-Morris and these accompanied her portfolio throughout the process.

Footnote: 4As the hearings in this grievance lasted five days, every single incident testified to and cross-examined on at length will not be detailed. Although the decision is based on all evidence at hearing, the Decision itself is a brief summary of the major events and controlling factors, not a month-by-month accounting of grievant's six years prior to her denial of tenure.

Footnote: 5Grievant made much of the fact she was selected as Teacher of the Year by the student body in 1992 or '93. Respondent argued that this award should be taken with a grain of salt as Grievant's was the only name on the ballot, only 43 students out of 4,000 voted and other vote getters included Mickey Mouse and Snoop-Doggy-Dog.

Footnote: 6Grievant also participated actively in the General Education component as all biology faculty are asked to do on a rotating basis. Several colleagues spoke to how helpful and competent Grievant was in these cases. However, Dr. Dean testified the lead faculty member in the courses asked Dr. Dean to not permit Grievant to teach them again. Level IV Test. - Dr. Dean.

Footnote: 7See discussion at 23, infra.

Footnote: 8After Grievant's election to the Faculty Senate, her department changed their meeting time to accommodate Grievant's Faculty Senate meeting.

Footnote: 9Dr. Harper-Morris' first year of teaching at State was in a non-tenure track position.

Footnote: 10Dr. Harper-Morris teaches two courses a semester instead of three.

Footnote: 11Dr. Harper-Morris was actively engaged in student-directed research at the time of the hearing.

Footnote: 12For the record, it is noted Grievant did not produce any documentation of these illnesses, as she did for her

later illness in 1993.

Footnote: 13Dr. Dean considered this a possibility because Grievant had taken her ten-year-old daughter out of school from the Wednesday before Thanksgiving until after the semester break. The daughterstayed out west with her father during this entire time.

Footnote: 14At this time, the Chair of the Faculty Senate did not receive release time.

Footnote: 15The elected Chair of the Faculty Senate, an older faculty member, refused to fill the position when he was not granted release time.