JOHN W. HATTMAN,

Grievant,

v v.

Docket No. 98-BOD-439

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, John W. Hattman, employed by the Board of Directors (Respondent) as a professor of English in the Department of Humanities at West Liberty State College (WLSC), filed a level one grievance on September 24, 1998, in which he alleged:

My grievance is that Dr. Sarah T. Coyne has unfairly, capriciously, arbitrarily and discriminatorily evaluated me. In the process of her evaluation she has demonstrated a complete contempt for my due-process rights by violating West Liberty State College policies 6, 43, 214, 215, 245, and Section 18B-8-3A of the W. Va. State code.

In her rejection of all my requests at our level one conference, she further attempted to deny my rights to redress by questioning the timeliness of my request. She may well be aware of when she first treated me in a grievable manner, but I was not absolutely certain of it until I received her letter of September 4, 1998, replying to my letter of August 27, 1998 and supplying me with the information I needed to be certain that I had been treated unfairly, arbitrarily, capriciously, and discriminatorily.

The relief I request is that:

1 1.

> My 1997-98 annual faculty/merit evaluation by Dr. Coyne be rescinded and the evaluation be re- conducted by the Academic Vice President. Dean Javersak reviewed and approved Dr. Coyne's efforts and cannot be considered uninvolved.

2 2.

Dr. Coyne be removed from all future evaluation processes involving me.

3 3.

Dr. Coyne be formally reprimanded for violating the policies listed in my grievance.

4 4.

Dr. Coyne offer me a written apology for having violatedmy rights.

The grievance was denied at levels one and two. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-3(c), and advanced his appeal to level four on November 5, 1998. Although Grievant indicated that a decision could be issued based upon the lower-level record, a level four hearing was conducted on February 11, 1999, at Respondent's request. The matter became mature for decision upon receipt of post hearing submissions on or before April 13, 1999. Grievant represented himself, and Gregory G. Skinner, Assistant Attorney General, appeared on behalf of Respondent at level four.

The following formal findings of fact are made based upon a review of the record in its entirety.

Findings of Fact

1. Grievant has been employed for approximately thirty-six years by the Board of Directors and has been assigned as a professor of English at WLSC at all times relevant to this matter.

2. Dr. Sally Coyne serves as chairperson of the Department of Humanities and is Grievant's immediate supervisor. In this capacity, she annually completes performance evaluations of the Department faculty, including Grievant.

3. For the 1997-98 academic year, faculty evaluations were used by WLSC to determine whether the individual was performing in a satisfactory manner, and to determine allocation of merit pay. 4. Faculty members were rated in three areas: teaching/job effectiveness (with a value of up to fifty points); professional activities (with a value of up to twenty points); and service (also with a value of up to twenty points). The faculty member was also awarded up to ten flex points which he could apply to the area of service or professional activity, but not teaching, at the individual's discretion.

5. Effective the 1997-98 academic year, four levels of merit increments were awarded in the Department of Humanities, with Level III (superior performance) the highest, followed by Levels II

(excellent performance) and Level I (good performance), with the fourth category being “no merit”. A Level III merit award was valued at $1,000.00, while Level II was valued at $600.00, and Level I at $300.00.

6. Using the one hundred point scale, “no merit” was awarded to individuals who scored fifty-nine points or below. Those individuals who scored sixty to seventy-four points were awarded a Level I allocation. Those who earned seventy-five to eighty-nine points were assigned to Level II, and Level III placement was earned with ninety to one hundred points.

7. Dr. Coyne completed Grievant's evaluation for the 1997-98 school year in May 1998. Her review concluded Grievant was entitled to thirty-five points for teaching/job effectiveness, fifteen points (including flex points) for professional activities, and twenty points for service, for a total of seventy points, a Level I merit rating.

8. Dean David T. Javersak reviewed and approved the evaluations completed by Dr. Coyne.

9. Grievant was notified on or about July 22, 1998, that he had received a LevelI merit evaluation, entitling him to $300.00.

10. By letter dated August 20, 1998, Dr. Coyne responded to a request by Grievant, and provided his merit point scores in each of the three categories, and the number of points needed for each merit level.

11. On August 27, 1998, Grievant requested the basis for his assigned merit. Dr. Coyne provided a written explanation of the evaluation on September 4, 1998.

Discussion

Initially, Respondent contends this grievance is untimely because the grievance was not initiated within the time limits contained in W. Va. Code §18-29-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997);Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Respondent argues that Grievant became aware of the outcome of his evaluation upon receipt of a letter advising that he had received a Level I merit evaluation from Dr. John McCullough, Provost and Vice President of Academic Affairs at WLSC, on or about July 22, 1998. A grievance was not filed within fifteen days of this event. Respondent further argues that on August 20, 1998, Dr. Coyne provided Grievant a letter documenting his point totals and the points needed for the various levels of merit. Again, Grievant did not file a complaint within fifteen days, but instead waited until September 24, 1998, to initiate this matter, some forty-five days after he first received knowledge of his evaluation.

In response, Grievant asserts that while he was disappointed with the July notice of his merit level, he was not aware of the facts which constituted the grievance at that time. Only after he returned to campus on August 16, 1997, did he begin to inquire about the evaluation. After further investigation indicated that Dr. Coyne had not used points to evaluate the faculty, Grievant asked Dr. McCullough to look into the matter. Finally, after his receipt of the letter dated September 4, 1998, in which Dr. Coyne offered an explanation of his points and a statement of how others in the department had been ranked, Grievant was able to conclude that her actions had been arbitrary and capricious. He requested an informal conference by letter dated September 14, 1998, and after theconference was held on September 22, 1998, he filed a level one appeal on September 24, 1998.

W. Va. Code §18-29-4(a)(1) provides:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy

sought.

"Days" is defined in W. Va. Code §18-29-2(b) as "days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings . . . ." Because Grievant's employment term did not begin until on or about August 16, 1998, the time period between his receipt of Dr. McCullough's July letter advising him of his merit ranking, and the beginning of the academic term cannot be considered when determining the issue of timeliness. Furthermore, documentation in the record supports Grievant's testimony that the delay in filing after his return to campus was caused by his efforts to obtain information regarding the evaluation process. After his receipt of that information in Dr. Coyne's letter of September 4, 1998, Grievant's request for an informal conference was made within fifteen work days.

This situation would appear to fall under the discovery rule exception to the statutory time limits discussed in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990). In that case, the West Virginia Supreme Court of Appeals determined that the timein which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. Although Grievant knew the results of his evaluation in July, he was not aware of the points allocated to each of the three categories, or the basis for the point allocation, until he received Dr. Coyne's letter dated September 4, 1998. The undersigned takes administrative notice that September 4 was Friday before the Labor Day weekend. Therefore, Grievant reasonably did not receive the letter until Tuesday, September 8, 1998. Accepting that Grievant's request for an informal conference was made on September 14, the matter was timely initiated.

Addressing the merits of this complaint, it is noted that because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. A preponderance of the evidence 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.

Grievant asserts that Respondent has violated the following WLSC policies:

Policy 6 provides that operational procedures or policies will be implemented in thefollowing order of precedence: federal or state statutes, Board of Directors policy bulletins, Board of Directors administrative bulletins, WLSC operational policies, WLSC administrative bulletins, and the student handbook.

Policy 43 begins with a statement that the College allocates appropriated funds for salaries and wages as fairly and equitably as possible. The policy generally addresses pay grades and job descriptions for classified staff, and states that faculty salaries are to be paid semi-monthly, and may be issued over a twelve-month period at the request of the individual.

Policy 214 requires that all faculty be evaluated annually and provides an outline of the criteria to be reviewed (teaching/job effectiveness, service, and professional activity), and the point system previously discussed. It also outlines the evaluation procedure, which begins with the department chair meeting with the faculty to establish the year's merit/evaluation performance factors. The factors must be approved by the Dean, after which the department chair reviews and approves the individual faculty member's performance planning document, which outlines the individual's planned objectives for the academic year, and submits them to the Vice President for Academic Services. The chair conducts annual evaluations in conference with each faculty member before the second Friday in April, and submits the evaluations to the school Dean who reviews and approves the documents. Final evaluations are submitted to the Vice President and are used to determine faculty merit bonuses, if any.

Policy 215 addresses student evaluations of faculty, stating their intended use to be for faculty evaluations and the improvement of instruction. The policy provides detailedguidelines on the procedure to be followed in eliciting the evaluations.

Policy 245 is Respondent's Institutional Salary Policy for full-time faculty. This policy addresses merit pay, and provides that it shall be the responsibility of the department chair, in conference with the school Dean to determine how merit recognition bonuses will be distributed, but that the bonuses must be awarded based upon the annual evaluation.

Grievant also asserts a violation of W. Va. Code §18B-8-3a, which requires, in part, that faculty be recognized for outstanding performance, and that equity among salaries be maintained.

Grievant initially argued that Dr. Coyne violated the above-referenced provisions when she did not initially assign points to the three categories. This issue arose from a letter Dr. Coyne sent to Dr. David Thomas, dated August 5, 1998, in which she stated, “Instead of points, I used a Level I, II, and III category-basis for evaluating all faculty . . . .” However, by letter dated August 17, 1998, Grievant requested that Dr. John McCullough, Provost at WLSC, conduct an investigation of this issue. At that time Grievant noted that merit bonus monies must be awarded based upon the annual evaluation, and the evaluation is based upon a one hundred point system.

In a response dated August 28, 1998, Dr. McCullough advised that he made an unannounced visit to Dean Javersak's office and reviewed the faculty evaluations completed by Dr. Coyne. He reported that he was provided documentation of each faculty member's point totals, on a one hundred point scale. He then met with Dr. Coyne and asked her to describe the methodology she had used in preparing the evaluations and merit levels. She stated that she had used the one hundred point system, and that shehad further used a level-type approach---good, excellent, superior---in grouping/categorizing the points to arrive at final merit levels. Dr. McCullough concluded that Dr. Coyne followed Policies 214 and 245 in assigning the points. Grievant responded on September 2, 1998, stating, “I accept that you found that the required points were used by the Chair and Dean.” This comment would appear to have resolved that issue.

Grievant also asserts that by failing to fully credit him for his accomplishments, Dr. Coyne acted in an arbitrary and capricious manner. An action is arbitrary and capricious if the agency or individual making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996).

An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997). The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts;

however, the scope of review is narrow, and an administrative law judge may not substitute her judgment for that of the decision maker. Generally, the Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate "such an arbitrary abuse on the part of the school official to show the primary purpose of the policies . . . has been confounded." Jones v. Braxton County Bd. of Educ., Docket No. 96-04-282 (June 28, 1997); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). Finally, the mere fact that a grievant disagrees with his evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988).

In the present matter, Grievant asserts that Dr. Coyne erroneously faulted him for releasing his classes early on a number of occasions, did not consider all his publications, and held him to impossible standards regarding teaching special arrangement/uncompensated courses. Dr. Coyne testified that Grievant did not attend all of his laboratories, until she asked him to do so, and he did not meet his full scheduled instructional period once a week, on average. She also testified that she did not see any development of classes, or courses by arrangement, and that he had only two advisees. Addressing Grievant's professional activities, Dr. Coyne stated that the instructor must have a minimum of two activities, and she saw only one newspaper article. Dr. Coyne stated that if Grievant had accomplished more, it was his responsibility to make her aware of the activities, and opined that, contrary to Grievant's perception, his evaluation was good or he would have received no merit compensation.

Upon consideration of the foregoing, it cannot be determined that the evaluationwas arbitrary and capricious. Clearly, Grievant perceives that he was underrated; however, Dr. Coyne provided a reasonable basis for her allocation of points. Further, her review was deemed sound by Dean Javersak, who testified that he reviewed the evaluations conducted by Dr. Coyne and found them to be comparable to those completed by the other four department chairs, and Provost McCullough, who conducted an investigation at Grievant's request.

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

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely

filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

2. W. Va. Code §18-29-4(a)(1) provides:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

3. Grievant requested an informal conference to begin the grievance procedure within fifteen days of learning the facts which were the basis of his grievance. Thegrievance was timely filed. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

4. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

5. An action is arbitrary and capricious if the agency or individual making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

6. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an administrativelaw judge may not substitute

her judgment for that of the decision maker.

7. Generally, the Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate "such an arbitrary abuse on the part of the school official to show the primary purpose of the policies . . . has been confounded." Jones v. Braxton County Bd. of Educ., Docket No. 96-04-282 (June 28, 1997); Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). 8. The mere fact that a grievant disagrees with his evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Romeo v. Harrison County Bd. of Educ., Docket No. 17-88-013 (Sept. 30, 1988). 9. Grievant failed to prove that Dr. Coyne acted in an arbitrary and capricious manner in completing his performance/merit evaluation.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County. Any 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 therecord can be prepared and properly transmitted to the appropriate circuit court.

Date: April 30, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE