TERRY WILSON,

Grievant,

v. Docket No. 99-BOT-115

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Terry Wilson, employed by the Board of Trustees as a full professor at West Virginia University (WVU or Respondent), in the College of Business and Economics (CBE), filed a level one grievance on July 10, 1997, following the termination of his employment, effective May 15, 1997. Gerald E. Lang, Provost and Vice President for Academic Affairs and Research, denied the matter at level one on July 24, 1997. Appeal to level two was made on July 30, 1997. A hearing was conducted by Jon A. Reed, General Counsel for WVU, on October 15 and 16, and November 12 and 13, 1998.

On March 17, 1999, Grievant filed a Notice of Default with the Grievance Board. A level two decision denying the grievance, but awarding some back pay, was issued on April 19, 1999. On May 13, 1999, a Default Order was issued by the undersigned Administrative Law Judge, holding that no default had occurred. Grievant elected to by- pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the grievance to level four. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on June 15, 16, 17, 23, and 24, 1999. Grievant was represented by counsel, Eugene G. Eisner and Jennifer R. Willig, Eisner & Hubbard, P.C., and Keith Pappas, Esq. Respondent was represented by William Hilary Hutchens, III, Associate General Counsel at WVU, Richard M. Yurko, Jr., Esq., and Lori A. Dawkins,Esq., Steptoe and Johnson. The matter became mature for decision on October 26, 1999, upon receipt of Respondent's response to Grievant's post-hearing submissions.

Background

Grievant was initially appointed to the faculty of the WVU College of Business and Economics as an Associate Professor in 1981, was awarded tenure in 1983, and promoted to the rank of full professor in 1987. Grievant's employment was terminated in May 1997. Because the dismissal letter contains a tremendous amount of information regarding this matter, it is included in substantial part

as follows:

Dear Professor Wilson:

I have carefully reviewed the recommendations forwarded to me, your responses, dated February 20,1997 and March 14, 1997, to those recommendations, and your complete personnel file. Dean Sydney V. Stem, Acting Chairperson William B. Riley, and your colleagues on the College of Business and Economics Promotion and Tenure Committee and the Department of Marketing Promotion. Tenure and Evaluation Committee have all recommended that your employment at West Virginia University be terminated. I regret to inform you that I concur with their recommendations. You are hereby terminated for cause, effectively immediately, consistent with the provisions of University System of West Virginia Series 36.

Relevant Policies

Your employment with West Virginia University is governed by West Virginia statutes, the University System of West Virginia Board of Trustees Series 36. "West Virginia University Policies and Procedures for Faculty Evaluations [hereafter, “university guidelines”)," "Procedures and Criteria" of the College of Business and Economics, and other university policies and procedures.

History

You were appointed to the university faculty in 1981, received an award of tenure in1983, and were promoted to the rank of Professor in 1987. Since 1995, there have been seriousproblems regarding (1) your productivity, (2) the credibility of your productivity reports, and (3) your frequent failure to respond to reasonable directives by administrators that you follow institutional procedures for completing your personnel file and other matters. Although you have been a tenured Professor for several years, the absence of material in your personnel file, as well as certain material contained therein, suggest that you have not appropriately fulfilled your responsibilities as a senior member of the university faculty. In his letter dated February 21, 1996, you were warned by Dean Stem that if you failed to follow his directives, you could be at risk of dismissal for cause.

Information About the Quality of Your Performance (1995)

Dean Stem's review letter of February 21, 1996 called to your attention the concerns that had arisen, particularly as a result of the 1995 annual review. He also directed you to take specific actions. Among other things. he wrote, "I find your overall performance unsatisfactory, falling far short of the expectations for a full professor in the College of Business and Economics." More specifically. he noted the following:

1 . "[Y]our actions in dealing with students and colleagues, cited in the chair and department letters and documented in your file, are unacceptable and will not be tolerated."

2. "I am directing you, herewith, to prepare a detailed plan for my review and approval, to correct the several deficiencies cited. The plan should be specific as to action, time schedule, and evidence to be presented to confim activities and results. You should work with your Department Chairperson in preparing the plan."

3. “You should regard this letter as formal notice and warning that action must be undertaken, immediately, to correct the deficiencies cited. If there are further instances of the unacceptable practices and behaviors cited in the review documents, I will have no choice but to recommend your dismissal from the faculty, for cause."

Numbered paragraphs 4 through 23. which follow below, trace the history of the specific matters to which reference was made in the Dean's review letter of February 21, 1996. These matters were stated in letters from the other levels of review in the College of Business and Economics during the 1995-96 review cycle. Some paragraphs add comments provided by me.

4. “ Student evaluation information for Fall, 1994 was not provided in the file.”(From “1995 Annual Review of TerryWilson,” from the Department of Marketing Promotion. Tenure and Evaluation Committee January 30. 1996.)

Comment: Review of your file (including both the Smead file and the "backup” file) provides no student evaluation information for courses taught in Fall 1994. (See footnote 1)

5. “The material from the Spring, 1995 rated Dr. Wilson low.” (From "1995 Annual Review of Terry Wilson,” from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30.

1996.)

"Student teacher evaluations for your Spring Semester Mkt. 321 course were present in the file. Thirty-seven students responded. . .[.]"

(From "1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson, February 15,1996.)

Comment: Review of the backup file produced 40 student evaluation forms for Marketing 321, in which, according to your productivity report for that year, 68 students were enrolled. [Of the 40 forms, 37 were paper-clipped to the computer printout. and three were in an adjacent envelope. All forty are included in the following statistics.) For question no.1, which evaluates the course, your composite score was 3.08 on a scale of one to five. five being high. For question no.2, which evaluates the instructor, you scored 2.89. On question no.27, which evaluates the instructor in comparison to other instructors, you scored 3.03. Forty-four percent of the respondents to this question rated you as "among the best;" thirty-four per cent rated you "among the worst."

All of the written student comments for this course follow:

Question 1 : Expand on the above items in which you rated your instructor EXCELLENT.

Student 1 - "I enjoyed the project." Student 2 - "Considered to be an excellent source of marketing knowledge, but couldn't get through the disrespectful unconcern for his students...so little knowledge was passed on."

Student 8 -"He knows Marketing."

Student 10 - "Great real world learning experience."

Student 11 -"This instructor Is obviously very knowledgeable in his subject and has had a lot of great experience In the area. If only he could spend more time communicating it to us."

Student 12 - "Dr. Wilson was available, but offered no constructive help."

Student 13 - "Need more direction in marketing projects.

Student 15 - "He is one the top instructors at this school. He doesn't coddle you. You do things yourself. He won't hold your hand. You learn from your mistakes."

Student 16 - "Although the class structure was unorthodox, I learned more applicable knowledge in my class than I ever had. It was a real world experience and great in gaining work skills.

Student 17 - “He obviously knew the subject. [T]his was an odd course - -different from any I've had. Right now, I don't feel like I learned that much about marketing this type of setting. Perhaps a year from now I'll feel differently. The painful lessons about group dynamics may be more valuable than any amount of marketing knowledge."

Question 2. Expand on the above items in which you gave your instructor a relatively LOW rating. Suggest ways in which the instructor or course may be improved.

Student 2 - "Instructor- extremely unprofessional! Little, if any, respect for students and fellow professors, and made this well known. Need to reconsider his goal as a marketing professor."
Student 3 -"Too much emphasis placed on group project! Project was a great idea - But needed more than just that and not good to base all grade on 1 group project."

Student 4 - "Large ethical problems and favoritism are exemplified by the professor. Smart, but there is no consistency.

Student 5 - “No direction! No class structure! EGO!”

Student 6 - "We never had teacher instruction --EVER.”

Student 7 - “Have him neutered or lobotomized, then give him a clue. The POOREST teacher I ever had."

Student 8 - "Bad supervision of groups.”

Student 9 - “Lack of respect for students.”

Student 10. 'Provides guidance and direction to those who need more attention.”

Student 11 - “The instructor could: 1) provide more guidance in a constructive manner, 2) Teach

more when students obviously don't have backgrounds in the area of Marketing, 3) Most important, treat student with more respect. TEACH, GUIDE, ASSIST (only then leave students to their own devices!)

Student 12 - It would take too long to go down through each one and explain why I put poor. Dr. Wilson was a terrible instructor who put tremendous pressure on us and caused EXTREME STRESS. Overall. this class was worthless.

Student 14 - “This class was terrible, the teacher was a !@#!%$!%! I would suggest that a new teacher teach this class."

Comment: I note that some of the responses to Question 1 have negative implications, and that the responses to Question 2 represent very serious concerns.

6. “[Student evaluation] information for Fall, 1995 was not handled appropriately and was invalidated by the Faculty Senate Office.” (From “1995 Annual Review of Terry Wilson,” from the Department at Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)

“It should be noted that the Faculty Secretary returned your Fall Semester 1995 Marketing 111, Sec. 45, student teacher evaluations because of two process infractions: (1) the envelope was unsealed and (2) the student administering the process did not sign the yellow form included with the packet." (From "1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson. February 15. 1996.)

Comment: “Unsealed envelopes and unsigned checklists invalidate the results and are routinely set aside since the purpose of signing the yellow sheet and sealing the envelope assures the confidentiality of the results." (From T. Wilson "Smead" file, “Chair's Insertions into Smead File," entry W-O6, memo from Chairperson Mahin to Faculty Secretary Smith. December 6,1995; entry W-07, Faculty Secretary Smith to T. Wilson, December 6, 1995.) It is your responsibility as the instructor of record to ensure that the individual administering the evaluation properly understands the instructions that accompany the evaluation forms.

7. "The Graduate Office administers an exit interview meeting which includes a student evaluation process. Dr. Wilson ranked low in that process." (From “1995 Annual Review of Terry Wilson," from

the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)

"I am inserting [into your Smead file] data compiled by the MBA Program Office on the teaching effectiveness of MBA faculty for 1994. Data [are] not yet available for 1995. You were ranked fourth from the bottom of all MBA faculty for 1994. Student comments are also attached...." (From T. Wilson "Smead" file, "Chair's Insertions Into Smead File," entry W-15, memo from Chairperson Mahin to T. Wilson. December 28, 1995.)

Comment: These data gave your ratings, along with those of seventeen other colleagues. as follows:

Faculty member:

motivates me to do my best work 2.53 (15th. avg. 3.20)

explains difficulty [sic] material clearly 2.65 (16th, avg. 3.47)

Faculty member:

is fair 2.71 (17th, avg. 3.62)

is accessible 2.29 (17th, avg. 3.78)

is knowledgeable of current professional issues and trends 3.76 (10th, avg. 3.71)

is sensitive to student issues 2.06 (18th, avg. 3.32)

is prepared for class 3.18 (17th, avg. 3.96)

has knowledge of career opportunities 3.18 (9th, avg. 3.13)

has awareness of other faculty members' courses 3.06 (10th. avg. 3.25)

returns assignments within reasonable time 3.24 (16th, avg. 3.73)

grading is done fairly 2.82 (17th, avg. 3.62)

Overall, this:

course is the best I have ever taken 2.47 (15th, avg. 3.18)

faculty member is among the best teachers, I have known 2.65 (15th, avg. 3.26)

Comment: Such low scores for an experienced senior faculty member are certainly disappointing.

8. “Written comments by students in [the above] process described him as 'intimidating,' 'sexist,' and 'arrogant.'” "Several of the written comments accused him of reading the student evaluations before turning in his grades (a major violation of the ethics at the student evaluation system)." (From "1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30. 1996.)

Supporting Document: All of the comments specifically about you, in response to the question, “Are the faculty creating an environment in which you can learn? Be as specific as you wish to be,” are as follows:

--“Too intimidating--sexist--arrogant--evaluation scandal--didn't learn much”

_“arrogant--teacher evaluation dispute--read before grades were turned in”

--"arrogant and pompous ass”

-- read teacher evaluation forms before he turned in the grades”

--"is arrogant, sexist, intimidating, read student evaluations before grades. “

(From T. Wilson "Smead" file. "Chair's Insertions into Smead File,” entry W-15, memo from Chairperson Mahin to T. Wilson. December 28, 1995.)

Comment: These observations suggest the need for improvement in several aspects of your relationship with students.

9. “Associate Dean Reece met with 12 MBA students regarding the teaching of Dr. Wilson. The report of that meeting describes Dr. Wilson as lacking respect for students, lack of professionalism (including the use of 'vulgar, scatological language'), and guilty of favoritism.” (From “1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30. 1996.)

“In 1995, your file documents that twelve MBA students from your Mkt. 321 class met with the associate dean and dean to express their dissatisfaction with your teaching performance. Their comments were summarized under four categories: (1) lack of respect for students, (2) lack of professionalism. (3) favoritism, and (4) students were used as guinea pigs for your research. Their expressed goal in meeting...was to prevent next year's MBA class from going through what they went

through." (From "1995 Annual Review of Terry Wilson," from the Department of Marketing Chairperson, February 15. 1996.)

More specifically. this memo stated

i. “The students felt that Professor Wilson had not shown the minimal level of respect for his students that they had a right to expect. This came up in answering questions, dealing with students in class, and dealing with students in meetings outside of class."

ii. “The students complained about lack of professionalism and specifically referred to Professor Wilson's use of vulgar scatological language and his criticism of his faculty colleagues and others at the University."

iii. "The students complained that Professor Wilson showed inappropriate favoritism toward some students, which affected grading. They said that students who worked on projects suggested by Wilson were favored over those who chose other topics. They had the impression that Wilson was using the student's results to support consulting work with clients and that this was only possible where he had suggested the topics. The students alleged that Professor Wilson was inappropriately socializing with some students outside of class and that these students received favorable treatment. They alleged that this went so far as Wilson's paying expenses for student's out-of-town trips, including a trip to Chicago.”

iv. ”Guinea pigs for Professor Wilson's research: Some students felt that Wilson may have been placing them in difficult situations to observe their behavior--these observations would then be used in writing a book about group psychology which Professor Wilson had mentioned to the class he was writing." (From T. Wilson “Smead” file, "Chair's Insertions into Smead File," entry W-O9, memo from Associate Dean Reece to Dean Stern May 26, 1995.)

Comment: These observations show a need for improvement in several aspects of your relationship with students. There is no evidence of a rebuttal to this document by you in the personnel file.

10. “Two grade appeals led to recommended grade changes." (From "1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)

"In 1995, there were two grade grievances [i.e., grade appeals] filed against you by students in your Spring Semester Mkt. 321 class. You did not respond to either the chair's or associate dean's request that you meet to discuss this issue. In both instances. the student's grades were changed from a "D" to a “C” by the department chair." (From "1995 Annual Review [of Terry Wilson]." from the Department of Marketing Chairperson. February 15, 1996.)

Supporting Document: “... I am requesting a meeting with you and the students to discuss this situation. Please contact me by June 12, 1995 so that we can discuss this matter and set up a meeting not later than June 14.” At the bottom of' this memo there is a hand-written note: "Wilson never responded to this letter. PWM[ahin]” (From T. Wilson "Smead" file. "Chair's Insertions into Smead File," entry W-11, memo from Chair Mahin to T. Wilson, June 7, 1995: “Student Grievances, Mkt. 321 Spring 1995 Semester.")

Supporting Document: "...Professor Mahin also forwarded to me a copy of his memo to you dated June 7, 1995, asking to meet with you, and a copy of his memo to you dated June 27, 1995, asking that you respond to [Ms. Ross's, June 22, 1995/Mr. Akladios's June 20, 1995] appeal memo. . .At your earliest convenience, but no later than August 18, 1995, please provide me a completed grade modification form to effect this grade change.” (From T. Wilson “Smead" file, "Chair's Insertions into Smead File," entries W-12 and W-13, memos from Associate Dean Reece to T. Wilson, May 26,1995: "Appeal by Deidra Ross of grade in Marketing 321;" "Appeal by Magdy Akladios of grade in Marketing 321.")

Comment: It is your responsibility as a faculty member to respond to these kinds of directions from your departmental chairperson. There is no evidence in the file that you responded to any of these requests.

11. "The file did not include Form A, Student Evaluation Checklist." (From "1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996[.])

“Your productivity file did not contain Form A, 'Student Evaluation Checklist' which documents a faculty member's student teacher evaluations between 1990-95. Thus, you were not in compliance with the chair's request to all faculty.” (From "1995 Annual Review [of Terry Wilson]," from the

Department of Marketing Chairperson, February 15, 1996.)

Comment: There is no evidence of this form in the file. You thus failed to follow this record-keeping directive.

12. "... I am requesting that you prepare a 1996 Teaching Plan of Action which addresses the following issues: (1) way to maintain a professional classroom presence and demeanor, (2) steps to eliminate all scatological, vulgar references from your speech, (3) assures the integrity of all future student teacher audits, and (4) identifies ways for you to upgrade your student teacher evaluations..." (From "1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson, February 15, 1996.)

Comment: There is no evidence in the file that you responded to this reasonable request from your departmental chairperson.

13. "Dr. Wilson co-authored a book, Value Driven Bank. A copy was not available to the committee but a flyer describing the book was in the file. (From "1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)

Comment: T. Wilson "Smead" file, "1995 Published Research Wilson," contains a two-sided publicity flyer: "Announcing The Value Driven Bank: Strategies for Total Market Satisfaction, by R. Eric Reidenbach, Terry C. Wilson, Gordon w. McClung, & Reginald W. Goeke. Burr Ridge, Illinois: Irwin Professional Publishing [n.d.]. It identifies the authors as "principals of the Valtech Group." A table of contents is provided on the flyer. Neither the book, portions of the book, reviews, nor evidence of actual publication is in the file. College guidelines specify that "Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process." The university guidelines state, "therecord in the personnel file should be sufficient to document and support all personnel decisions [stress added]." It is your responsibility as a faculty member to supply this kind of information.

14. "The outlines of two conference presentations were in the file."(From "1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee

January 30, 1996.)

Comment: T. Wilson “Smead" file, "1995 Published Research Wilson," contains (1) a seven-page document, with cover page: “Interethics. Presentation at: National Communications Forum, Chicago, IL October 17, 1995,” and (2) a five-page document, with cover page: “Internet Issues: Small Office Home Office [sic]. Presentation at: National Communications Forum, Chicago, IL October 17, 1995. Both appear to be hard copy for overhead transparencies. Whether hard copy or not, there is no evidence in the file that they were actually given as presentations, or that they belong in a file identified as "published research.” College guidelines specify that “Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process." The university guidelines state, “the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]."

15. "Dr. Wilson's file indicates he is an active researcher. Summarizing this activity is made difficult by inconsistencies between his vita, his productivity report and his file.” (From "1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)

Comment: What follows is a comparison of your 1995 Productivity Report, the contents of your personnel file, and your 1996 curriculum vitae, the only curriculum vitae found in your file. [Small Roman numerals are identical in the three lists if items appear to be Identical.]

1995 Productivity Report

This document, dated 12-6-95, and signed by Chair Mahin, 1/30/96, lists the following "Research and Scholarly Activity:”

Basic Scholarship: Works Published or Presented:

i. *Value Driven Bank*, co-authored, IrwinPro, 1995 ("scholarly book").

ii. "Unlocking the Real Value of the Internet,” co- authored, National Communication Forum, Annual Review of Communications,1995(“proceedings from scholarly meeting/papers presented at academic meetings”).

iii./iv. National Communications Forum (2) Presentations: "Interethics"and "Small Office/Home Office [sic] and the Internet."

Applied Scholarship: Works Published or Presented:

v. "Business Philosophy," *Journal of Agricultural Lending*, Fall 1995 ("professional journal").

vi. "The Value Driven Bank: A New Paradigm for Survival and Prosperity," *Bankers*, Sept/Oct 1995 ("professional journal").

vii. "Interethics," Presentation at NCF, Chicago, 10/95.

viii. "Small Office-Home Office [sic] and the Internet," Presentation at NCF, Chicago. 10/95.

[Comment: Nos. iii-iv and vii-viii are apparently the same.]

Wilson Personnel File

The folder "1995 Published Research Wilson" contains

i. A flyer for *Value Driven Bank*, co-authored, IrwinPro 1995 ("scholarly book"), but no book;

ii. An eleven-page article. apparently produced on a word-processor, that could be "Unlocking the Real Value of the Internet," co-authored, National Communication Forum, *Annual Review of Communications*, 1995 ("proceedings from scholarly meeting/papers presented at academic meetings"), but there is no evidence that it ever appeared in a publication.

iii./iv. Material, identified above [item 14]. for what could be National Communications Forum (2) Presentations; "Interethics" and "Small Office/Home Office and the Internet;"

There is no evidence in the Personnel File of the following:

v. "Business Philosophy," *Journal of Agricultural Lending*. Fall 1995 (“professional journal") or

vi. "The Value Driven Bank: A New Paradigm for Survival and Prosperity," *Bankers*, Sept/Oct 1995 ("professional journal”).

Also present in this folder is the following:

ix. “The Value Driven Bank: A New Paradigm for Survival and Prosperity," by R. Eric Reidenbach and Terry C. Wilson, *Consumer Banking*, Sept/Oct 1995. It is not clear whether this is identical to No. vi, which has the same title, and is apparently single-authored. but is in a different journal. [This off-print identifies the co-authors as co-authors of No. i, here shown as published by Probus Publishing.]

Wilson Curriculum Vitae, 1996

The file has no curriculum vitae for 1995. The 1996 document indicates the following activity for 1995:

i. Value Driven Bank, co-authored. IrwinPro 1995 (“scholarly book).

ii[?]. “Unlocking the Real Value of the Internet,” co- authored, National Communication Forum, Annual Review of Communications, 1995, except in this document it is titled“Value and the Internet," and identified with the International Engineering Consortium.

vi. "The Value Driven Bank: A New Paradigm for Survival and Prosperity,” *Bankers*, Sept/Oct 1995, but now shown as co-authored with Eric Reidenbach.

[x.] Also listed are three articles not identified above in *Journal of Agricultural Lending*, one of which is identified as "Winter 1995.”

Comment: Of the total of ten different items identified on these three lists, there is hard evidence to support and analyze only one publication (No. IX), and some evidence of publication for only one

other (No. i).

There is no evidence in the personnel file that the other events occurred or that the other items were published; no qualitative evaluation of the absent items could take place. College guidelines specify that “Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process." The university guidelines state, "the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]. ...The faculty member is responsible for completing [Item 3]. all other information that bears upon the quality of the faculty members performance in all pertinent areas." As suggested above, there are inconsistencies in the file.

16. “In my December 4, 1995 letter to our marketing faculty ref. 'Faculty Productivity Files-1995 Annual Evaluation,' I requested all faculty to provide 'proof of publication (a copy of the publication's author/article index plus the article itself) for all 1995 published articles, a sample of books published in 1995, etc.' ...In 1995 your productivity report indicates that you were a co-author of a scholarly book. ...that you were a co- author of one proceedings [sic] article at a scholarly meeting..., that you co-authored two articles in professional proceedings..., and that you made two presentations." (From "1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson, February 15, 1996.)

Comment: There is only limited evidence in the file that you complied with these requests [see also items 13 and 14, above]. College guidelines specify that “Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process.” The university guidelines state, “the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]. ...The faculty member is responsible for completing [Item 3], all other information that bears upon the quality of the faculty members performance in all pertinent areas."

17. " I am requesting that you prepare a 1996 Research Plan of Action which clearly identifies your research activities and your expected 1996 research publications. As a goal, I would suggest that you strive to achieve at least one sole authored refereed journal article this year or two co-authored refereed journal articles.” (From “1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson. February 15, 1996.)

Comment: There is no evidence in the file that you responded to this request.

18. "Dr. Wilson prepared a marketing plan for a private school and made a presentation to the Federal Home Loan Bank Board." (From “1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion. Tenure and Evaluation Committee January 30, 1996.)

Comment: The Productivity Report dated 12-6-95, unsigned by Professor Wilson, and signed and dated by Chair Mahin, 1/30/96 (from T. Wilson “Smead” file, "Productivity Report") listed the above Service activity, with no additional evidence that the activity occurred.

19. "Dr. Wilson reported no committee services at any level. He noted 'None by direction of Dean.' The committee was not clear about the alleged restriction.” (From “1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)
"Your 1995 productivity file contains the comment 'no (committee service) by direction of Dean.' I believe this is an erroneous statement, and it should be removed from your file.” (From “1995 Annual Review [of Terry WiIson],” from the Department of Marketing Chairperson, February 15. 1996.)

Comment: There is no evidence that you were directed to refrain from serving on committees by the Dean. Additionally, in the grievance you initiated just prior to the 1995-96 evaluation cycle, a specific finding was made that you were "not denied participation on departmental committees.”

20. “I concur with the committee's observation [that your service record is unsatisfactory]. . . I am requesting that you prepare a 1996 Service Plan of Action which, identifies areas where you will devote your time to assist the department, college, university, community, or state. (From “1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson, February 15, 1996.)

Comment: There is no evidence in the file that you responded to this request.

21. "The productivity report was not signed." (From “1995 Annual Review of Terry Wilson," from the Department of Marketing Promotion, Tenure and Evaluation Committee January 30, 1996.)

Comment: The Productivity Report, dated 12-6-95, was not signed by you.

22. In 1995, your file documents harassment by you directed at one marketing faculty member and the department chair." (From "1995 Annual Review [of Terry Wilson]" from the Department of Marketing Chairperson, February 15, 1996; see also T. Wilson "Smead" file, "Chair's Insertions into Smead File," entry W-01, memo from Chair Mahin to J. Dooley, December 11, 1995: "Harassment by Terry Wilson" and entry W-19, memo from Chair Mahin to T. Wilson, February 27, 1996. "Wilson's Harassment of the Chair on 2/21/96.")

Comment: There is no evidence in your personnel file that you rebutted this review.

23. "This review letter serves as a warning that your 1996 productivity must be improved substantially in all three areas: teaching, research. and service. Therefore, I am requesting that you (1) prepare a 1996 Teaching, Research, and Service Plan of Action and (2) review these documents with both Dean Stern and me at your earliest convenience but not later than Tuesday, March 19, 1996." (From "1995 Annual Review [of Terry Wilson]," from the Department of Marketing Chairperson, February 15, 1996.)

Comment: There is no evidence in the file that you responded to either part of this warning from your departmental chairperson.

Summary of 1995 Review

Based on its 1995 review of your personnel file, the committee voted to recommend your retention by a vote of three for retention, two opposed. It then voted to recommend "retention with sanctions and warning, which was approved by a vote of five to zero. You were found to be unsatisfactory in teaching and unsatisfactory in service. The committee did not characterize your research: its report stated, "summarizing this activity is made difficult by inconsistencies between his vita, his productivity report and his file."

Based on his 1995 review of your personnel file, the Chairperson recommended "retention with sanctions and warning." The chairperson found that, "your teaching was unsatisfactory, your research is difficult to assess without proper documentation but appears marginally satisfactory for a senior faculty member and your service was unsatisfactory."

University “Policies and Procedures for Faculty Evaluations” state, “A faculty member may include a rebuttal to that [department-Ievel] recommendation for review at the next level. A rebuttal must be placed in the file within five (5) working days of receipt of the recommendation.” There Is no evidence in your personnel file that you rebutted or otherwise challenged these department-Ievel reviews.

There is also no evidence in your personnel file that you rebutted or otherwise challenged the Dean's review letter of February 21, 1996, cited above. You did, however, initiate a grievance regarding some of the file material that could affect the 1995 review process. As you know, the decision in the grievance stated, In pertinent part, “The tenure and promotion process in the department and in the college were conducted according toUniversity policy. Dr. Wilson was evaluated according to the same guidelines and standards as everyone eIse. There is no evidence that he was singled out for discriminatory treatment.“

Information About the Quality of Your Performance (1996)

Numbered paragraphs 24 through 40.[sic] which follow below, trace the history of specific matters regarding your 1996 performance. In response to Interim Chairperson Riley's letter to you dated January 31. 1997, in which you were advised that a rebuttal to the statements by the departmental committee and the chairperson must be placed in the file within five (5) working days of receipt, you forwarded to the Dean a rebuttal statement dated February 20, 1997. For convenience, I have inserted remarks from your rebuttal at appropriate points in my summary of the statements from the department and the chairperson. On occasion, your rebuttal statement refers to the grievance previously cited that you initiated prior to your 1995-96 evaluations; in some instances here, I also refer to the findings from that grievance.

“1996 Annual Review of Terry Wilson." from the Department of Marketing Promotion, Tenure and Evaluation Committee (January 24, 1997):

24. ”Dr. Wilson taught 2 sections of Marketing 111 and 1 section of Marketing 191 during the Spring, 1996 semester. He was on leave without pay in the Fall semester. He had a total of 54 students in the 2 sections of Marketing 111 and 37 students in Marketing 191.”

25. “Student evaluations were provided for 3 courses. The evaluations were within or above the

ratings at the University and College level."

Rebuttal: " ...paragraph 3 stating 'The evaluations were within or above the ratings. . .,' is given no weight in the subsequent summary of teaching or in the final conclusions."

Comment: I have considered all information in your personnel file. There is no evidence in the file to confirm your allegations that this information was not duly considered.

26. "An unusual feature of the evaluation was that they were based on participation of less than half the studentstaught by Dr. Wilson. Fifty percent (50%) of his Marketing 111 students completed forms and 46% of the students in Marketing 191."

Rebuttal: "[This] paragraph states that it unusual that approximately half the students completed the forms. Because students are not required to WVU [sic]. It is the student choice to fill out the form which is typically administered during the week before finals when attendance in basic courses is often sporadic. As usual, there is no benchmark provided by the committee."

Comment: Using information in the file, including enrollments reported on annual productivity reports and information from course evaluation forms since 1992, the following can be observed.

Semester and Course	Enrollment	Eval. Response	% Response
Spr. '92. MKTG 311	18	18	100.00
F. '92, MKTG 311	36	28	77.78
Spr. '95. MKTG 321	68	40	58.82
Spr. '96. MKTG 111 (2 sec)	54	27	50.00
Spr. '96. MKTG 191	37	17	45.95

It does appear that the percentage of students responding to these forms significantly decreased over time.

27. "It appears that Dr. Wilson's personal situation was discussed with the students prior to the completion of the forms. One student noted, 'Do not throw away a valuable asset' and another noted 'If y'all decide to fire him you guys are soooo WRONG .'"

Rebuttal: "The fact is I was absolutely honest with [the students] in telling them about the evaluation

issues that were involved with the University."

Comment: The file contains only copies, rather than originals, of forms submitted in Spring 1996, and some written student comments did not reproduce well. 0f the twenty-seven students enrolled in MKTG 111 who responded, eighteen provided written comments, all of which were positive. Of the seventeen students enrolled in MKTG 191 who responded,thirteen provided written comments, all of which were positive. These included the two statements cited above:

"Dr. Wilson is an Excellent teacher. Do Not throw away a valuable asset."

"He was always prepared. He totally encouraged discussion! He was happy and friendly. He made the topic tolerable. Bus A is about the most boring thing I have ever taken and I would have stopped coming to class if it were not for the instructor's behavior and attitude. He was always pleased to see us in class and out. I really enjoyed him!!! P.S. to whoever reviews these evaluations: If y'all decide to fire him you guys are soooooo WRONG. You will lose a great asset to this university."

In this instance you acted inappropriately. Your discussion clearly influenced the comments of the students.

28. "Normally this Committee would review the student evaluations from the previous Fall semester as part of this years review. That was not possible in Dr. Wilson's case because the Faculty Senate Office invalidated the student evaluation forms due to irregularities in the administration of the process." [See item 6, above.]

Rebuttal: "The paragraph goes on to state that the Fall 1995 evaluations were not available. Both my April 1996 grievance and replies to 1995 evaluations provide sufficient evidence that it was Mahin's bias, not my error or my teaching effectiveness, that was the issue when the Faculty Senate Office sent a routine form letter concerning administrative irregularities."

Comment: There is no evidence in the file of the "replies to 1995 evaluations." Regarding this matter, the grievance decision found, "it was appropriate for Dr. Mahin to include these items [about this incident] in the personnel file. There is no indication that Dr. Mahin was singling Dr. Wilson out for discriminatory or harassing treatment."

29. "The Committee recommended that the Chair monitor Dr. Wilson's handling the classes on Mondays. There was noapproval from [sic] such an arrangement. The file also includes a memorandum from the Chair of a confrontation initiated by Dr. Wilson toward the Chair over this monitoring activity. The memo describes threatening and unprofessional behavior on the part of Dr. Wilson."

Rebuttal: "In fact, a graduate student administered two quizzes during the semester, and that has been common practice never before requiring approval. The committee addresses the chair's perceptions of meetings, but never considers my reply to those allegations."

Comment: See T. Wilson "Smead" file, "Chairs Insertions into Smead File," entry W-18, memo from Chair Mahin to T. Wilson, February 27, 1996: "Graduate Assistant Proctoring Your Classes." I have considered all information in your personnel file. There is no evidence in the file of "replies to those allegations."

30. "Dr. Wilson lists a co-authored article on Time Contracts under 'Works Accepted But Not Yet In Print.' The instructions require him to list the title, journal name, date to be published, an unconditional letter of acceptance and a copy of the accepted work must be in the backup file. A three and one- half page document is in the file but there is no indication of the journal involved, etc."

Rebuttal: "The Committee conveniently overlooks the fact that the appropriate citation is included on the current vita. They refer to a three and one-half page document, but the Proceedings paper is five pages and was attached in full to the packet sent to Stern."

Comment: The instructions can be found in "Guidelines for Implementation of the College of Business and Economics Promotion, Tenure and Evaluation Process. July 24, 1991. I have considered all information in your personnel file. The file (in the folder "1996 Published Research Wilson") contains a five-page document titled "Time Contracts," by Robert W. Cook and Terry C. Wilson. The narrative is three and one-half pages long; this narrative must be what the committee called "a three and one-half page document." There is no evidence that it is a published journal article.

31. "He also lists, under Works Published or Presented, the title 'Unlocking Value on the Internet,' in Multimedia Over the Broadband Network 1996, International Engineering Consortium and 'Value

Paradigms in Banking,' presented at American Banking Association Small Business Consortium, Boston, May 15, 1996. There is no 1996 supporting information for these claimed research activities. This Committee cannot verify or review these items."

Rebuttal: "For other Works, the committee claims they cannot verify the research activities. A phone call to ABA or IEC would suffice if they were really interested in substance rather than form. . . ."

Comment: See "Guidelines for Implementation of the College of Business and Economics Promotion, Tenure and Evaluation Process["], July 24, 1991. The university guidelines state, "the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]....The faculty member is responsible for completing [Item 3], all other information that bears upon the quality of the faculty member's performance in all pertinent areas."

32. "Based on the requirement that verification of research and scholarly work 'must be in the back up file' this Committee must conclude that Dr. Wilson's performance in this category is unsatisfactory."

Comment: See "Guidelines for Implementation of the College of Business and Economics Promotion, Tenure and Evaluation Process['], July 24, 1991, and the university guidelines.

33. "Dr. Wilson lists memberships in 5 professional associations; notes his role as advisor for a conference; and lists participation on the marketing advisory council to General Electric and the State Hardware Association."

34. "The department chair in his 1995...review letter...indicated that it was erroneous for Dr. Wilson to claim. ..no committee service... 'by direction of the Dean.' He was told to cease using this statement. Dr. Wilson once again had no committee service and once again stated 'none by direction of the Dean.' "

Rebuttal: "Because the Dean had eliminated my participation in all major committees and I was not aware of any other appointments, that is what I stated in my report."

Comment: I have considered all information in your personnel file. There is no evidence in the file of such a directive from the Dean [see above, item 19]. Also, the grievance, [sic] to which reference was

made above, included a specific finding that you were "not denied participation on departmental committees."

35. "Dr. Wilson continues to ignore requirements of the review process and special requirements imposed by various parties in the review process."

36. "It is the unanimous judgment of this committee that Dr. Wilson has exhibited...[1] Personal conduct which substantially impairs his fulfillment of Institutional responsibilities[; 2] Insubordination by refusal to abide by legitimate, reasonable directions of administrators[; and 3] Substantial and manifest neglect of duty."

Based on its 1996 review of your personnel file, the committee voted to recommend your dismissal for cause by a vote of five for dismissal, zero opposed.

"Annual Review of Terry Wilson" from the Department of Marketing Interim Chairperson (January 31,1997):

37. "I...recommend that [Wilson] be dismissed from the faculty for cause....This recommendation is based on his failure to address a 1996 administrative directive from the Dean of the College of Business and Economics and [in] consideration of his performance in the areas of teaching. research, and service.["]

"1996 Review of Terry Wilson, Professor of Marketing," from the College of Business and Economics Promotion and Tenure Committee (February 28, 1997[)]:

38. "This Committee finds no evidence in his file that Professor Wilson has complied with Dean Stem's February 21, 1996 directive."
The Dean's letter of March 4. 1997 reminded you of his direction of February 21, 1996, and evaluated your performance for 1996:

39. "You were directed to submit a plan to correct the deficiencies noted and warned that failure to take satisfactory action would lead to a recommendation for dismissal."

40. "Based on the review of your record for 1996, I find your performance continues to be

unsatisfactory. You have failed to remedy the deficiencies noted this year and previously. Further, you have not submitted a plan to correct the deficiencies."

Comment: I have considered all information in your personnel file. I agree that you failed to follow the Dean's directive.

Specific Policies

As noted above, your employment with West Virginia University is governed by West Virginia statutes, the University System of West Virginia Board of Trustees Series 36, "West Virginia University Policies and Procedures for Faculty Evaluations [hereafter, “university guidelines”]," “Procedures and Criteria” of the College of Business and Economics, and other university policies and procedures.

Section 8.1 of Series 36 in discussing tenure indicates the following:

“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 as 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. [stress added]”

Section 11 of Series 36 identifies five reasons for the possible dismissal for cause of a tenured faculty member. At least three of those reasons are applicable in your case: demonstrated incompetence in the performance of professional duties; insubordination by refusal to abide by legitimate reasonable directions of administrators; and substantial and manifest neglect of duty.

Dismissal for cause in accord with Section 11.1.3 of Series 36:”Insubordination by refusal to abide by legitimate reasonable directions of administrators or of the Board of Trustees.”
I conclude, from reviewing your personnel file, that you have been repeatedly insubordinate of legitimate and reasonable directions given you by administrators of the University. "Reasonable requests” made by administrators are commensurate with “reasonable directions" or "reasonable directives.” Such directions include adherence to policies and procedures of the institution and the

college. Among the instances of such insubordination are the following:

41. You failed to enter into your personnel file student evaluation information for Fall 1994 [see item 4, above]. College guidelines specify that the file should include "summaries of teaching evaluations of all courses taught." University guidelines specify that the personnel file should contain “all other information that bears upon the quality of the faculty member's performance in all areas. This information may include, but need not be limited to, teaching evaluations. . . .”

42. You failed to respond to requests (directives) to meet with your Chairperson regarding two student grades appeals (see item 10, above].

43. You failed to respond to the Associate Dean regarding two student grade appeals [see item 10, above].

44. You failed to follow the chairperson's request (directive) that all faculty include in their personnel file the “Student Evaluation Checklist” [see item 11, above].

45. You failed to respond to the chairperson's request (directive) to prepare a “1996 Teaching Plan of Action” [see item 12, above].

46. You failed to enter into your personnel file documented evidence of the claimed publication The Value Driven Bank [see item 13, above]. Lack of such evidence prevented appropriate evaluation of this claimed publication. College guidelines specify that “Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process.” The university guidelines state, “the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]. ...The faculty member is responsible for completing [Item 3], all other information that bears upon the quality of the faculty member's performance in all pertinent areas.”

47. You failed to enter into your personnel file documented evidence of two claimed conference presentations [see item 14, above]. Lack of such evidence prevented appropriate evaluation of these claimed presentations. College guidelines specify that “Only documented material should be Included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process.” The university guidelines

state, “the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]....Thefaculty member is responsible for completing [Item 3], all other information that bears upon the quality of the faculty member's performance in all pertinent areas."

48. You failed to enter into your personnel file documented evidence of several other claimed publications and presentations [see item 15, above]. Lack of such evidence prevented appropriate authentication and evaluation of these alleged presentations. College guidelines specify that “Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process." The university guidelines state, “the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]. . . ." The faculty member is responsible for completing [Item 3], all other information that bears upon the quality of the faculty member's performance in all pertinent areas."

49. There is only limited evidence in the personnel file that you responded to the chairperson's request (directive) that all faculty provide proof of publication and other documentation for material in the personnel file [see item 16, above].

50. You failed to respond to the chairperson's request (directive) to prepare a “1996 Research Plan of Action” [see item 17, above].

51. You failed to enter into your personnel file documented evidence of claimed service [see item 18, above]. Lack of such evidence prevented appropriate authentication and evaluation of this claimed service. College guidelines specify that "Only documented material should be included in the Smead file. Undocumented evidence presented in the faculty personnel file as well as hearsay evidence should be ignored in the review process.” The university guidelines state, “the record in the personnel file should be sufficient to document and support all personnel decisions [stress added]....The faculty member is responsible for completing [Item 3], all other information that bears upon the quality of the faculty member's performance in all pertinent areas.”

52. After criticism of the inadequate documentation of research and service in your 1995 productivity report, and directions for correction of these deficiencies, you failed to respond to these

directions by properly documenting research and service in your 1996 productivity report [see items 30, 31, and 33, above].

53. You failed to respond to the chairperson's request (directive) to prepare a “1996 Service Plan of Action” [see item 20, above].

54. You failed to respond to the chairperson's request (directive) to review the various above-mentioned 1996 Plans of Action with the chairperson and the dean [see item 23, above].

55. You failed to respond to the dean's directive to prepare a detailed plan "to correct the several deficiencies cited" in the 1995 annual review [see item 2, above].

Your repeated insubordination by refusal to abide by legitimate and reasonable directions on this many specific occasions is sufficient cause for your dismissal.

Dismissal for cause in accord with section 11.1.1 of Series 36: “Demonstrated incompetence or dishonesty in the performance of professional duties.”

I conclude, from reviewing your personnel file, that you have repeatedly demonstrated incompetence or dishonesty in the performance of your professional duties. Instances of such demonstrated incompetence or dishonesty include the following:

56. Your failure to complete your personnel file in an appropriate manner, detailed above, constitutes incompetence or dishonesty in the performance of your professional duties. This is particularly true of the 1996 file, which reflects your lack of attention to the correction of weakness in the 1995 file.

57. The allegations that you read student evaluations before turning in grades, and your lack of response to the allegations support the charge of incompetence or dishonesty in the performance of your professional duties [see item 8. above].

58. The allegations that you were guilty of favoritism and your lack of response to the allegations support the charge of incompetence or dishonesty in the performance of your professional duties (see items 5 and 9. above].

59. Your failure, in instances cited above [items 13, 14, 15, 16, 18, 30, 31, 33], to follow university and college guidelines for making entries to your personnel file constitutes incompetence or dishonesty in the performance of your professional duties in two consecutive years.

60. Your failure, in instances, cited above [Items 10, 11,12, 15, 16, 17, 20, 23, and 41-56], to respond to requests (directives) by various administrators constitutes incompetence or dishonesty in the performance of your professional duties.

61. Your failure to adequately document a record of effectiveness in research constitutes incompetence or dishonesty in the performance of your professional duties.

62. Your failure to adequately document a record of effectiveness in service constitutes incompetence or dishonesty in the performance of your professional duties.

Your incompetence or dishonesty in the performance of professional duties is sufficient cause for your dismissal.

Dismissal for cause in accord with Section 11.1.5 of Series 36: "Substantial and manifest neglect of duty."

I conclude, from reviewing your personnel file, that your performance has been repeatedly characterized by substantial and manifest neglect of duty. The following are among some of the instances of such neglect:

63. Unprofessional behavior and your lack of response to the accusations constitute substantial and manifest neglect of duty [see items 8 and 9, above].

64. A lack of respect for students and your lack of response to the accusations constitute substantial and manifest neglect of duty [see item 9, above].

65. A lack of professionalism, including the use of “vulgar, scatological language” and your lack of response to the accusations constitute substantial and manifest neglect of duty [see item 9, above].

66. Your failure to include materials In your personnel file that support the quality of your

performance provides evidence of substantial and manifest neglect of duty.

67. Your failure to verify your 1995 Productivity Report by signing it provides evidence of substantial and manifest neglect of duty [see item 21, above].

68. Your failure to observe the requests and directives given to you by administrators of the University represents substantial and manifest neglect of duty.

Your repeated instances of substantial and manifest neglect of duty are sufficient cause for your dismissal.

Dismissal for Cause

You are dismissed for cause effective May 15, 1997 for demonstrated incompetence in the performance of your professional duties, substantial and manifest neglect of duty, and insubordination by refusal to abide by legitimate reasonable direction of administrators. This dismissal for cause is consistent with Section 11 of Board of Trustees Series 36.

Under Series 36, you can be dismissed for cause immediately. I have chosen to make your dismissal effective with the end of your current contractual year. The timetable that applies to any appeal you wish to make of this dismissal is described in the last section of this letter. Those time frames take effect with your receipt of this letter.

Findings of Fact

1. Grievant was initially employed by Respondent in 1981 as a nine month, tenure track Associate Professor in the College of Business and Economics. Grievant was granted tenure in 1983, and was promoted to full professor in the Department of Marketing in 1987.

2. All faculty at WVU are evaluated on an annual basis in accordance with the procedures set forth in the “West Virginia University Policies and Procedures For Faculty Evaluations" (University Guidelines), and the College of Business and Economics “Guidelines For Implementation of the College of Business and Economics Promotion, Tenure and Evaluation Process”. July 24, 1991" (College Guidelines).

3. University Guidelines requires that faculty personnel files “be established and maintained for

each faculty member in the office of the chairperson."

4. Each personnel file is required to include: (1) a current curriculum vitae and bibliography; (2) a record of classes taught and enrollments in each, graduate students supervised, clinical assignments, significant committee assignments, and other aspects of the individual's plan of work; (3) all other information which bears upon the quality of the individual's performance in all pertinent areas; (4) a copy of past evaluations and any written responses; (5) other information and records that the chairperson or dean may wish to include; and, (6) a continuing chronological inventory of entries to assure the integrity of the file.

5. The faculty member is responsible for completing items 1, 2, and 3 listed above. The Chairperson shares responsibility for item 2, and has responsibility for items 4, 5, and 6. 6. The College Guidelines provide that it is the responsibility of the Chair to ensure that faculty files are complete, in required order, and secured until they are transferred to the Dean's secretary for review at the college level.

7. All faculty have a personnel file which consists of two parts: a "Smead File", and a "Back-up File". The Smead file is the primary file used in the review process at the department and college levels, while the Back-up file contains all the supporting documentation for that listed in the Smead file.

8. The Smead file is to contain: (1) a current vita; (2) a faculty productivity report covering the period under review; (3) copies of all previous evaluations at both the college and department levels; (4) a chronology of all entries in the Smead file and chronology of all entries in the Back-up file; and (5) summaries of teaching evaluations of all courses taught while at WVU, including course number and semester the course was taught.

9. Only documented material is to be included in the Smead file. Undocumented evidence and hearsay evidence are to be ignored in the review process.

10. Faculty personnel files are closed at the end of each calendar year, at which time the annual review process begins.

11. University Guidelines provides that only materials generated as a consequence of the faculty evaluation shall be added to the personnel file after the deadline date. Personnel files not in order and updated by January 1, will not be reviewed at any level.

12. During Grievant's employment at WVU some Chairpersons notified a faculty member, as a

matter of professional courtesy, if his or her file was not complete, and whatwas needed, prior to or during the review process. Further, verifiability rather than documentation was the standard of review.

13. During the review process, each member of the department's Promotion, Tenure and Evaluation (PTE) Committee has access to the personnel files, and are allowed to remove the files from the Chair's office to conduct their review.

14. The annual review of a full professor begins with the Department promotion and tenure committee, which makes a recommendation to the Department Chair as to whether or not the faculty member should be retained or terminated. The Department Chair reviews the recommendation, and then makes his or her recommendation. The school promotion and tenure committee next reviews the file, and forwards its report to the Dean. The Dean's recommendation proceeds to the Vice-President for Academic Affairs and Research for further action.

15. University Guidelines provide that faculty evaluations are to be based on a review of the individual's performance in the areas of teaching, research, and service.

16. In a memorandum dated January 29, 1992, the Interdepartmental Faculty Review Committee notified then-Chair Robert Cook that the 1991 Annual Review for Grievant could not be completed “because his file is not current.” Dr. Cook subsequently recommended that Grievant be retained as a full Professor, finding his service to the department to have been “exemplary”, and his teaching effectiveness to have been undiminished by his role in the K-Mart program.

17. In its 1992 review of Grievant, the Interdepartmental Faculty Review Committee, comprised of Gordon McClung, Thomas Ponzurick, Philip Mahin, and PaulaBone, recommended that he be retained, finding his teaching to meet or exceed college and departmental levels of performance, his research efforts to be “exemplary”, and his service activities commendable.

18. In his review of Grievant for 1992, Chair Cook recommended that Grievant be retained, noting his contributions to the department and college.

19. Grievant received glowing evaluations from the Department PTE Committee, and Chair Gordon McClung in February 1994 (addressing his 1993 performance).

20. In 1993, the K-mart Chair was established at the College of Business and Economics. The consulting agreement provided two million dollars, plus an annual expenditure of one million dollars to WVU.

21. Grievant was instrumental in developing the K-Mart program, which was structured in a

series of modules taught primarily by the full-time, CBE Marketing Department faculty. One faculty member, Philip Mahin, was not included in the project based upon a perception that he did not possess the educational background, or consulting experience, essential to the program.

22. Those faculty members who were selected to participate in the K-Mart program were compensated at an hourly rate of three hundred ($300) dollars per hour.

23. In 1994, Grievant and Dr. McClung filed plagiarism and copyright infringement charges against two other faculty members, Cyril Logar and Thomas Ponzurick. The charges arose from their alleged use of materials from the K-Mart Program in a federal grant application involving a proposal to develop an industrial training program in the Czech Republic. 24. By August 1994, Dr. Sydney V. Stern was appointed Dean of CBE, and a rift had occurred in the faculty when four members, Logar, Ponzurick, Bone, and Robert Corey, determined they were not receiving a fair opportunity to participate in the K-Mart Program, while individuals from outside the department were being included. These four faculty were on one side of the rift, while Grievant, Dr. McClung, and Dr. Cook were on the other.

25. When the Department PTE Committee completed the 1994 Annual Review of Grievant in January 1995, it recommended his retention by a vote of four (4) to one (1). The letter of recommendation issued by the Committee concluded that “the Committee is unable to evaluate the instruction and research activities of Dr. Wilson. The committee finds his service record to be unsatisfactory.”

26. Dr. Ponzurick, Acting Chair, completed Grievant's 1994 Annual Review, and concluded that the Committee's review “reflects on the incompleteness of Dr. Wilson's file rather than on his actual performance.” The Chair determined that Grievant needed “to increase his activity in the areas of basic and applied research as well as service and teaching output”, as well as provide updated support for his activities in his personnel file. Grievant was characterized as a “valuable member of the Marketing Department.”

27. Philip Mahin was appointed Department Chair in or about June 1995.

28. By memorandum dated December 4, 1995, Mr. Mahin advised the Marketing faculty to begin updating their 1995 productivity files.

29. During the period of December 12 through 29, 1995, Mr. Mahin placed fifteen documents in Grievant's file: a. A letter of December 11, 1995, to Jacqueline Dooley, Affirmative Action

Specialist, citing four incidents of his harassment by Grievant, which had occurred in August 1992 and December 1995. Mr. Mahin characterized the incidents as verbal threats and ridicule.

b. A written memorialization of a conversation with Grievant on December 7, 1995, regarding two of the incidents reported to Ms. Dooley.

c. A letter dated December 5, 1995, from Grievant to George Markusic, thanking him for covering a class in November. Grievant stated, “[t]he student feedback was very positive, and believe me that is a sincere compliment because they classified another sub as “a jerk.” Mr. Mahin understood that he was the other sub, and this letter was part of his complaint to Ms. Dooley.

d. A letter dated August 28, 1991, from Phil Mahin to then-Dean Cyril Logar, reporting that he received a threatening phone call from Grievant, who was seeking admission to one of Mr. Mahin's classes for the daughter of a colleague. Mr. Mahin stated that Grievant's comment had been, “[w]hat the 'fuck' are you doing? You track down Dr. Anderson's daughter tonight and admit her to the BA 130 class or I'll dog your ass all semester.”

e. A memorandum dated August 29, 1991, from Phil Mahin to Grievant, addressing the August 28, 1991, phone call, advising that he had not admitted any students over the class limit.

f. A memorandum dated December 6, 1995, from Mr. Mahin to Patricia Smith, Faculty Secretary, stating that student evaluations had been slipped under his office dooron November 30. He indicated the identity of the person who delivered the envelope was unknown, and the clasp of the envelope had been fastened, but was unsealed. Mr. Mahin noted that the failure to seal the envelope, and the absence of a student signature on the yellow form were infractions of the evaluation process.

g. A memorandum of December 6, 1995, from Ms. Smith advising Grievant of the infractions which invalidated the results. She further indicated that she was returning the forms for the class to him, and reminded him that in the future, the individual who administers the evaluation must accurately follow the directions.

h. A letter of August 1, 1995, from Ms. Dooley, advising Grievant that sexual harassment charges had been filed against him by several students in his Marketing 321 class offered the previous Spring. She advised him that an investigation was being conducted, and requested that he provide a written response.

i. May 26, 1995, letter from William S. Reece, Associate Dean, to Dean Stern, summarizing a

meeting he had conducted with twelve (12) MBA students who had expressed their dissatisfaction with Grievant's Marketing 321 class. The complaints were categorized as showing a lack of respect for the students, a lack of professionalism, as evidenced by the use of vulgar, scatological language, and his criticism of colleagues and others at WVU, favoritism to some students, and the concern that he was using the students as guinea pigs for research purposes.

j. May 24, 1995, memorandum from Paula Bone to Phil Mahin, regarding a conversation she had with a female student in Marketing 321, concerning Grievant's inappropriate comments regarding another student's breasts. k. June 7, 1995, memo from Phil Mahin to Grievant, advising him that two (2) students had filed grievances challenging their grades in Marketing 321. Mr. Mahin requested that Grievant meet with the students and report back by June 12, 1995. A handwritten note by Mr. Mahin indicates that Grievant did not respond.

l. July 24, 1995, letter from Associate Dean Reece to Grievant regarding a meeting he had conducted with one of the students who was appealing her grade. Dean Reece recommended that the student's grade be changed from a “D” to a “C”, and directed that a completed grade modification form to effect the change be provided to him by no later than August 18, 1995.

m. A duplicate letter for the second student grade appeal.

n. December 13, 1995, Mr. Mahin notified Grievant of copies of the materials he had inserted into his Smead file, and advised him of the opportunity to file a rebuttal.

o. December 28, 1995, Mr. Mahin notified Grievant that he was inserting into Grievant's file a letter from Paul Speaker, Director of the MBA Programs, documentation that Grievant had taught Marketing 321, and that he had been ranked fourth from the bottom of all MBA faculty.

30. Grievant filed a grievance under the BOT Policy Bulletin 36 procedure, in December 1995, alleging the evaluation of his performance was not accurate, and showed favoritism. A hearing was held on April 11, 1996, and a decision dated February 11, 1997, was issued by WVU President David C. Hardesty, Jr., denying the grievance.

31. The Department PTE Committee completed the 1995 Annual Review of Grievant in January 1996, with a vote of three (3) to two (2) for retention, and a vote of five(5) to zero (0) that the recommendation be with sanctions and warning. The Committee noted Grievant's low student evaluations, and that the information from Fall 1995 had been invalidated by the Faculty Senate Office. The meeting with Dean Reece and twelve (12) of the students was included in the

determination that Grievant's teaching record was unsatisfactory. Evaluating Grievant's research, it was stated that he had co-authored a book, but that a copy was not available for review, the file contained only a flyer describing the book. The committee further noted that while the file indicates Grievant to be an active researcher, summarizing the activity was difficult due to inconsistencies in his vita, productivity report, and personnel file. Grievant's service record was found to be unsatisfactory. Other observations were that the file did not include a Form A, Student Evaluation Checklist, and his productivity report was not signed.

32. Chair Mahin concurred with the Committee findings in his Annual Review of Grievant, dated February 15, 1996. He concluded by stating, “[t]his letter serves as a warning that your 1996 productivity must be improved substantially in all three areas: teaching, research, and service.” Mr. Mahin also requested “that you (1) prepare a 1996 Teaching, Research, and Service Plan of Action and (2) review these documents with both Dean Stern and me at your earliest convenience but not later than Tuesday March19, 1996.”

33. Dean Stern determined that Grievant's overall performance for 1995 was unsatisfactory, and directed him “to prepare a detailed plan, for my review and approval, to correct the several deficiencies cited.” 34. Prior to 1996, the Marketing faculty was evaluated by a department “committee as a whole”, i.e., all the remaining members of the department. In 1996, the process was changed to a five member committee. One member of this committee was from the Marketing Department while the remaining four members were from other departments of the CBE.

35. In the 1995 annual review, the PTE committee cited deficiencies in Grievant's teaching, research and service, and recommended that he be retained with sanctions and a warning.

36. Chair Mahin concurred with the PTE committee findings and recommendation that Grievant be retained with sanctions and a warning.

37. In February 1996, Dean Stern determined Grievant's overall performance to be unsatisfactory, particularly, his actions dealing with students and colleagues, as cited in the chair and department letters. In the February 21, 1996, letter, Dean Stern directed Grievant, in collaboration with Chair Mahin, to prepare a detailed plan, for review and approval, to correct the cited deficiencies. While Dean Stern required the plan to be “be specific as to action, time schedule, and evidence to be presented to confirm activities and results”, he did not state a time line in which the plan was to be developed.

38. Grievant's Spring 1996 student evaluations were good, and no further complaints filed regarding his demeanor.

39. The Chair did not appoint Grievant to serve on any committees for the 1996- 97 academic year. 40. In or about September 1995, Grievant developed health problems. In January 1996, he applied for a medical leave of absence. Grievant later changed his application to an unpaid leave of absence. This leave was granted for the academic year, from August 16, 1996, through May 15, 1997.

41. Effective January 1, 1997, Mr. Mahin returned to the faculty, and William Riley, Chair of the Finance Department, became Acting Chair of the Marketing Department. 42. Because Mr. Riley was unfamiliar with the Marketing faculty, Mr. Mahin acted as surrogate to him regarding Grievant's annual review.

43. In January 1997, the Marketing Department Promotion and Tenure Committee recommended that Grievant be dismissed for cause. The Committee specifically determined that Grievant had exhibited personal conduct which substantially impaired his fulfillment of institutional responsibilities, insubordination, and substantial and manifest neglect of duty.

44. Chair Riley recommended that Grievant be dismissed for cause, i.e., his refusal to abide by a legitimate and reasonable directive from the Dean to develop a plan for improvement, and in consideration of his performance in the areas of teaching, service, and research. Chair Riley noted that “[a]s of December 31, 1996 no such plan was submitted by Dr. Wilson. . . .” The Chair did not specifically address Grievant's teaching, service, or research performance.

45. Dean Stern recommended Grievant's dismissal based upon his performance in 1995 and 1996, and his failure to either remedy the deficiencies or submit a plan to correct the deficiencies. 46. In May 1997, the University Promotion and Tenure Advisory Panel concluded that based upon the materials available for review, all published procedures and criteria were followed in conducting Grievant's annual review.

47. Provost Gerald Lang notified Grievant by letter dated May 15, 1997, that his employment was terminated for cause, effective the end of his contract year.

Discussion

Respondent argues that Grievant was dismissed for cause, in compliance with the University System of West Virginia board of Trustees Series 36, “West Virginia University Policies and Procedures for Faculty Evaluations”. Specifically, Respondent charges Grievant with numerous actions constituting insubordination, incompetence, and substantial and manifest neglect of duty. Grievant asserts that he did not engage in any of the three causes for dismissal, and charges the dismissal was arbitrary and capricious. In the alternative, Grievant argues that dismissal was clearly disproportionate to his actions, and requests that the penalty be reviewed in light of a number of mitigating circumstances.

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 98-BOD-108 (Oct. 21, 1998); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of theevidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Respondent acted to terminate Grievant's employment in accordance with authority contained in Series 36 of the Procedural Rule enacted by the University System of West Virginia Board of Trustees, (Series 36), 128 C.S.R. 36 (1992). Those sections which address the termination of a tenured faculty member cited by Respondent in the present matter are as follows:

11.1 Causes for Dismissal: The dismissal of a faculty member shall be effected only pursuant to the procedures provided in these policies and only for one or more of the following causes:

11.1.1 Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to research misconduct;

11.1.3 Insubordination by refusal to abide by legitimate reasonable directions of administrators or of the Board of Trustees;

11.1.5 Substantial and manifest neglect of duty . . . .

As set forth in paragraphs 41 through 68 of the dismissal letter, Respondent charges Grievant with twenty-eight incidents of wrongdoing, characterized as insubordination, incompetence or dishonesty, and neglect of duty. Series 36, Section11.1.3, defines insubordination as “refusal to abide by legitimate reasonable directions of administrators or of the Board of Trustees.” The Grievance Board has previously held that in order to establish insubordination, an employer must prove the employee engaged in a “willful failure or refusal to obey reasonable orders of a superior entitled to give such an order.” Latassa v. Bd. of Trustees, W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997); Riddle v. Bd. of Directors, Southern W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1995). That the employee had sufficient knowledge of the directive and specific intent to defy it, are inherent in a charge of insubordination. Connor v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Skeens v. Bd. of Directors/Southern W. Va. Community and Technical College, Docket No. 97-BOD-450 (Mar. 24, 2998), citing Burdell v. Bd. of Directors/W. Va. State College, Docket No. 96-BOD-023 (Dec. 10, 1996), aff'd, Civil Action No. 97-AA-6 (Kanawha County Cir. Ct. Aug. 7, 1997).

However, a misunderstanding or misinterpretation of a superior's instruction, resulting in a failure to comply with a directive, lacks the intent necessary to establish insubordination. Cobb v. Dept. of Admin., Gen. Servs. Div., Docket No. 97-ADMN-405455 (May 26, 1999). Further, poor judgment, with no resulting harm to the employer, is not sufficient to justify termination. See Beverlin v. Bd. of Educ. of the County of Lewis, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

Respondent listed seven charges characterized as incompetence or dishonesty. Incompetence, sometimes referred to as unsatisfactory performance, “apply to theindividual's ability to perform all the expectations of a position, not just one.” Zimowski v. Mineral County Bd. of Educ., Docket No. 98-28-050 (July 20, 1998); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). Generally, an employee who produces unsatisfactory performance due to a lack of ability or training may be found incompetent. Dishonest is defined as “disposed to lie, cheat, defraud, or deceive. The American Heritage Dictionary of the English Langage 534 (3^{d} ed. 1996).

Respondent also charges Grievant with six acts of “substantial and manifest neglect of duty”. Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of “willful neglect of duty,” it does encompass something more serious than incompetence and imports

"a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock 183 W. Va. 638, 398 S.E.2d 120 (1990); Zimowski, supra. Respondent's use of the adjectives "substantial" and "manifest" further connotes an intent that the charges of neglect are egregious and deliberate.

The charges for dismissal will be addressed according to topic, in that many are included under insubordination, and/or incompetence or dishonesty, and/or substantial and manifest neglect of duty.

Student Grade Appeals

42. "You failed to respond to request (directives to meet with your Chairperson regarding two student grade appeals . . . ."

43. "You failed to respond to the Associate Dean regarding two student grade appeals. . . ." Two students in Grievant's Spring 1995 Marketing 321 class appealed the grades they received. Chairman Mahin requested by memo dated June 7, 1995, that Grievant contact him by June 12, to discuss the matter and set up a meeting no later than June 14. Department of Marketing Associate Dean William Reece advised Grievant by memoranda dated July 24, 1995, (one for each student) that he had met with the students to discuss their grade appeals. Following an unsuccessful attempt to contact Grievant to hear his views, Associate Dean Reece concluded that changes were in order. Dean Reece directed that "[a]t your earliest convenience, but no later than August 18, 1995, please provide to me a completed grade modification form to effect this grade change."

Grievant concedes that he did not respond to either Mr. Mahin or Dean Reece, because his nine-month employment contract expires in May, and he was not on campus in June and July. Upon his return on or about August 15, 1995, he received the memoranda, and completed the grade modification forms on August 18, 1995, in compliance with Dean Reece's directive. Copies of the forms were entered into the level four record as Grievant's Exhibits 2 and 3.

Because Grievant is employed under a nine-month contract, he is not required to be in his office from mid-May through mid-August. Yet, both Mr. Mahin and Dean Reece issued internal memoranda to Grievant. There is no evidence that the documents were forwarded to his home in New York, or anywhere else. Under these circumstances, it is not surprising, or unreasonable, that Grievant did not respond to the administrators in June and July. Further, he completed the grade modification forms within the time limits set byDean Reece. Therefore, Respondent has failed to prove that Grievant engaged in insubordination as set forth in charges 42 and 43.

Allegations of Improper Actions

57. "The allegations that you read student evaluations before turning in grades, and your lack of response to the allegations support the charge of incompetence or dishonesty in the performance of your professional duties . . . ."

58. "The allegations that you were guilty of favoritism and your lack of response to the allegations support the charge of incompetence or dishonesty in the performance of your professional duties . . . ."

63. "Unprofessional behavior and your lack of response to the accusations, constitute substantial and manifest neglect of duty . . . ."

64. "A lack of respect for students and your lack of response to the accusations constitute substantial and manifest neglect of duty . . . ."

65. "A lack of professionalism, including the use of 'vulgar, scatological language' and your lack of response to the accusations constitute substantial and manifest neglect of duty . . . ."

These charges arise from 1994 student exit interviews, and the Spring 1995 Marketing 321 class evaluations. A number of comments were negative, accusing him of being "extremely unprofessional", exhibiting a lack of respect for students and colleagues, and favoritism. Several students found Grievant to be "arrogant", and a "sexist". A number of the students accused him of reading the student evaluations prior to completing thegrading process. Twelve of the students in this class met with Dean Reece to further air their concerns regarding the foregoing.

Associate Dean Reece memorialized the student meeting in a memorandum dated June 26, 1995, to Dean Stern. (See footnote 2) The memo simply noted the concerns were a lack of respect for the students, a lack of professionalism evidenced by the use of vulgar, scatological language and criticism of faculty colleagues and others at the university, that favoritism was shown to some students, and that Grievant was using them as guinea pigs for his research. The students asked for no relief on grading, and explained they were acting out of concern for the next class. This memorandum does not indicate that a copy was sent to Grievant, and it was not placed in Grievant's personnel file by Mr. Mahin until December 12, 1995.

Grievant denies that he has ever read a student evaluation before he turned in a grade, and notes that only one student accused him of favoritism. He notes that the complaining students had all received low grades, C's or D's, which are considered to be failing at the graduate level. He states

that because Mr. Mahin did not insert the memorandum from Dean Reece to Dean Stern into his file until the Christmas holiday break, he did not have the opportunity to respond to the allegations prior to the annual review being conducted, and that a response would not have been appropriate given the fact that Affirmative Action began conducting an investigation after Dean Stern forwarded the memo to the Affirmative Action Office. Grievant concluded that he fully complied withMs. Dooley and Ms. MacIntosh during their investigation of the alleged gender harassment, and they ultimately determined that the charges were unsubstantiated.

It is unclear from the record by what means a faculty member is to respond to student comments made during exit interviews. Grievant was not included in the June 1995 meeting with the students and administrators, and was apparently not given the opportunity to respond until the charges were sent to the Affirmative Action office, and when the memo was placed in his personnel file in mid-December. Respondent does not dispute Grievant's claim that he fully cooperated with the Affirmative Action investigation, or the results which exonerated him. Certainly, the delay in placing the memo in his file until the holiday break deprived him of any practical opportunity to file a response prior to December 31, 1995. Even more important than the procedural issues regarding these charges, is the underlying substantive claims. The student allegations of favoritism, using them as guinea pigs, and reading their evaluations, were based upon their perceptions, and there is no evidence in the record that the claims were in fact true. Therefore, Respondent has failed to prove by a preponderance of the evidence that Grievant demonstrated incompetence or neglect of duty, as set forth in charges 57, 58, 63, 64, and 65.

Plan of Action

45. “You failed to respond to the chairperson's request (directive) to prepare a '1996 Teaching Plan of Action' . . . .”

50. “You failed to respond to the chairperson's request (directive) to prepare a '1996 Research Plan of Action' . . . .” 53. “You failed to respond to the chairperson's request (directive) to prepare a '1996 Service Plan of Action' . . . .”

54. “You failed to respond to the chairperson's request (directive) to review the various above-mentioned 1996 Plans of Action with the chairperson and the dean . . . .”

55. “You failed to respond to the dean's directive to prepare a detailed plan 'to correct the several deficiencies cited' in the 1995 annual review . . . .”

Although the charges imply three separate plans were to be developed, in fact only one plan addressing all three areas was required. In his February 15, 1996, review of Grievant, Chairperson Mahin determined that Grievant's teaching performance was unsatisfactory, and requested that he prepare a plan of action to address: (1) ways to maintain a professional classroom presence and demeanor; (2) steps to eliminate all scatological, vulgar references from your speech; (3) assures the integrity of future student evaluations; and, (4) identifies ways to upgrade his student evaluations. In the area of research, a Plan was requested which “clearly identifies your research activities and your expected 1996 research publications.” Mr. Mahin suggested that one sole authored refereed journal article or two co-authored refereed journal articles be a goal for the coming year. In the area of service, Mr. Mahin requested a plan “which identifies area where you will devote your time to assist the department, college, university, community, or state.”

Mr. Mahin concluded:

[t]his review letter serves as a warning that your 1996 productivity must be improved substantially in all three areas: teaching, research, and service. Therefore, I am requestingthat you (1) prepare a 1996 Teaching, Research, and Service plan of Action and (2) review these documents with both Dean Stern and me at your earliest convenience but not later than Tuesday March 19, 1996.

By memorandum dated February 21, 1996, Dean Stern advised Grievant to prepare a detailed plan for approval, to correct the deficiencies cited by the Department Promotion and Tenure Committee, and the Department Chairperson. “The plan should be specific as to action, time schedule, and evidence to be presented to confirm activities and results. You should work with your Department Chairperson in preparing the plan.”

Grievant did not develop a Plan of Action as directed by Mr. Mahin or Dean Stern. Grievant testified that he attempted to obtain clarification from Dean Stern as to what he wanted, but that the Dean refused to discuss the matter with him. Since he was suffering from gastroesophageal reflux disease, and emotional stress due to the sexual harassment investigation, a grievance he had filed regarding the documents Mr. Mahin had placed into his personnel file, and isolation within the department, he was not capable of responding, and determined that a leave of absence was his plan of action for the 1996-97 academic year. Respondent has proven that Grievant failed to develop a plan of action, addressed in charges 45, 50, 53, 54, and 55.

Personnel File

41. "You failed to enter into your personnel file student evaluation information for Fall 1994 . . . ." 44. "You failed to follow the chairperson's request (directive) that all faculty include in their personnel file the 'Student Evaluation Checklist' . . . ."

46. "You failed to enter into your personnel file documented evidence of the claimed publication The Value Driven Bank . . . ."

47. "You failed to enter into your personnel file documented evidence of two claimed conference presentations . . . ."

48. "You failed to enter into your personnel file documented evidence of several other claimed publications and presentations . . . ."

49. "There is only limited evidence in the personnel file that you responded to the chairperson's request (directive) that all faculty provide proof of publication and other documentation for material in the personnel file. . . ."

51. "You failed to enter into your personnel file documented evidence of claimed service . . . ."

52. "After criticism of the inadequate documentation of research and service in your 1995 productivity report, and the directions for correction of these deficiencies, you failed to respond to these directions by properly documenting research and service in your 1996 productivity report . . . ."

56. "Your failure to complete your personnel file in an appropriate manner, detailed above, constitutes incompetence or dishonesty in the performance of your professional duties. This is particularly true of the 1996 file, which reflects your lack of attention to the correction of weakness in the 1995 file." 59. "Your failure, in instances, [sic] cited above [Items 13, 14, 15, 16, 18, 30, 31,33], to follow university and college guidelines for making entries to your personnel file constitutes incompetence or dishonesty in the performance of your professional duties in two consecutive years."

60. "Your failure, in instances cited above . . . to respond to requests (directives) by various administrators constitutes incompetence or dishonesty in the performance of your professional duties."

61. "Your failure to adequately document a record of effectiveness in research constitutes incompetence or dishonesty in the performance of your professional duties."

62. "Your failure to adequately document a record of effectiveness in service constitutes incompetence or dishonesty in the performance of your professional duties."

66. "Your failure to include materials in your personnel file that support the quality of your performance provides evidence of substantial and manifest neglect of duty."

67. "Your failure to verity your 1995 Productivity Report by signing it provides evidence of substantial and manifest neglect of duty . . . ."

68. "Your failure to observe the requests and directives given to you by administrators of the University represents substantial and manifest neglect of duty."

Grievant denies that he willfully and deliberately refused to make entries into his personnel file, because he continued to follow the procedure that had been in place, which had relied on verifiability rather than actual documentation, and was unaware that any change in the practice had taken place. He concedes that he did not include Form A in his file, because he did not perceive it to be a directive, but rather a request or suggestionto help the faculty to organize their files. Based on this perception, Grievant asserts that he did not willfully and deliberately refuse to provide it, and, even if he was in some way negligent, negligence is not tantamount to incompetence. Grievant testified that he had placed a number of the documents referred to in these charges in his personnel file, but they were not there when he requested a copy following the dismissal. Finally, Grievant claims that the failure to sign his 1995 Productivity Report was a mere oversight.

The evidence regarding these charges establish that Grievant did not maintain his personnel file in compliance with CBE and WVU guidelines.

The WVU Policies and Procedures for Faculty Evaluations provide in pertinent part:

It therefore is University policy that the official FACULTY PERSONNEL FILE be established and maintained for each faculty member in the office of the chairperson or, when appropriate, in the office of the dean. In principle, the record in the personnel file should be sufficient to document and to support all personnel decisions.

* * *

The faculty member's file should contain, at the minimum, the following items:

1. An up-to-date curriculum vitae and bibliography containing the following information:

a) Critical dates relative to education, employment, change in status, promotion, leave of absence, etc.;

b) A list of publications with complete citations, grants and contract, and/or other evidence of scholarship;

c) A list of service activities.

2. For each semester or term since appointment or last promotion, a record of classes taught and enrollments in each,graduate students supervised, clinical assignments, significant committee assignments, and other aspects of the faculty member's plan of work. Each unit may design a simple form appropriate to the work assignments in that unit for use by all members of the unit, including the chairperson.

3. All other information that bears upon the quality of the faculty member's performance in all pertinent areas. This information may include, but need not be limited to, teaching evaluations, professional presentations, research in progress and the preparation of unpublished materials, other creative scholarship and service to the University.

4. A copy of past annual evaluations and any written responses.

5. Other information and records that the chairperson or dean may wish to include. Faculty members may include written responses to such material.

6. A continuing chronological inventory of entries to assure the integrity of the file.

The “Promotion and Tenure Procedures and Criteria” of the CBE essentially restate the University criteria.

These charges accuse Grievant of failure to submit documentation of his teaching, research, and service activities, or that the documentation contained errors, or was incomplete. By his own admission, Grievant did not sign his 1995 Productivity Report, or complete Form A, a student evaluation checklist. He further concedes that he did not provide the detailed documentation of his work from which the charges arise, based upon past, accepted practice within the department. Although Grievant contests the charges that he completely failed to document the file regarding a number of matters, it is unnecessary to make a credibility determination because, based upon Grievant's ownadmissions, he did not maintain his personnel file in compliance with WVU and CBE guidelines.

Mitigation

Grievant denies that any of his actions, including admitted or oversights were willful and intentional so as to constitute insubordination, incompetence, or neglect of duty, and requests that the measure of discipline be mitigated, with consideration given to a number of circumstances.

A grievant who requests that a disciplinary measure be mitigated bears the burden of demonstrating that his penalty was “clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.” Olmstead, supra; Martin v. W. Va. Fire Comm., Docket No. 89-SFC-145 (Aug. 8, 1989). “When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved.” Olmstead, supra; Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Grievant has been employed by Respondent for sixteen years. While he may not have been the perfect employee, there is no evidence that his overall performance evaluations were less than satisfactory prior to 1995. To the contrary, during his service at WVU, Grievant was awarded promotion to full professor and tenure, thus attaining thehighest level faculty status. The record is equally clear that Grievant is not universally well-liked by his colleagues. The testimony of Drs. McClung, Logar, and Cook, Mr. Mahin, and Grievant, provide a consistent and vivid description as to the negative impact the K- Mart endowment has had on the Marketing faculty. Dr. McClung, Dr. Cook, and Grievant were clearly the ultimate losers in the struggle. Dr. McClung has since left the faculty for the private sector. Dr. Cook testified he continues to feel that he is an outcast in the department.

Although the record indicates that Grievant had not maintained his personnel file in a completely satisfactory manner earlier in his career, these matters did not become serious until Mr. Mahin, the only Marketing Department faculty member to be excluded from the K-Mart program, became Chair. The intensity of Mr. Mahin's animosity is demonstrated by his placement of documents into Grievant's file referencing personal encounters with Grievant as far back as 1991. Mr. Mahin explained that he had not placed the information in Grievant's file earlier because he had not been the Chair; however,

both the placement of stale complaints which should have been addressed years earlier, and the timing of the placement, during the Christmas holidays, effectively eliminating an opportunity for Grievant to respond, were suspect. Further submissions of another grievance filed by Grievant, and complaints filed with the Affirmative Action office appear only to serve the purpose of casting Grievant in a disreputable light with departmental, school, and institutional evaluators.

Upon review of the twenty-eight charges of insubordination, incompetence, and neglect of duty, Respondent has proven that (1) Grievant did not develop a plan of actionfor 1996, as directed by his Chair and Dean; and, (2) Grievant did not maintain his personnel file in compliance with University and CBE guidelines. Grievant's explanation that he considered a leave of absence to be his plan of action is unacceptable. The record establishes that Grievant directed a memorandum to WVU President David Hardesty, dated January 3, 1996, requesting a medical leave of absence. He could have simply directed this information to Chairperson Mahin and Dean Stern, to discuss a delay or other accommodation, to their directives. However, even if Grievant had not requested a leave of absence, the directives in this matter were confusing at the least.

Mr. Mahin directed Grievant to develop a plan of action to improve his performance. This directive was so precise that it, in fact, appears to be a plan of action in that it specifically sets forth what is expected of Grievant to exhibit satisfactory future performance in teaching, research, and service. The Dean's directive, which presumably supercedes that of the Chair, included no specific actions, or even a deadline for completing the plan, but only stated it was to be composed with the Chair. Dean Stern's directive was issued in late February. Chair Mahin's deadline for the plan was March 19, approximately mid-semester. There is no indication that Mr. Mahin made any effort to work with Grievant on the plan subsequent to Dean Stern's directive. As previously noted, Mr. Mahin had already stated what appears to be a list of deficiencies and objectives, and he needed only to obtain input from Grievant to finalize the plan. Although Grievant technically committed insubordination in his failure to develop the plan, the infraction must be considered in light of the surrounding circumstances. Grievant's testimony that prior departmental practice in completing personnel files had been verifiability rather than actual documentation was supported by his colleagues. Apparently, prior to the split in the faculty, such matters had been managed on a very informal basis. Grievant claims that he was never advised of a change in the practice, but certainly he was put on notice after receiving his 1995 evaluation. Perhaps Grievant best summarized his position when he stated that he

had been advised that his file was not complete in prior years, but that he had taken no affirmative action to correct the matter because the reasons for a full professor to update his file were to obtain a merit raise or a sabbatical, and he knew that he would not receive either. While this observation may well be accurate, it is not complete.

Tenured, full professors may not act irresponsibly, demonstrate mediocrity, or deliberately refuse to meet academic requirements or professional responsibilities. Periodic evaluation by peer and administrative personnel is essential to the viability of the tenure system. See State ex rel. McLendon v. Morton, 162 W. Va. 431, 249 S.E.2d 919 (1978). A tenured, full professor must perform satisfactorily in the areas of teaching, research, and service. One of those responsibilities includes the development of his personnel file in compliance with institutional and departmental guidelines, so that a complete and meaningful evaluation of his performance may be made by individuals at each level of review. Clearly, Greivant did not maintain his file in compliance with University and school guidelines. However, it is significant to note that while concern is stated in the record regarding Grievant's performance, the charges upon which the dismissal rests address only his failure to adequately document his personnel file. WhileGrievant's lack of care and attention impeded the evaluation process, it did not cause Respondent any significant harm, and does not warrant dismissal.

In consideration of Grievant's sixteen years of service, with no prior disciplinary record, the poor communication and lack of action by Respondent to develop a plan of action which it perceived to be necessary, and that Grievant's failure to adequately document his personnel file caused no apparent harm to Respondent, mitigation is warranted in this matter. Accepting that Respondent has a legitimate interest in upholding the integrity of its faculty, and Grievant's actions interfered in the process by which Respondent must evaluate him, it is determined that reinstatement at his previous status is appropriate, but with no additional back pay other than that awarded at level two. (See footnote 3)

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Olmstead v. Bd. of Directors/Bluefield State

College, Docket No. 98-BOD-108 (Oct. 28, 1998); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 2. Grievant engaged in insubordination when he failed to develop a plan of action for 1996, as directed by the Chairperson of his department, and the Dean of the School of Business and Economics.

3. Grievant engaged in insubordination, demonstrated incompetence, and/or neglected his duties when he failed to document his personnel file in compliance with institutional and school guidelines.

4. When considering whether to mitigate a punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of the prohibitions against the conduct involved. Olmstead, supra.

5. A grievant bears the burden of demonstrating that a penalty was clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.

6. Grievant has met his burden of proof and established that mitigation of the clearly excessive penalty, dismissal, is appropriate.

7. The West Virginia Education and State Employees Grievance Board has authority to "provide such relief as is deemed fair and equitable" in grievances arising under W. Va. Code §§18-29-1, et seq. Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992).

Accordingly, the grievance is **GRANTED** in part, and Respondent Ordered to reinstate Grievant, consistent with the provisions of this decision.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

Date: December 21, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

CBE Guidelines provide that the faculty personnel files be in two parts, the Smead file, is the primary file used in the review process at the department and college levels, while the back-up file contains all of the supporting documentation.

Footnote: 2

The first page of the memo was dated May 26, 1995; however, the second page was dated June 26, 1995. Apparently, the June date was correct.

Footnote: 3

Upon finding that Grievant had not been provided all the pre-termination due process to which he was entitled, the level two hearing evaluator awarded back pay for the 1997-98 academic year, and the 1998-99 academic year up to the date of the decision (April 19, 1999).