DEAN SHACKLEFORD,

Grievant,

v.

DOCKET NO. 96-BOD-414

WEST VIRGINIA BOARD OF DIRECTORS/

CONCORD COLLEGE,

Respondent.

D E C I S I O N

This grievance is the result of two separate grievances filed by Grievant, Dean Shackleford, on or about August 7, 1996, Docket No. 96-BOD-414, and on September 24, 1996, Docket No. 96-BOD-470. The first grievance was held in abeyance pending the second grievance, and was consolidated with the second by Order dated October 28, 1996, under Docket No. 96-BOD-414.

The statement of grievance is as follows:

> Dr. Shackleford is aggrieved by the actions of Concord College in failing to promote him to the rank of Associate Professor in 1995 and again in 1996. The procedure used by Concord College in both the 1994-95 evaluation and the 1995-96 evaluation is contrary to the Concord College Faculty Handbook and Policy Bulletin 36. That procedure allows the use of criteria other than that specified in the faculty Handbook and policy Bulletin 36; improperly uses anonymous student and peer evaluations; allows the personnel committee to consider sabbatical leave in their deliberations; allows the division chair to distort and misrepresent application materials and make arbitrary and capricious recommendations. The administration wrongfully relies on the recommendation of the division chair obtained through this flawed process; misuses the anonymous student and peer evaluations; does not set, adhere to, or enforce any reasonable time framesin the promotion evaluation process; and renders arbitrary and capricious decisions.

Relief Requested:

> For relief, Dr. Shackleford is seeking promotion effective June 1995, backpay, attorney fees and removal of Dr. William Ofsa from further evaluations of me for a

period of 5 years. (See footnote 1)

This grievance was denied at all lower levels, and appealed to level four on November 7, 1996. Following several continuances for good cause, three days of hearing were held in the Grievance Board's Charleston, West Virginia, office on January 24, 1997, February 24, 1997, and May 20, 1997. Post-hearing submissions were filed by the parties on June 11, 1997, and responses filed by June 27, 1997, at which time this case became mature for decision.

SUMMARY OF EVIDENCE

The summary of evidence is attached as Appendix A.

FINDINGS OF FACT

1. Grievant was employed by Concord College ("Concord") as an Assistant Professor of English in the fall of 1988.

2. In 1993, after six years as a probationary faculty member, Grievant became eligible for promotion and tenure, and appropriately applied to be promoted and tenured. 3. With regard to Grievant's application for tenure, the Division of Language and Literature Personnel Committee voted 3 to 2 in favor of tenure. This was less than the 2/3 required for a positive recommendation. LIV R. Ex. 2; LIV Jt. Ex. 1. (See footnote 2)

4. Dr. William Ofsa, Chairman of the Division of Language and Literature, concurred with the Personnel Committee's recommendation against tenure. LIV G. Exs. 7, 11. Dr. Ofsa found Grievant had "impressive strengths in areas such as scholarly activity, active participation in work with the Division, and conscientious efforts in other areas of college responsibilities." However, Dr. Ofsa was concerned about reports of Grievant's classroom behavior, including parent and student complaints that Grievant "dwelt too much on matters of sex regardless of the class being taught." Dr. Ofsa had received complaints from students, which he told them to put into writing. Dr. Ofsa noted that

> I do not object across the board to Dr. Shackleford's selection of material, although I do think he could be more responsive to the sensibilities of many of his students. I do object to what he did with the material in a number of instances in the classroom: his relentless reading and discussing of sexually explicit material to the embarrassment and discomfort of many students in [t]his classes, and his characterizing students who showed discomfort as being immature.

5. Dr. Dean W. Turner, Vice President and Academic Dean, reviewed the recommendations of the Personnel Committee and Dr. Ofsa, and performed his own review of Grievant's tenure and promotion materials. Dr. Turner found Grievant had improved on areas which had been discussed in the past, but noted, “[t]he submission ofletters from students, alumni, and colleagues has become a significant issue in this evaluation for the student concerns have been referenced as pivotal in some of the final recommendations forwarded to me.” Dr. Turner reviewed nine signed letters and two initialed letters expressing concern about Grievant's teaching methods, and found “the essence of concern seems to be the inappropriate and offensive nature of the material and the classroom discussions of it, and Dr. Shackleford's intolerance and insensitivity to the viewpoints or discomforts of the students.” Dr. Turner also read forty-four (44) letters in support of Grievant, and concluded that the “weight of evidence cannot support denial of tenure on these submissions.” In conclusion, Dr. Turner recommended to President Jerry Beasley that Grievant be granted tenure, and that the usual process be followed with respect to Grievant's application for promotion. LIV R. Ex. 2. Thereafter, President Beasley awarded tenure.

7. With regard to Grievant's promotion application, Dr. Ofsa recommended it be denied, noting the Personnel Committee had voted against promotion by a vote of four against and one abstention. Dr. Ofsa summarized his and the Committee's views in stating:

> that before promotion can be considered the candidate must address areas of concern repeatedly expressed in peer and student evaluations and in previous reports of the Personnel Committee.

LIV G. Ex. 10. Further, a review of Grievant's student evaluations indicated that Grievant's scores were quite low in comparison to his colleagues in the Division, indicating that Grievant had not satisfied “an important criterion for promotion: excellence in teaching.” Finally, Grievant's peer reviews rated him last for Teaching Effectiveness, Supportive of Student Needs, College Working Relationships, Overall Value to the Division, and OverallValue to the College. Dr. Ofsa concluded that Grievant “has more than a few problems with collegiality.”

8. Dr. Turner recommended that Grievant's 1993 application for promotion be denied, referring to the Personnel Committee and Dr. Ofsa's recommendations, as well as his previous letter regarding Grievant's application for tenure. Dr. Turner concluded that Grievant's application lacked essential

support from his peers, and that he had not adequately addressed concerns his colleagues had included in previous evaluations, nor had he demonstrated continuing growth as a teacher. LIV R. Ex. 3; LIIB G. Ex. 1.

9. Grievant applied for promotion again in 1994. The Personnel Committee voted four in favor and one opposed to Grievant's promotion. The Committee was overall very impressed with Grievant's activities, but noted there were still areas of concern. The Committee noted that Grievant demonstrated a continuing tendency toward excessively defensive behavior, he had a tendency to interpret negative remarks on student or peer evaluations as the products of prejudice, seldom if ever considered the possibility that he was in any way at fault for negative comments received on student or peer evaluations, and that he reacted hastily in writing or talking outside the division, when his time would be better spent in reflection and by attempting to work out difficulties informally. LIIB G. Ex. 2.

10. Dr. Ofsa recommended that Grievant's 1994 application for promotion be denied. Dr. Ofsa found a comparison of Grievant's student and peer evaluations for the 1993-94 and 1994-95 academic years did not indicate continuing growth as a teacher. Grievant continued to fall below the Division average in his scores, which did not indicate excellence in teaching. Dr. Ofsa noted there was much positive and negative feedback inGrievant's student evaluations, which, if he did not discredit it as prejudicial, could be helpful to him in analyzing his teaching behavior. In conclusion, Dr. Ofsa could not recommend Grievant for promotion, because he did not think it likely that Grievant would address any concerns raised by students or peers with regard to his teaching effectiveness. LIV G. Ex. 9.

11. Dr. Turner recommended that Grievant's 1994 application for promotion be denied. Dr. Turner noted his disappointment and frustration that Grievant's student and peer evaluations failed to show any improvement over the past year's evaluation, and seemed to indicate Grievant's unwillingness to adapt or accept any suggestions given to improve his teaching effectiveness. LIV R. Ex. 4.

12. Following his denial of Grievant's promotion, Dr. Turner met with Grievant on August 2, 1995 to discuss his recommendation. Grievant was offended by Dr. Turner's responses to some of his questions and left the meeting. Dr. Turner followed up the meeting with a memorandum to Grievant dated the same day, asking that they agree to meet at a later date. LIV R. Ex. 6.

13. President Beasley did not issue a decision on Grievant's 1994 promotion application.

14. On December 20, 1995, Dr. Turner informed Grievant that President Beasley issued a "pocket veto" on Grievant's 1994 application for promotion, which resulted in that application being denied. LIIA G. Ex. 4.

15. Grievant submitted an application packet for promotion again on February 15, 1996 (which will be referred to as the "1995 application"). LIIA G. Ex. 7. 16. Grievant went on approved sabbatical during the Spring semester of 1996. 17. On April 19, 1996, the Personnel Committee denied Grievant's application by a vote of one against and four abstentions. The Committee found Grievant's "lack of improvement . . . on both the peer evaluations and student evaluations . . . to be puzzling. . .". Further, the Committee noted that, in its opinion, Grievant "did not allow a sufficient time interval since his last application to document improvement, especially since he was going to be on sabbatical leave this semester." LIIA G. Ex. 1.

18. On August 7, 1996, Dr. Ofsa recommended that Grievant's 1995 application for promotion be denied, noting the Personnel Committee did not find enough improvement in his peer and student evaluations from his last application for promotion to warrant a positive recommendation. Dr. Ofsa further noted that, while Grievant had made some improvement overall in his student evaluation scores, he still remained below the division and college averages. Grievant also received the lowest score of his peers in the area of Teaching Effectiveness on his peer evaluations, and remained last among his peers overall. LIIA G. Ex. 2; LIV R. Ex. 1.

19. Shortly thereafter, on or about August 7, 1996, Grievant filed this grievance.

20. On September 5, 1996, Dr. Turner recommended that Grievant's 1995 promotion application be denied. Dr. Turner shared Dr. Ofsa's and the Personnel Committee's concern with the lack of significant improvement reflected in Grievant's student or peer evaluations of teaching. LIIB G. Ex. 3; LIV R. Ex. 5.

21. On October 30, 1996, President Beasley denied Grievant's 1994 application for promotion. LIIB R. Ex. 1. 22. On November 21, 1996, President Beasley denied Grievant's 1995 application for promotion. LIIB R. Ex. 1.

PRELIMINARY ISSUE

Concord moved to dismiss the grievance on the basis that, since no final decision had been made

regarding the promotion applications at the time Grievant filed the grievance, there was no grievable event under the applicable grievance statute.

W. Va. Code § 18-29-2 defines “grievance” as:

> . . . any claim by one or more affected employees of the governing boards of higher education, . . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or a misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Grievant applied for promotion in the fall of 1994, and did not receive a final decision on that application until October 1996, after the level two hearing was held, and the President was ordered by the hearing examiner to issue a decision. Grievant again applied for promotion in February 1996, and did not receive a decision from the President until November 1996, following the level two hearing in this grievance. No explanation was given for these delays, other than the President's vague references in his decision that he “did not want to discourage [Grievant's] efforts toward improvement.” LIIB R. Ex. 1.

While the Faculty Handbook does not provide any time frame in which the application process is to be completed, it is not unreasonable to expect that a candidate's application for promotion would be completed within the year it was offered. In Grievant'scase, it took two years and a level two decision to prompt a final decision on his 1994 application, and one year and a level two decision for the final decision on his 1995 application.

If Concord were to prevail on this issue, how long would an applicant for promotion have to wait to receive a final decision from the President, which would then constitute a grievable event? It is not a reasonable interpretation of the Faculty Handbook provisions or the grievance statute to hold that no grievable event has occurred until the President makes a final decision, when there is no time frame in which the President is required to make that decision. The definition of “grievance” is very broad and encompasses virtually all manner of actions and conduct by an employer against an employee. In this instance, Grievant's claim that the overlong delay in receiving a final decision on his applications for promotion interfered with his job performance, or constituted a misapplication of

policies and rules affecting his employment status, can be considered a "grievable" event under W. Va. Code § 18-29-1, et seq.

ISSUES

Grievant alleges various violations of the rules, policies, laws, and practices governing promotion of faculty members at Concord College. The issues to be decided are:

1) whether the evaluation procedure used by Concord College for applications for promotion is contrary to Policy Bulletin 36 and the Concord College Faculty Handbook;

2) whether Concord used criteria other than that specified in the Handbook and Policy Bulletin 36 in evaluating Grievant's applications for promotion; 3) whether Concord improperly used student and peer evaluations in Grievant's evaluations for promotion;

4) whether Concord improperly considered the fact that Grievant was on a sabbatical leave at the time he applied for promotion in 1995-96;

5) whether Concord allowed the Division Chair to distort and misrepresent application materials and in reliance on those, made arbitrary and capricious recommendations which have been acted on by the President to Grievant's detriment;

6) whether Concord violated any policy, rule, law or practice by not placing Grievant on an improvement plan; and

7) whether Concord discriminated against Grievant on the basis of his sexual orientation.

DISCUSSION

Grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). The decisional subjective process by which promotion and tenure is awarded or denied is best left to the professional judgment 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 (4th Cir. 1984); Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994).

1.

Whether the evaluation procedure used by Concord College for applications for promotion is contrary to Policy Bulletin 36 and the Concord College Faculty Handbook.

The Concord College Faculty Handbook sets out the mechanics of promotion within that institution. That process consists, in pertinent part, of the following:

1. The process of consideration for academic promotion may be initiated by the chair (divisional or departmental), or an individual faculty member through submitting to the Divisional Personnel Committee written evidence that attests to a candidate's teaching competence, student evaluation participation, professional growth potential, research ability, and service to the institution as well as to the community at large.

. . .

3. The chain of review and recommendation is as follows:

a. Chairs, academic discipline membership, and/or an individual faculty member initiates proposed academic promotion to the Divisional Personnel Committee.

b. From Divisional Personnel Committee to departmental chair (where they exist).

c. From departmental to divisional chair.

d. From divisional chair to Vice President and Academic Dean.

e. From Vice President and Academic Dean to President.

f. At the completion of the process, notification of the decision will then be sent to the candidate by the President.

4. At each point in the reviewing process, a report explaining the recommendation will be sent to the committee or persons at the next level of review, with a copy of the report given to the candidate for promotion. All recommendations, whether negative or positive, shall be forwarded to the President for the final decision. The candidate will be informed of that decision by the Office of the President.

LIV Jt. Ex. 1, pp. 61-62.

When Grievant initially filed this grievance, he had not yet received a final decision from President Beasley on either the 1994 or 1995 applications for promotion. He had only been told by Dean Turner regarding the 1994 application that President Beasley hadissued a “pocket veto”, which resulted in denial of his application. (See footnote 3) In his original grievance statement, Grievant asked that a final decision on his applications be rendered. Following the level two hearing, President Beasley rendered his decisions. Thus, Grievant's relief was granted at that time. Grievant then pressed forward with his grievance, asserting many other claims against the Concord resulting from the application process. (See footnote 4)

Grievant alleged that Dr. Ofsa did not forward his recommendations to the Academic Dean within a reasonable time frame, referring to an internal calendar prepared by Dr. Turner with deadlines for filing various material, including promotion recommendations. There is no evidence that this internal calendar was meant to be binding upon the faculty, nor is it required by the Faculty Handbook or Policy Bulletin 36. Dr. Turner testified he did not intend the calendar to be rigidly adhered to, but that it was merely a guideline to follow. Grievant has not proven by a preponderance of the evidence that this calendar is a “policy”, “procedure”, or “rule” of Concord, or that Dr. Ofsa's recommendations to Dr. Turner were not filed within a reasonable period of time within the framework of the Faculty Handbook.

Thus, with regard to Grievant's claims that the procedure outlined in the Faculty Handbook for promotions was violated, that violation had been cured with the President's decisions. No other procedural violation in the processing of Grievant's applications can be found, and this claim must fail.

2. Whether Concord used criteria other than that specified in the Handbook and Policy Bulletin 36 in evaluating Grievant's applications for promotion.

The Concord College Faculty Handbook, using language identical to that found in the West Virginia Board of Directors Policy Bulletin 36 (Series 36), with regard to promotion of faculty, sets forth the following criteria:

a.

Within the following framework, each President shall establish, in cooperation with the faculty or duly elected representatives of the faculty, guidelines and criteria for promotion in rank:

(1) There shall be demonstrated evidence that promotion is based upon a wide range of criteria, established by the institution in conformance with this document and appropriate to the mission of the institution. Examples appropriate to some colleges might be: excellence in teaching; accessibility to students; professional and scholarly activities and recognition; significant service to the college community; experience in higher education, and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field; 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 promotion shall rest with the institution.

(2) There shall be demonstrated evidence that, in the process of making evaluations for promotions, there is participation of persons from several different groups, such as: peers from within and without the particular unit of the institution, supervisory administrative personnel such as the department/division chair and the dean, and students.

(3) There shall be no practice of granting promotion routinely or because of length of service or of denying promotion capriciously.

(4)

> The institution shall provide copies of its general guidelines and criteria for promotion to the Board of Directors and shall make available such guidelines and criteria to its faculty.

b.

> Promotion shall not be granted automatically, but shall result from action by the President of the institution following consultation with the appropriate academic units.

. . .

In addition to the more objective minimum criteria listed for each academic rank, there is the further general requirement that all candidates for promotion to any rank should have professional records that clearly indicate their continuing growth as teachers, scholars, and, broadly, as members of the larger academic community.

An Associate Professor at Concord College must have an earned terminal degree and six years of full-time college teaching experience at the rank of Assistant Professor or higher. LIV Jt. Ex. 1; LIIB G. Ex. 4.

Dr. Turner, with the assistance of other faculty, developed a Template for Faculty Evaluation in October 1994, to assist the individual faculty member, as well as those involved in the application process, in determining what material would be helpful and/or necessary for processing an application. LIIA G. Ex. 6. The Template breaks down the general criteria referred to in the Handbook into more specific areas: Excellence in Teaching, Accessibility to Students, Professional & Scholarly Activity & Recognition, Advising Activities, Service to the College & West Virginia, Degrees Completed and/or in Progress, Potential for Continued Professional Growth, Experience in Higher Education, Publications and/or Research Activities, and Working Relationships. Under the heading “Excellence in Teaching” are listed Student Evaluations and their subparts, and Peer Review Questionnaire, especially the subpart “Teaching Effectiveness”. Under Accessibility to Students, Student Evaluations and Peer Evaluations are listed again as materials which would demonstrate a candidate's performance in this area. Peer Reviews are also listed under Potential for Continued Professional Growth and under Working Relationships. The faculty of Concord College developed the Student Evaluation Form as well as the Peer Review Questionnaire.

It is unclear what “other” criteria Grievant is alleging Concord used in performing his evaluations which is not contemplated in the Handbook or Policy Bulletin 36. In his Proposed Findings of Fact and Conclusions of Law, Grievant asserts Concord has adopted “different and much less rigorous” criteria for promotion than that used for tenure. G's Brief, at 3. It appears that Grievant is arguing that, because he was granted tenure, he should have been granted promotion, because “less rigorous” criteria are used for promotion. Since he was not promoted, then, Concord must have used criteria other than that specified in the Handbook to make its decision.

The promotion and tenure provisions of the Handbook and Series 36 are identical. Granted, Concord adds some additional clarification regarding the tenure procedure, including a breakdown of the criteria recommended to be used, but a quick glance at that list of criteria reveals that it is basically the same information as that contained in the Template. It is quite apparent from a review of the many letters of recommendation involved in Grievant's two applications for promotion, that the criteria listed on the Template were the criteria looked at by the Personnel Committee, Dr. Ofsa, and Dr. Turner.

Dr. Turner and Dr. Ofsa testified that the primary reason for denying Grievant's promotion was that he has not yet achieved excellence in teaching. Grievant's student evaluations simply do not support Grievant's contention that he deserved promotion. Promotion is not granted routinely or simply on the basis of length of service, as is more often found in tenure applications. Thus, it would appear that the exact opposite of what Grievant contends is true: that Concord uses less rigorous criteria for tenure applications,and looks more closely at the criteria, especially excellence in teaching, for promotion applications.

3.

Whether Concord improperly considered the fact that Grievant was on a sabbatical leave at the time he applied for promotion in 1995-96.

The only other improper “criteria” Grievant alludes to is his allegation that the Personnel Committee improperly considered his being on sabbatical in its recommendation to deny his 1995-96 promotion application. The Faculty Handbook provides, with regard to sabbatical, that, “[a] faculty member's institutional position, status, and rank shall not be adversely affected solely by his or her absence.” LIV Jt. Ex. 1, p. 99 (emphasis added).

In its recommendation to deny Grievant's 1995-96 application for promotion, the Personnel Committee noted that, in its judgment, “Dr. Shackleford did not allow a sufficient interval since his last application to document improvement, especially since he was going to be on sabbatical leave this semester.” LIIA G. Ex. 1. However, it is clear from the Personnel Committee's recommendation, that this reference to Grievant's sabbatical, if negative at all, was not the only factor which the Committee considered in reaching its ultimate conclusion. The Committee specifically makes reference to Grievant's lack of improvement on both the peer evaluations and student evaluations. The Handbook only prohibits the sole use of sabbatical leave to impact adversely on a faculty member's status. Additionally, there is no further mention of Grievant's being on sabbatical in either Dr. Ofsa's or Dr. Turner's recommendations to deny Grievant's application for promotion.

Based upon a review of the evidence and testimony, I find no evidence that the Personnel Committee, Dr. Ofsa, or Dr. Turner relied on any “criteria” other than those listed on the Template and in the Handbook and Series 36; nor did the Personnel Committee relysolely on Grievant's sabbatical in the Spring of 1996, in recommending his denial of promotion in April 1996. Thus, these claims must be denied.

5.

Whether Concord allowed the Division Chair to distort and misrepresent application materials, and, in reliance on those, made arbitrary and capricious recommendations which have been acted on by the President to Grievant's detriment.

Grievant alleges that Dr. Ofsa “misrepresented and distorted application materials” in his recommendations to deny promotion. Although somewhat vague, I believe this statement refers to Grievant's argument that too much weight was given by Dr. Ofsa and Dr. Turner to Grievant's student and peer evaluations in making their determinations.

First, it is undisputed that the Concord faculty developed the student and peer evaluations. Grievant does not contest the use of these documents in assessing a faculty member's performance, just the weight that has been given to them by Concord. As discussed in the Findings of Fact, Grievant's scores on these documents for the two years in question fell below the department and division averages, and in many cases, he was ranked last among his colleagues in both the student and peer evaluations. Dr. Ofsa and Dr. Turner do not dispute they give great weight to these documents in assessing a candidate for promotion. Both testified these two documents are the

primary tools in assessing a candidate's teaching effectiveness. Concord does not engage in classroom observation of its faculty. Thus, a review of a professor's syllabi and any other class preparation materials he wishes to submit, and the student and peer evaluations, are the only tools available to assess the professor's performance in the classroom.

Dr. Ofsa and Dr. Turner conceded that student evaluations are subjective and can be swayed by any number of factors. Thus, a statistical model is generated from thescores received which results in a “mean of mean” average. That average is then used to compare the applicant to colleagues within the division and department in order to arrive at a division average. In this instance, Grievant's scores fell below the division average.

Dr. Turner testified that in order for him to approve Grievant's application for promotion, he would have to see consistent scores either at or above the division average. Dr. Turner stressed that “excellence in teaching” is the most important criterion and the primary mission of the College, and that scores below the division average are not indicative of “excellence” in teaching.

It is undisputed that those who evaluated Grievant for promotion were impressed with his contributions in the areas of professional growth potential, research ability, and service to the college and West Virginia. The only requirement which they did not consider impressive was competence in teaching. Obviously, Grievant would have preferred that those evaluating him weight these other criteria greater than his student and peer evaluation scores. Undoubtedly, had Grievant received scores above the division average, he would not now be contesting the use of them in his evaluation.

Grievant presented the testimony of Robert Wilson, an expert in employment practice and procedure in higher education, regarding the student and peer evaluations. Dr. Wilson opined these forms are not statistically valid, and indeed, they have not been validated by the faculty or Concord for use as testing instruments. Of course, these instruments are not tests. They are “instruments of a secondary nature to be used for informational purposes.” LIV, Wilson. Dr. Wilson pointed out the problems with these types of instruments, i.e., they are subject to emotional bias, are impacted by factors beyond the professor's control, lack definition of criteria, and lack validation. He stated that students give feedback depending on how they feel at the time, so their responses are not consistent and not reliable. Dr. Wilson also pointed out what he perceived as a significant difficulty in using these instruments to evaluate teaching effectiveness; the term “teaching effectiveness” was not defined and therefore could not be measured. He opined that “crunching numbers to obtain the mean

of means is not interpretable as anything useful."

Everything Dr. Wilson testified to is accurate as far as the subjectivity of the student evaluation forms. It is inherent in that type of anonymous evaluation that the scores given will be based almost entirely on subjective factors: what grade the student is getting, how he or she feels that day, whether they believe they have anything useful to say, whether they "like" the professor. Since the faculty designed the form, it must be assumed the faculty realized the inherent subjectivity of the form. "Crunching numbers" to achieve a "mean of means", while maybe not "useful" in Dr. Wilson's view, at least serves to create an average range of scores, which necessarily throws out the worst scores and the best scores received. The worst and best scores would seem to be the most subjective of all, as far as measuring whether they were based on grades and personal likes and dislikes. While Dr. Wilson's testimony was instructive and interesting, he ultimately did not make any conclusions regarding this specific case. Dr. Wilson did not review Grievant's scores vis-a-vis other faculty members, nor did he create a statistical model of these scores to demonstrate their unpredictability. Rather, Dr. Wilson merely observed that these general types of instrument are subject to emotional bias. In conclusion, Grievant has failed to present evidence that Dr. Ofsa "distored and misrepresented" the application materials, especially the student and peer evaluations, or that Concord's use of these instruments was arbitrary and capricious in evaluating Grievant's applications for promotion.

6.

Whether Concord violated any policy, rule, law or practice by not placing Grievant on an improvement plan.

Grievant alleges that, if his teaching effectiveness was so poor, he should have been placed on an improvement plan to assist him in improving his performance. There is nothing in the Faculty Handbook or Series 36 which requires the implementation of such a plan. There was no testimony that Grievant ever requested an improvement plan, and no testimony that an improvement plan had ever been developed for any other faculty member at Concord. Grievant's claim in this regard must fail, as he has failed to identify any violation of any rule, policy, law, or procedure which would require Concord to place him on an improvement plan. The only evidence regarding an improvement plan is the testimony of Tina Hanlon, more fully discussed below, that she believed, at one point in 1992,

there was some discussion among Dr. Ofsa, Dr. Turner and Grievant that Dr. Ofsa would assist Grievant in his professional development. However, Ms. Hanlon's testimony does not prove that an improvement plan was ever devised, or that Concord was required to do so with regard to Grievant.

7.

Whether Concord discriminated against Grievant on the basis of his sexual orientation.

W. Va. Code § 18-29-4(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees.” To establish a prima facie case of discrimination, Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agree to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-214 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id.

Grievant alleges Concord has discriminated against him because he is a homosexual and has not promoted him in rank. As part of this claim, Grievant alleges that the student and peer evaluations are filled with bias against him because he is a homosexual, and thus reliance upon them by Concord was arbitrary and capricious and constitutes discrimination.

Dr. Wilson testified that homosexuality is an emotional issue with a lot of people, so that the potential exists for bias to be reflected in student and peer evaluations. However, Dr. Wilson did not render an opinion that this student evaluation process and this peer review process were, in fact,

injected with a bias against Grievant because of his sexual orientation. Thus, Dr. Wilson's opinion does not constitute evidence of any kind to support Grievant's allegations that the student and peer evaluations were infected with bias because of Grievant's sexual orientation.

The use of student and peer evaluations and the weight given to them are constantly being challenged by unsuccessful applicants for tenure and promotion. However, the faculty in this instance designed those forms, not Concord. For a faculty member who participated in the creation of a form designed to evaluate, to now complain that the form is not statistically valid, and that the College uses it too freely, is patently unfair. It is for the faculty at Concord to correct this situation if they do not like it. Apparently, Grievant currently serves on a committee set up to do just that.

Grievant identified two other faculty members who applied for, and were granted, promotion within the last five years. Dr. John Baker was granted promotion to Associate Professor, and Mrs. Jane Jabour was granted promotion to the rank of Assistant Professor. The only evidence presented about these two individuals was testimony from Dr. Turner that the same Handbook and Series 36 criteria were applied to them, and they were found to be above average. No evidence was presented as to the years these individuals were granted promotion, what division or department they were in, what their background was, or any other information regarding their application materials. When questioned whether Dr. Baker and Mrs. Jabour were gay, Dr. Turner answered he had no knowledge.

Grievant submitted a letter from Dr. Baker to Dr. Bailey, Chairman of the Personnel Committee, in which Dr. Baker informs him that Dr. Ofsa notified him that he had met the minimum criterion to apply for promotion. LIV G. Ex. 12. Grievant contends that, because Dr. Ofsa apparently never told him he had met the minimum criterion to apply, this is evidence of discrimination. As noted above, the Faculty Handbook specifically provides that the process of consideration for academic promotion may be initiated by the chair or the individual faculty member. Thus, there is nothing procedurally wrong with Dr. Ofsa mentioning to Dr. Baker that he had met the minimum criterion for promotion. Further, there is nothing in that statement that indicates that Dr. Ofsa somehow favored Dr. Bakerover Grievant, or that he had been given some advantage over Grievant in applying for promotion. Grievant clearly was familiar with the process for applying for promotion.

Grievant's argument is simply that, because is a homosexual, and presuming the other two individuals are not, the differences in treatment must be motivated by prejudice. However, such

information standing alone cannot make a prima facie showing of discrimination. Ftnt. 1, Phillips v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-289 (Jan. 15, 1992). Such information standing alone, as here, also cannot show an employer's job-related explanation is a mere pretext. Woods v. Dept. of Health and Human Res., Docket No. 97-HHR-248 (Sept. 22, 1997). Under any analysis of the evidence presented, Grievant's discrimination claim must fail.

It is incumbent upon Grievant to prove bias by his supervisor. Heller v. Dept. of Tax and Revenue, Docket No. 96-R&R-318 (May 9, 1997) at 6. Grievant offered several illustrations to show that Dr. Ofsa must be biased against him because he is gay. None of Grievant's illustrations prove his point. Grievant did succeed in proving that he has had a difficult relationship with Dr. Ofsa over the years.

Dr. Charles Brichford, a member of the Personnel Committee, testified that he had concerns with Grievant's relationships with his peers, and that collegiality with Grievant was a problem. Dr. Frederick Bailey also testified that Grievant's main problem with regard to peer evaluations was his relationships with his peers, and that it had been a problem for a long time.

At one point, Grievant filed an internal grievance against Dr. Ofsa, claiming discrimination and violation of the Academic Freedom Policy. Specifically, after receiving several complaints from students regarding the sexual content of some of Grievant'scourses, and his apparent emphasis on homosexuality, Dr. Ofsa requested that Grievant place a disclosure statement in his course material to instruct students that some of the material may contain content of a sexual or homosexual nature. Grievant eventually withdrew his internal grievance, and it is undisputed that Dr. Ofsa never told Grievant he could not teach any type of material he chose, but merely requested that he place a disclosure regarding his course syllabi for his students.

Grievant also told of an instance where again, students complained to Dr. Ofsa about his course content, and Dr. Ofsa responded by setting up an alternative class for the students to take. Again, Dr. Ofsa did not tell Grievant he could not teach the desired material; he merely gave the students an option not to take Grievant's class.

Dr. Ofsa testified that, as Division Chair, it is his responsibility to look into any concerns or complaints that are brought to his attention. In this case, complaints were about Grievant's classes and course content. Some students found the material objectionable because of the heavy emphasis on sexuality and homosexuality. Unfortunately for Grievant, there are going to be some people who are offended by this material, and Dr. Ofsa's attempts to placate the students, his customers at

Concord, does not give rise to an inference that Dr. Ofsa was prejudiced against Grievant because he is a homosexual. (See footnote 5) Grievant testified that the division secretary displays anti-gay propaganda on her desk, and tunes her radio in the office to a religious radio station. Grievant presented no evidence that this individual played any part in his evaluation process, or had any persuasive effect on any of the individuals involved with that process. Rather, in contradiction of his apparent desire to be treated like everyone else, Grievant suggested this secretary should not be allowed to play a religious broadcast on her radio, and should not be allowed to have a Bible on her desk, because it offends his sense of morality. Grievant cannot have it both ways. Concord can no more sanitize its campus for Grievant, than it can demand that this secretary refrain from indulging in the entertainment of her choosing.

Finally, Grievant presented the testimony of Tina Hanlon, an Associate Professor of English, who formerly taught at Concord. Ms. Hanlon testified that Grievant is an excellent teacher, having sat in on his classes from time to time, and having an office next to his at Concord. Ms. Hanlon testified that her relationship with Dr. Ofsa deteriorated drastically over the years and that he treated her badly. She said he wrote “hateful” things about her, and misrepresented her student evaluations. Additionally, Ms. Hanlon served on the division Personnel Committee the year Grievant was up for retention, in approximately 1992. She testified that Dr. Ofsa was supposed to be working with Grievant on his professional development, couching it in terms of an “improvement plan.” She testified that when it came time for voting on Grievant's retention, Dr. Ofsa said he did not remember he was supposed to do that, and she got in trouble for bringing it up. Interestingly, the Committee voted against retaining Grievant, and Dr. Ofsa recommended retention. Ms. Hanlon's testimony supported Grievant's contention that Dr. Ofsa was difficult to work with. However, it also showed Dr. Ofsa was perhaps difficult for a lot of people, especially Ms. Hanlon. Ms. Hanlon did not testify that she was a homosexual, or that that was the reason she did not get along with Dr. Ofsa, and her testimony did not lend any support to Grievant's contention that Dr. Ofsa recommended against his promotion solely because he is a homosexual.

In Grievant's efforts to be treated like everyone else, he makes it abundantly clear that he should be treated quite differently than everyone else. He wants Concord to throw out all of his student and peer evaluations because they “might” be infected with bias against him. Grievant's relief is untenable. His case is made up of conjecture, speculation, and paranoia. He argues that students

"may" be prejudiced against him because he is gay. He argues his peers "may" be prejudiced against him because he is gay. He argues that Dr. Ofsa's concerns with negative student letters is evidence that he is anti-gay, as is Dr. Ofsa's request that he provide a disclosure in his course syllabi regarding what may be perceived as objectionable course content.

None of this evidence proves that the students, the faculty, Dr. Ofsa, or Concord, are anti-gay. Grievant's sexual preference discrimination assertion is tautological, and rejected, as he has presented no objective evidence to support any finding of discrimination or bias. There is no proof, only speculation and suspicion on Grievant's part. Under these circumstances, Grievant's argument must fail. Heller, supra. See Woods v. Dept. of Health and Human Resources, Docket No. 97-HHR-248 (Sept. 23, 1997); Taylor v. Monongalia County Health Dept., Docket No. 96-MCHD-383 (May 28, 1997); Nafe v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-386 (Mar. 26, 1997).

CONCLUSIONS OF LAW

1. Grievant must prove all the allegations constituting the 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 decisional subjective process by which promotion and tenure is awarded or denied is best left to the professional judgment 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 (4th Cir. 1984); Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994).

3. W. Va. Code § 18-29-2(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 by the employees." To establish a prima facie case of discrimination, Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other

employee(s) has/have not, in a significant particular; and,

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agree to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-214 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id.

4. Grievant has failed to prove his claims against Concord by a preponderance of the evidence. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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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MARY JO SWARTZ

Administrative Law Judge

Dated: October 9, 1997

SUMMARY OF EVIDENCE

Appendix A

September 12, 1996 Hearing (Level IIA)

Grievant

Ex. 1 -

April 19, 1996 memorandum from Personnel Committee to Dr. William J. Ofsa.

Ex. 2 -

August 7, 1996 memorandum from Dr. William J. Ofsa to Dr. Dean Turner

Ex. 3 - May 7, 1996 memorandum from Grievant to Dr. Frederick Bailey

Ex. 4 -

December 20, 1995 memorandum from Dean Turner to Grievant

Ex. 5 -

Sample Student Evaluation of Faculty Form

Ex. 6 - Template for Faculty Evaluations, effective October 27, 1994

Ex. 7 -

Promotion Packet prepared by Grievant

October 24, 1996 Hearing (Level IIB)

Grievant

Ex. 1 -

June 13, 1994 memorandum from Dean Turner to Dr. Jerry Beasley

Ex. 2 -

July 31, 1994 memorandum from Dean Turner to Dr. Jerry Beasley; March 20, 1995 memorandum from Personnel Committee to Dr. William J. Ofsa

Ex. 3 -

September 5, 1996 memorandum from Dean Turner to Dr. Jerry Beasley

Ex. 4 -

Title 131 Procedural Rule, State College System of West Virginia, Board of Directors Series 36 (Policy Bulletin 36)

Respondent

Ex. 1 -

November 21, 1996 letter from Jerry Beasley to Mary Ellen Griffith, Esq.; October 30, 1996 letter from Jerry Beasley to Mary Ellen Griffith, Esq.; October 30, 1996 letter from Jerry Beasley to Grievant; October 29, 1996 memorandum from Joe Bagnoli to Jerry Beasley

Level Four Hearing

Grievant

Ex. 1 -

Student Comments Criticizing Course Content 1988-1994

Ex. 2 -

Comments Concerning Sexual Content 1988-1993

Ex. 3 -

Concord College 1995-96 Academic Due Date Calendar

Ex. 4 -

October 18, 1995 memorandum from Dr. William Ofsa to Dr. Frederick Bailey

Ex. 5 -

March 6, 1995 memorandum from Grievant to Dr. William Ofsa

Ex. 6 -

May 12, 1994 memorandum from Dr. William Ofsa to GrievantEx. 7 - February 25, 1994 memorandum from Dr. William Ofsa to Dean Turner

Ex. 8 -

Vita of Robert A. Wilson, PhD

Ex. 9 -

May 1, 1995 memorandum from Dr. William Ofsa to Dean Turner

Ex. 10 -

April 28, 1994 memorandum from Dr. William Ofsa to Dean Turner

Ex. 11 -

February 25, 1994 memorandum from Dr. William Ofsa to Dean Turner

Ex. 12 -

February 24, 1992 memorandum from Dr. John Baker to Dr. Fred Bailey

Respondent

Ex. 1 -

August 7, 1996 memorandum from Dr. William Ofsa to Dean Turner

Ex. 2 -

April 22, 1994 memorandum from Dean Turner to Jerry Beasley

Ex. 3 -

June 13, 1994 memorandum from Dean Turner to Jerry Beasley

Ex. 4 -

July 31, 1995 memorandum from Dean Turner to Jerry Beasley

Ex. 5 -

September 5, 1996 memorandum from Dean Turner to Jerry Beasley

Ex. 6 -

August 2, 1995 memorandum from Dean Turner to Grievant

Joint

Jt. Ex. 1 -

Concord College Faculty Handbook

Jt. Ex. 2 -

Policy Bulletin 56 - Social Justice Policy

Testimony

Grievant testified in his own behalf and offered the testimony of Dr. April Beavers, Dr. Frederick Bailey, Dr. William Ofsa, Dr. Dean Turner, Dr. Sandy Bailey, Dr. Charles Brichford, Dr. Jerry Beasley, Dr. Robert Wilson and Dr. Tina Hanlon. Respondent offered the testimony of Dr. William Ofsa and Dr. Dean Turner

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Footnote: 1

Grievant's claims against Concord have changed dramatically since this grievance was filed originally. In addition to the procedural violations noted above, Grievant also has alleged that he has been discriminated against by Concord on the basis of sexual preference. Concord did not object to the alteration of the grievance statement, and in accordance with W. Va. Code § 18-29-3(j), the evidence and testimony on the discrimination claim will be considered in this decision.

Footnote: 2

References to exhibits and testimony will be as follows: The September 12, 1996 hearing will be referenced as "LIIA Ex. ; the October 24, 1996 hearing will be referenced as "LIIB Ex. ; and the level four hearing will be referenced as "LIV Ex. .

Footnote: 3

Neither Dr. Turner nor Dr. Beasley were asked during the hearing what a "pocket veto" is or how it was used in this context.

Footnote: 4

Concord again moved to dismiss the grievance, alleging that Grievant's additional claims constituted a new grievance. Concord's motion was denied in an effort to expedite this already protracted matter through the grievance process.

Footnote: 5

Grievant introduced exhibits he prepared summarizing the number or amount of comments on his student evaluations criticizing course content or expressing concerns about sexuality, in an effort to show that the students were not as concerned about these things as Dr. Ofsa represented. LIV G. Exs. 1, 2. However, as noted before, these tools are subjective, and just because a student did not make a comment on a form does not mean he or she was not concerned about these matters, or that their concerns did not show up as a low rating on the evaluation form.