MARK E. KOEPKE,

Grievant,

v. **Docket No. 99-BOT-060**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Mark E. Koepke, employed by the Board of Trustees as an Associate Professor of Physics in the College of Arts and Sciences at West Virginia University (WVU or Respondent), filed a level one grievance on May 20, 1998, after his request for promotion was denied. The grievance was denied at level one by decision dated July 2, 1998. The grievance was advanced to level two, and an evidentiary hearing was conducted on October 27, 1998. A level two decision was issued on January 19, 1999, and Grievant filed a level four appeal on February 10, 1999. An evidentiary hearing was conducted on June 8, 1999, at which time Grievant appeared pro se, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. The matter became mature for decision upon receipt of Grievant's post-hearing submission on July 28, 1999.

The following findings of fact are made from a review of the level two transcript, exhibits, and decision, as well as the record developed at level four.

Findings of Fact

1. Grievant was first employed by Respondent in 1987 as an Assistant Professor in the WVU Department of Physics. Thereafter, he was promoted to Associate Professor, and granted tenure, in 1993.

2. In 1997 Grievant applied for promotion to Professor. 3. WVU Policies and Procedures for Faculty Evaluations provide that review for promotion is to be made at: (1) the department/division level; (2) college/school level; (3) provost and vice-presidential level; and, (4) presidential level.

4. Dr. Larry Halliburton, Chairman of the Department of Physics, supported Grievant's application and recommended that he be promoted to full Professor.

5. The Department Promotion and Tenure Committee determined that Grievant met the standards for promotion, and recommended that he be made Professor.

6. The School of Natural Sciences Promotion and Tenure Subcommittee voted to recommend that Grievant not be promoted, finding that he had not been an effective teacher. This recommendation was based upon student evaluations from 1993, 1995, 1996, and 1997.

7. M. Duane Nellis, Dean of the Eberly College of Arts and Sciences recommended that promotion be granted.

8. David Hardesty, President of WVU, has delegated the duty and responsibility of making final promotion and tenure decisions to Provost Gerald Lang. Provost Lang denied the request for promotion, finding that Grievant had failed to demonstrate excellence in the area of teaching. Grievant was notified of this decision by letter dated May 15, 1998.

9. Grievant filed a level one grievance on May 20, 1998. Provost Lang denied the matter, and Grievant advanced his claim to level two.

10. The level two evidentiary hearing was concluded on October 27, 1998; however, the hearing evaluator left the record open to review the transcript. 11. The hearing was officially adjourned on January 15, 1999, and a level two decision denying the promotion was issued on January 19, 1999.

12. The date Grievant received the level two decision is not established; however, he does not deny that he failed to file an appeal within five days of receipt.

13. Grievant filed a level four appeal on February 10, 1999.

Discussion

Timeliness

As a preliminary matter, Respondent argues that the level four appeal was not timely filed within the provisions of W. Va. Code §18-29-4. 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. Dept. 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 the level two decision was issued on January 19, 1999, and a level four appeal was not filed until February 10, 1999, nearly a month later. Grievant responds to this issue as follows:

(1) The five-day limitation was not explicitly stated on the Level II decision, as the relevant time limitations had at other levels.

(2) I was not notified of the Level II decision by certified mail, as I had for all the other notifications. It was unclear to me when the clock for the appeal began, or if it indeed had begun, until I spoke to Colleen Lankford by phone. With the other notifications, I chose when to start the clock by signing the certified form at the US Post Office. Certainly, the Level II Hearing Examiner chose when to start his clock (after which he had five days to decide) by declaring exactly when the hearing was adjourned (and he chose three months to wait). I figured somehow that the expectation that I choose when to start my clock was not waived. Apparently, any choice I might have had was bypassed when the Level II decision was hand delivered (not [by] the US Post Office) to my departmental mailbox.

W. Va. Code §18-29-4(d)(1) states in pertinent part, "[i]f the grievant is not satisfied with the action taken by the chief administrator . . . within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner . . . ."

Respondent has established that the level two decision was issued on January 19, 1999, and that a level four appeal was not filed until February 10, 1999, fourteen workingdays after the date of issuance. Although Respondent did not establish the date Grievant received the decision, Grievant does not dispute that he did not file a level four appeal within the statutory time lines.

As previously noted, Grievant may offer a proper basis to excuse his failure to timely file an

appeal. Grievant clearly was unaware of the statutory time lines, and had previously relied upon the decisions to provide him that information. A review of the record indicates that in both the letter advising Grievant that the promotion was denied, and in the level one response, he was advised of his grievance rights under both W. Va. Code §§18-29-1, et seq, and BOT Series 36, including directions on where to file, and the time lines for filing. The level two decision included a notice of appeal rights, but did not include time lines for filing.

W. Va. Code §18-29-3(i) requires that "decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level two whom appeal may be made." Respondent has no statutory responsibility to advise grievant of the time lines for an appeal to be filed.

Grievant additionally raises the issue that Respondent had not followed the time lines when issuing the level two decision. The evidence of record establishes that Respondent's hearing evaluator, Kenneth D. Gray, did not render a level two decision until very nearly three months after the hearing was concluded. At the conclusion of the leveltwo hearing, Mr. Gray stated: "[t]he, ah - - - a lot of information has been presented, ah, today and as a result I will recess the hearing pending completion of the record and at which time I will review the record and make a determination. I will notify all the parties when the hearing has been adjourned and closed at some future date. This hearing is in recess." (Level II Trans. p. 258). On January 15, 1999, Mr. Gray advised Grievant and Respondent's counsel William H. Hutchins, by e-mail, that he had reviewed the record and concluded no further evidence or testimony would be required, and the hearing would be closed as of that date.

Similar claims have recently been made in other grievances involving Respondent. See Bowyer v. Bd. of Trustees/W. Va. University, Docket No. 99-BOT-197D (June 13, 1999), and Wilson v. Bd. of Trustees/W. Va. University, Docket No.99-BOT-115D (May 13, 1999). Allowing a hearing evaluator the opportunity to review the transcript of grievance proceedings may certainly prove beneficial to both parties, for obvious reasons. However, it is important that Respondent obtain a grievant's consent to extent the time lines, as was done in Wilson and Bowyer. (See footnote 1) The present case differs in that the hearing officer held the record open for months, without the consent of the grievant. Grievant could have elected to file a claim for default, or could have advanced it to level

four, under these circumstances but did not take that course of action. Although Respondent may not have acted within the statutory time lines, this may not excuse Grievant's subsequent failure totimely file a level four appeal.

Promotion

___Because the grievance has been found untimely filed, it is unnecessary to address the merits of the complaint; however, they will be briefly reviewed.___Because denial of promotion is not 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. The review of an institution of higher learning's promotion and tenure decisions is “generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious.” Karle v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-258 (Apr. 19, 1999); Harrison v. W. Va. Bd. of Directors, Docket No. 93-BOD-400 (Apr. 11, 1995). “The decisional subjective process by which promotion and tenure are awarded or denied is best left to the professional judgement of those presumed to possess a special competency in making the evaluation unless shown to be arbitrary and capricious or clearly wrong.” Sui v. Johnson, 784 F.2d 238 (4th Circ. 1984). “Deference is granted to the subjective determination made by the official[s] administering the process.” Harrison, supra.

Specific policies applicable to this matter include, University Systems of West Virginia Board of Trustees Procedural Rule, Title 128, Series 36, Section 6, “Promotion in Rank”, which states in pertinent part:6.1 Within the following framework, each president shall establish, in cooperation with the faculty or duly-elected representatives of the faculty, guidelines and criteria for promotion in rank:

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

research; potential for continued professional growth; and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to promotion shall rest with the institution.

WVU's Policies and Procedures for Faculty Evaluations for the 1997-98 academic year addresses the criteria for tenure or promotion in general terms, noting that college or departmental criteria may elaborate on the expectations, taking into account the distinctive character of the faculty member's discipline. The Policy specifically states, “[i]n order to be recommended for promotion in rank, a tenured or tenure-track faculty member will be expected to demonstrate significant contributions in two of the following areas: teaching in the classroom or other settings, research and service.” In the third area of endeavor, the faculty member will be expected to make reasonable contributions.

Grievant asserts that Provost Lang's decision to deny the promotion was erroneous for many reasons. First, Grievant argues that undue weight was placed on the student evaluations, undervaluing his teaching activities involving thesis and dissertation direction,advising, mentoring, and other out-of-classroom activities. Grievant interprets the Faculty Guidelines to state that in-classroom and outside-classroom activities are to be equally considered. He additionally asserts that the equal consideration given to the five to six hundred Physics I and II students, who rated him lower than the approximately twenty advanced level students, created a ratio so extreme that the outside-classroom activities, applied mainly to the advanced students, effectively did not count toward meeting the promotion criterion. Furthermore, he suggests that the weighting results in a conclusion that any inability to meet a benchmark score on the student evaluations in Physics I is thirty to fifty times more important than all his success in outside-classroom activities. Grievant argues that the weighting unilaterally modified his promotion criteria, and notes that many of his teaching activities were deemed significant contributions by other evaluators, but those judgments were dismissed by the Provost.

Finally, Grievant claims error occurred when the Provost applied the 1997-98 descriptors to pre-1997 evaluations. Prior to 1997, the Faculty Guidelines provided that a faculty member's performance was to be “excellent” or “satisfactory”. Effective the 1997- 98 academic year, a faculty member could be assessed as “excellent”, “good”, “satisfactory”, or “unsatisfactory”. This change moved a satisfactory rating from one to two steps below excellent. The change was problematic for Grievant because Dr. Halliburton and Dr. Weldon, a member of the Physics Department and the Promotion

Committee, testified that it was their understanding that annual evaluations were to be "satisfactory",with an "excellent" rating reserved for a promotion and/or tenure year evaluation. (See footnote 2)

Respondent simply argues that the decision to deny Grievant a promotion was properly based upon his failure to demonstrate significant contributions in teaching, and denies that it acted in an arbitrary and capricious manner.

A review of the undisputed evidence of record establishes that Grievant has engaged in an impressive body of work. Respondent concurs that his efforts in the area of research are excellent, and his service, satisfactory. Addressing his teaching performance, it is noted that Grievant specializes in the area of plasma physics. Within this specialty, he has developed, and teaches, four graduate-level classes. This effort has doubled the number of higher-level classes previously offered at WVU. Grievant has also mentored a number of students who have since pursued careers in physics.

In addition to his work in plasma physics, Grievant instructs Physics I and II classes. He does not dispute that his student evaluations from these classes are somewhat lower than those received by other faculty, but offers a basis for the difference. Grievant experiments in his methods of content presentation, such as using the Internet, and offering the first test twice to relieve test anxiety. Dr. Halliburton opined that he does not perceive students to always be open to innovative teaching methods, to Grievant's detriment. Dr. Halliburton also stated that the majority of students in these classes are pursuing degrees in Health Sciences, not Physics, and enroll only to fulfill a requirement. This situation, he believes also contributes to the lower student evaluation scores Grievant receives. Finally, it appears that Grievant holds the students to a rigorous standard of performance. This standard is in compliance with Respondent's overall goal of establishing higher standards for student performance, but likely does not enhance his evaluations.

As is true of all evaluative tools, student evaluations are subject to flaws. In a Respondent generated document titled "WVU Student Evaluation of Instruction Report of Results Interpretive Guide", it is noted that limitations must be placed on the use of these reports for the purpose of faculty evaluation. Noting that student evaluations is a measure of teacher effectiveness, it must also be recognized that the evaluations are only perceptions of individual students reported in numerical form. In the present case, three questions from the evaluation summaries were reviewed: (1) "The

overall quality of this course was . . .”; (2) “In general, this instructor's teaching was . . .”; and, (27) “How does this instructor compare with other instructors?” Ratings are on a scale from one (low) to five (high). Grievant's scores on all three questions during the 1993-97 period was somewhat lower than those received by other faculty in the College of Arts and Sciences who were considered for promotion and tenure during that time period.

In summary, Grievant has presented a complete and well-organized response to Provost Lang's decision to deny promotion. In consideration of all the evidence, the undersigned might have made a decision different than the one issued by the Provost; however, the Administrative Law Judge may not simply substitute her judgment for that of the decision maker. While Grievant's arguments relating to the apparent weight given tothe student evaluations are well stated, the Faculty Guidelines simply do not prohibit an evaluator from placing more emphasis on one area than another. Further, it appears that Provost Lang also considered Grievant's other teaching activities, which were not quantifiable. Finally, the Provost is not held to the findings of other evaluators when making his determination. Because there was no violation of policy, the decision of the Provost may only be reversed by finding that it was arbitrary and capricious.

An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible 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). Based upon a review of the evidence in its entirety, it cannot be determined that the decision to deny promotion in this case was arbitrary and capricious.

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

Conclusions of Law

1. W. Va. Code §18-29-4(d)(1) states in pertinent part, "[i]f the grievant is not satisfied with the action taken by the chief administrator . . . within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner . . . ."

2. Grievant failed to file a level four appeal within the statutory time lines, and failed to offer a proper basis to excuse his failure in a timely manner.

Accordingly, the grievance is **DENIED**.

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: September 20, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Although consent was obtained in these cases, both grievants indicated that they had not intended to consent to the delay experienced in receiving their decisions. Certainly, every attempt should be made to obtain an agreed upon amended time line, to avoid further complaints of this nature.

Footnote: 2

Since the understanding of the department members differs from the Provost, Respondent is urged to clarify this matter to avoid further miscommunication on faculty evaluations.