JOYCE G. WEBB,

Grievant,

v. **Docket Nos. 97-BOD-402/403**

BOARD OF DIRECTORS/SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Grievant, Dr. Joyce G. Webb, employed by the Board of Directors as an Assistant Professor of Speech and Director of Debate and Forensics, at Shepherd College (Respondent), filed level four grievance appeals on September 8, 1997, alleging that she had been improperly denied promotion to the rank of full Professor, and denied merit pay for the 1996-97 academic year. Grievant had initially filed her complaints at level two. Following evidentiary hearings at that level, Shepherd College President David L. Dunlop accepted the recommendations of his designated hearing evaluator and denied the grievances. A combined level four evidentiary hearing was conducted on March 16 & 17, 1998, on the campus of Shepherd College, at Respondent's request, and with the consent of Grievant. (See footnote 1) The matter became mature for decision on June 15, 1998, the final date for responsive submissions.

The following findings of fact are derived from the record in its entirety.

Findings of Fact

1. Grievant has been continuously employed by the Board of Directors at Shepherd College since July 30, 1979. She has held the rank of Associate Professor of Communications for the past ten years, and also holds the position of Director of Debateand Forensics.

2. During the 1996-97 academic year Grievant applied for promotion to the rank of full Professor. Grievant prepared a promotion file listing her accomplishments of the past decade, and twice supplemented it, first at the request of the Division Promotion and Tenure Committee, and second, to advise that she had been elected Secretary of the Faculty Senate.

3. Because Grievant held the position of Chair of the Department of Communications at the time of her application for promotion, Dr. Charlotte Anderson, Chair of the Department of Nursing, agreed to review Grievant's application at the initial level. Dr. Anderson recommended promotion.

4. Because Dr. Anderson was limited in her ability to review matters related to the area of Communication, Grievant's promotion file was sent to two individuals in that discipline for external review. One of the reviewers was selected by Grievant, the second was selected by Respondent.

5. One outside reviewer recommended promotion. The second reviewer made no recommendation whether Grievant should be promoted.

6. The departmental Promotion and Tenure Committee recommended that promotion be denied. The campus-wide Professional Status Committee recommended the promotion be granted.

7. Vice President for Academic Affairs, Dr. Mark Stern, recommended that promotion be denied on the basis that “the candidate did not demonstrate continuing and sustained professional development throughout the time of her tenure as an associate professor.” 8. By letter dated June 18, 1997, Shepherd College President, Dr. David L. Dunlop, denied the promotion stating, “I am specifically concerned about whether you entirely meet the standards in any of the criteria of teaching excellence, service, or scholarship and professional development necessary for the rank of Professor, nor am I satisfied with your application's self-assessment in the criteria for promotion which are designated for inclusion in every application.”

9. Respondent evaluated all faculty members for the purpose of granting merit pay for the academic year 1996-97. The evaluation forms establish that “Teaching” was 50% of the total score, “Scholarly/Artistic/Performance Endeavors”, 20%, and “Professional Service”, 10%. The remaining 20% was to be applied to any of the three sections, at the discretion of the employee.

10. Grievant elected to apply the discretionary percentage to the area of Scholarly/Artistic/Performance Endeavors.

11. Four categories were devised to determine the amount of merit increase to be awarded to an employee: 0) 0 - 69 points; 1) 70 -79 points; 2) 80 -89 points; and 3) 90 -100 points.

12. Grievant was evaluated by Department Chair, Dr. Sally Hresan, and Division Chair, Dr. Farrell Coy. She was awarded a total of 41 merit points, and received no merit pay.

13. Only two of thirty-four faculty members of the Division of Arts and Humanities were awarded no merit pay.

Promotion

Grievant argues that President Dunlop has set her up for failure in her bid tobecome a full professor, because she has no authority to reduce her teaching assignment to allow her more time to

engage in scholarly research and publication. Grievant notes that she could reduce her activities as Director of Debate and Forensics, but that she would then risk receiving a lower rating in the area of service, and being denied promotion for that reason. She complains that Respondent has encouraged, and perhaps expected, the excellence that the debate teams have exhibited, but now uses that excellence to deny her promotion.

Respondent argues that beginning in October 1994 the administration began communicating to the faculty that there was a rising level of expectation in the area of scholarly professional activity to meet the criteria for promotion to Professor. President Dunlop concluded that Grievant's performance in this area was deficient, and that her performance in teaching had been adequate, but not clearly excellent. Respondent concludes that these findings demonstrate a clear, cogent, and rational basis for the determination that promotion should be denied.

Because promotion is not disciplinary in nature, Grievant must prove all of the allegations constituting the greivance by a preponderance of the evidence. Shackleford v. W. Va. Bd. of Directors/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997); Baroni v. Bd. of Directors/ Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). The decisional subjective process by which promotion 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). An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp., 769 F.2d 238 (4th Cir. 1984). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

The 1996 Shepherd College Faculty Handbook provides that:

[p]romotion and tenure of faculty are the prerogatives of the President, who will base his or her decision primarily upon the guidelines and the recommendation(s) of [the] Vice President for

Academic Affairs, the Department Chair, and the appropriate College Promotion and Tenure Committees.

Promotion in rank and tenure will not be granted routinely nor automatically because of length of service. Neither will promotion or tenure be denied capriciously. Requests for granting of promotion or tenure will be evaluated on the basis of the following five areas of performance:

(1) The possession of the terminal degree . . .;

(2) Excellence in teaching as evidenced by recent and regular evaluation;

(3) Professional growth as evidenced by scholarly research or creative work appropriate to the discipline or field of appointment. Such evidence may include publication; presentation of scholarly papers at professional forums; participation and recognition in juried shows, concerts, recitals; or other achievements of significant professional stature;

(4) Evidence of excellence in professional service, manifestedin activities that add to the efficiency and positive image of the discipline, the department, or school, Shepherd College, and the State of West Virginia, including involvement in professional organizations at the national, regional, and state levels;

(5) Attainment of the minimum educational and experience requirements . . . .

Tenure may be attained only by faculty who hold the rank of Assistant Professor or higher. Tenure evaluation by the President and Vice President for Academic Affairs may also be affected by the tenure profile of the institution and projections for future needs.

President Dunlop testified that after reviewing Grievant's application for promotion and the recommendations of the previous evaluators, he determined that she had demonstrated excellence in service, and found her teaching to be acceptable, but judged her to be lacking in professional development. He noted that Grievant listed only one publication, a small book of approximately one hundred pages, of which she was listed as the second of three authors. President Dunlop stated that it was impossible to determine what portion of the book was Grievant's work product, and that the publication was more in the nature of a student workbook than a scholarly treatise. He also noted that

the references in the book were generally several decades old, indicating that the subject matter had not been addressed in an up-to-date, scholarly manner. Finally, President Dunlop commented that Grievant had not included any information as to how often her work had been cited, and by whom. He opined that work of full professor scholarship would be quoted by others.

Grievant had also included on her application for promotion two works which were still in progress. President Dunlop testified that he accorded these documents no weightbecause they were not available for review by himself, or by scholars in the field. Grievant listed no publications, grants, or contracts on her application.

President Dunlop continued to testify that he had also considered Grievant's presentations at conferences, but that they were accorded less weight than publications because they are not subject to the same evaluation, or refereed, and lack the rigor of more academic scholarship. He concluded that Grievant had made a good start with her presentations, but that her work as a chair at such events was more an administrative, or service function, than scholarly. Grievant's work with the debate and forensics teams was not considered as professional development, but her success in this area was acknowledged and credited in the area of service.

President Dunlop testified that upon finding Grievant fatally deficient in the area of professional development, he did not evaluate her teaching in detail, but noted that while the student evaluations she provided were good, there were gaps during the period since her last promotion, and her application did not include all the classes she taught. He stated that he did not pursue any additional information related to Grievant's teaching, because it would not have changed the outcome of his decision.

President Dunlop's decision was based upon the information provided by Grievant, and was properly derived based upon the criteria listed in the Faculty Handbook. Grievant's primary complaint appears to be that her teaching and service activities do not allow her adequate time to participate in professional development of a scholarly nature. Clearly, she devotes a substantial amount of time to the debate and forensics teams, in addition to her classroom instruction; however, promotion to the level of full Professor does not come without significant achievement. Grievant was given notice as early as April 1994, of the importance of scholarly publication. Then-Dean Ron Jones provided Grievant information relating to promotion to the rank of professor, noting that she would need to provide evidence that she was current in the knowledge of her field. He stated, “[o]bviously, if you

have been reviewed by your professional peers or have published in refreed [sic] journals, there is reason to believe that you are current in your specific field." An attached document addressing promotion and tenure listed the procedures and criteria. Under "Professional Growth", number one was "[t]he extent to which there are refereed accomplishments." Grievant failed to prove that President Dunlop's decision to deny her tenure was based upon irrelevant factors, was a clear error of judgment, or was arbitrary and capricious.

Merit Pay

Evaluations for merit pay are based on the same criteria used for promotion, however, the award was for one year only. In May 1997, Grievant was evaluated by Department Chair, Dr. Sally Hresan, and Division Chair, Dr. Farrell Coy, for purposes of awarding merit pay. The Faculty Merit Pay Evaluation Form indicates that the individual was to be rated in the areas of teaching (50%), scholarly/artistic/performance endeavors (20%), and professional service (10%). Grievant elected to allocate the additional 20% to the area of scholarly/artistic/performance endeavors. Her total score was calculated to be forty-one points, placing her in merit category 0, awarding her no merit pay. Only two of the approximately thirty-four faculty members in the Division of Arts and Humanities were not awarded merit pay.

Grievant argues that the procedure utilized by the Department and Divisional Chairswas biased, arbitrary and capricious. She notes that a time line for processing the merit pay requests was not provided to her until April 15, 1997, well after the March 31 deadline. Grievant also asserts that she was not provided a meeting with her Department Chair, as required by the guidelines, but rather, only met with Dr. Hresan when she was given the final results of her evaluation by Dr. Coy.

Addressing the specific areas in which she was rated, Grievant argues that almost no weight was given to the positive student evaluations which she provided, but that "tremendous credence" was given to what was characterized as unsolicited negative student evaluations. She also asserts that her work with the debate team was not given the credit it deserved in the scholarly/artistic/performance category.

Dr. Coy testified that he considered the meeting between the Department Chair and the faculty member optional. Dr. Coy stated that he had given Grievant 30 out of 50 points in the area of teaching based upon his concerns that she had submitted a small number of evaluations, and the unprecedented number of complaints about Grievant that he had received from present and former

students, a substitute adjunct faculty member, and her Chair, since February. These complaints included claims that she was consistently unprepared for class, was frequently tardy and/or absent, and did not keep regular office hours. He noted from personal observation that Grievant was not present during her posted office hours, and was frequently late for class.

Dr. Coy continued that he accorded Grievant five out of forty points in the area of scholarly/artistic/performance endeavors. Dr. Coy stated that he did not place any substantive weight on Grievant's work in progress because it could not be reviewed. Grievant declined the opportunity to provide him or Dr. Hresan with supplementaldocumentation or evidence regarding a book she is writing with a student. Dr. Coy indicated he had contacted the publisher of Grievant's first workbook to confirm that a second edition was being prepared, but that he had been advised that it was not. He noted that no scholarly activity had been completed during the 1996-97 academic year. He acknowledged Grievant's teaching efforts with the debate and forensic teams, but awarded her minimal credit because the students, not Grievant, engaged in the scholarly/artistic/performance endeavors.

Grievant was awarded six out of ten points for professional service. Dr. Coy noted that she was a member of the Faculty Senate, which meets twice monthly, and was elected as Secretary shortly before she was evaluated; however, he checked with the former Secretary and found that she had attended only two meetings the first semester. Dr. Coy acknowledged that he had not inquired as to why Grievant was absent, and conceded that her work with the debate and forensic teams may have been the cause of a number of the absences.

Dr. Coy's evaluation is troublesome in that he based his decisions on negative information which he actively acquired, and on information which he perceived to be negative, but did not investigate. By his own admission, Dr. Coy was advised by Dr. Hresan that Vicki Sherette, a former student who had been substituting for Grievant, had advised her of complaints made by the students regarding Grievant. Dr. Hresan advised her to report this information to Dr. Coy; however, he testified that upon hearing this second-hand report from Dr. Hresan, he went to Ms. Sherette to hear the complaints. At level two, he testified that he told Ms. Sherette and Dr. Hresan that his door was open and “to make sure that the students knew that”. He acknowledged that this action could beconstrued as soliciting their input, but denied that was his intent.

The record contains typed synopses of a number of students who made the complaints.

Apparently three students signed these statements, and some students made more than one complaint. It appears that there may have been approximately ten student complaints. Little weight can be accorded to statements which are unsigned, and which Grievant had no opportunity to address. Dr. Coy's consideration of comments made by a former student he met in a restaurant in Hershey, Pennsylvania, is entirely improper. The record does not reflect when the student attended Shepherd College, and the merit pay was for the 1996-97 year only.

As presented, it appears that Dr. Coy specifically sought out negative input regarding Grievant's teaching. Certainly, the record does not reflect that any effort was made to solicit positive comments from students. Further, there is little evidence that Dr. Coy investigated to ascertain whether the complaints were valid. For example, one complaint involved frequent absences. Dr. Coy did not inquire as to whether the absences occurred when Grievant was traveling with the debate and forensics teams. He indicated that in February or March he passed by her office during office hours, but he did not observe her teaching or performing other duties.

Also of concern is the rating in professional service. Dr. Coy appears to base this largely upon Grievant's attendance at Faculty Senate meetings. While attendance may well be considered, it is problematic that he did not inquire regarding the reasons for the absences, particularly in light of the fact that Dr. Coy is well aware that Grievant travels frequently with the debate and forensics teams. Apparently, the absences were not considered vital by Grievant's colleagues, as indicated by her subsequent election asSecretary.

The evidence relating to this issue establishes that Dr. Coy weighted negative information more heavily than positive information, made an effort to secure information which was specifically negative, and evaluated other information negatively without investigating underlying facts. Under these circumstances, the determination that Grievant was entitled to only forty-one points, denying her merit pay, was arbitrary and capricious. Grievant must be re-evaluated in a fair and impartial manner regarding merit pay for the 1996-97 academic year.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In a grievance challenging promotion and/or tenure, the grievant has the burden of proving each element of her complaint by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket

No. 94-BOD-1072 (Sept. 13, 1995); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. The decisional subjective process by which promotion 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. Grievant failed to prove that Respondent's decision not to grant promotion was arbitrary and capricious or clearly wrong.

4. Grievant has proven that her ranking for purposes of merit pay for the 1996-97 academic year was arbitrary and capricious.

Accordingly, the grievance is **GRANTED** to the extent that Respondent is Ordered to re-evaluate Grievant for merit pay purposes. The grievance relating to promotion is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson 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.

Date: August 3, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by WVEA Consultant Harvey Bane, and Respondent was represented by K. Alan Perdue, Esq.