

**DALLAS BROZIK and
ALINA ZAPALSKA,**

Grievants,

v. DOCKET NO. 99-BOT-357

**BOARD OF TRUSTEES/
MARSHALL UNIVERSITY,**

Respondent.

DECISION

This grievance was filed on or about March 29, 1999, by Grievants, Dallas Brozik and Alina Zapalska, who are employed as faculty members in the Lewis College of Business, by the Board of Trustees/Marshall University, Respondent ("Marshall"). The statement of grievance reads as follows:

The Lewis College of Business policy of awarding the merit/market supplement based partly on longevity is inappropriate, unfair and discriminatory. [\(See footnote 1\)](#)

As relief Grievants sought:

To resolve this grievance we are asking that the issue regarding longevity be deleted in determination for compensation. We are also asking to recover any and all money lost to us due to this policy. [\(See footnote 2\)](#)

Grievant Brozik believes the use of longevity as a factor has cost him over \$1,405.00 in two years, and Grievant Zapalska believes it has cost her \$100.00.

Before addressing the merits of this grievance, two procedural issues need to be addressed. First, at the Level IV hearing, the parties reserved Respondent's Exhibit Number 8 for the minutes of a Lewis College of Business faculty meeting in 1992. After the hearing, the undersigned was informed that these minutes could not be found. Accordingly, Respondent's Exhibit Number 8 is considered withdrawn.

The second procedural issue is Respondent's Motion to Dismiss on the grounds that the proper forum for this issue is a vote of the faculty of Grievants' department, and Grievants should pursue that

avenue. While it is questionable whether the undersigned would have the authority to overturn a faculty vote, there is nothing in the record to suggest that the faculty have complete control over merit policies, and that Marshall cannot change merit policies without faculty approval. Calvin Kent, Dean of the Lewis College of Business, stated that he would not change this policy without faculty consent, but that does not mean Marshall could not do so. Certainly, the faculty may give its input, but is Marshall required to do what the faculty votes should be done? This is not likely. In fact, Respondent placed evidence in the record that the merit/market policy at issue had not only been adopted and approved by the faculty, but had also been approved by Marshall's president, and the policy had specifically been excepted from Marshall's standard policy for all other groups within the institution. All of this indicates the faculty may certainly give its input, but it is the Marshall administration which has the final say in such matters, and whose action has affected Grievants. The Motion to Dismiss is denied.

The following findings of fact have been properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant Brozik has been employed by Marshall for 13 years. He is currently employed as a Professor of Finance. Grievant Zapalska has been employed by Marshall since 1991, and is currently employed as an Associate Professor. Both are employed in the Lewis College of Business.

2. The Lewis College of Business distributes merit increases to those who qualify by meeting certain standards of meritorious service, as set forth in its faculty handbook. They are distributed with the dual purposes of rewarding meritorious service and bringing faculty salaries up to market level. The system used for distribution of these increases is called a merit-market system.

3. The amount of the merit increase awarded to each qualified faculty member is determined by first comparing the faculty member's salary to the meansalary earned by similarly ranked faculty at other schools which are certified as the College of Business is. The mean salary figure for these schools is adjusted for each Lewis College of Business faculty member, at the rate of \$500.00 for each year of experience. The formula used by the College of Business is that no adjustment is made to the mean comparative salary for Assistant Professors with 6 years of total teaching experience, Associate Professors with 13 years of total teaching experience, or Full Professors with 20 years of

total teaching experience. For those faculty with less experience than this, \$500.00 is subtracted from the mean comparison salary for each year less than 6, 13, or 20 years, depending upon the rank of the faculty member. Likewise, \$500.00 is added for each year of experience greater than 6, 13, or 20, up to a maximum of 7, 15, or 32 years. [\(See footnote 3\)](#) Those faculty whose salaries are above this comparison salary are not eligible for a merit increase.

4. Each qualified faculty member receives as a merit-market increase, the amount of the difference between his salary and the comparative salary multiplied by a percentage. The percentage is the same for each faculty member, and represents how much of the salary gap can be filled with the money available for merit increases. There has not been enough money available to fund the entire amount of this gap in recent years.

5. Grievant Brozik is credited with 15 years of total experience when this formula is applied, and Grievant Zapalska is credited with 11 years of experience.

6. The majority of the faculty of the Lewis College of Business has approved of this method of distributing merit increases on at least two occasions, including a vote in October 1999. When the College of Business was going through the accreditation process, the faculty voted to keep this policy in place, by a vote of 41 to 4. [\(See footnote 4\)](#)

7. Marshall has approved the Lewis College of Business' merit-market system, and exempted it from Marshall's merit distribution system which is set forth in the Marshall faculty handbook.

Discussion

The burden of proof is upon Grievants to establish their allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987). Grievants argued that because longevity has nothing to do with merit, it is arbitrary and capricious to consider longevity in determining the amount of merit increases. In support of this assertion, Grievants offered the opinion testimony of Grievant Brozik, including his opinion that this is an unethical practice.

Respondent denied it is arbitrary and capricious to include longevity as a factor in determining the amount of each employee's merit increase. Respondent pointed out that the faculty of the Lewis College of Business voted to include longevity as a factor, and recently specifically voted not to remove this factor from the calculation of merit increases.

Grievants also argued the inclusion of a longevity factor for purposes of calculating the amount of merit increases means longevity is counted twice, in the employee's base salary and again when calculating merit pay. Respondent disputed this. Grievants did not explain why double counting is wrong, and the parties presented no factual information which would allow the undersigned to evaluate this issue. Accordingly, assuming Grievants are correct, so what?

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgement for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if factors that were intended to be considered were not relied upon, important aspects of the problem were entirely ignored, it is explained in a manner contrary to the evidence, or is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of the facts. Black's Law Dictionary, 55 (abr. 5th ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." See Trimboli v. W. Va. Dep't of Health and Human Servs., Docket No. 93-HHR-322 (June 27, 1997).

Marshall's faculty handbook, commonly referred to as the Greenbook, provides with regard to merit increases, that the funds for merit increases are distributed to colleges and departments,

as follows: First, one third of these remaining funds would be distributed by the dean in consultation with department chairs. Second, each department or school would distribute the other two thirds based on a faculty committee [sic] recommendation. Merit awards will not be added to the base salary and shall not be less than \$1,000.

Grievants argued the Lewis College of Business does not follow Marshall's policy. This is true. The Lewis College of Business has its own faculty handbook, and its merit increase policy has been exempted from the requirements of Marshall's faculty handbook, as is specifically allowed by the Marshall faculty handbook. The Lewis College of Business faculty handbook states with regard to merit increases:

2.3 The merit salary stipend is the faculty member's additional salary as determined by the qualified member's assigned position on the scale which is developed from the Peer Group Salary Analysis of schools selected by the President.

2.5 Faculty members with base salaries above the level determined in the peer group analysis are not eligible for merit based stipends.

. . .

3.0 Faculty placement for merit based stipend

3.1 Considerations for receiving a merit based salary stipend:

3.1.1

Be academically or professionally qualified as stipulated in Standard P.D.5 of the AACSB Standards for Business and Accounting Accreditation.

3.1.2

Have made within the preceding five years substantial intellectual contributions as stipulated in section 1C.1 of the AACSB Standards for Business and Accounting Accreditation.

3.1.3

Be qualified as an average or above average instructor as rated by both student and Division Head evaluations.

3.2 Each new faculty member will be placed at a level of equity within the division based on degree, intellectual contribution and years of teaching or comparable experience. The Division Head, after discussion with the Dean, will form and explain a recommended position which must be approved by the Dean. The Dean's recommendation is submitted to the Vice President of Academic Affairs for approval.

3.3 Each continuing faculty member meeting criteria stated in 3.1 will be placed in a position of equity within his/her division. Total years of full-time higher education experience or equivalent will be used to differentiate among faculty otherwise similarly situated. (Emphasis added.)

The inclusion of longevity as a factor in determining the amount of each faculty member's merit

increase is not unreasonable, for several reasons. First, it is not unreasonable to include this factor if the majority of the faculty have voted to do so. While Grievants do not believe they should be bound by what the majority of the faculty wants, it is reasonable to try to accommodate the wishes of the majority. Second, Mike McGuffey, Marshall's Director of Institutional Research, testified it was not unusual for institutions of higher education to build a longevity factor into merit raise distributions.

Third, Dent Kent testified that, in his view, longevity should be a factor because more senior faculty are less mobile, and salaries can become compressed. He further believed there should be some reward simply for the time and dedication of more senior faculty. This certainly is not a unique view, and is not unreasonable.

Finally, the undersigned concludes from the testimony that consideration of the longevity factor is necessary. This is not just a merit system; it is referred to as a "merit/market" system, and that is the reason for the reference in the handbook to "Peer Group Salary Analysis of schools selected by the President." Mr. McGuffey testified it is the goal of Marshall in determining which departments get money from Marshall's pool for merit increases, to try to get salaries as close as possible to the market salary for the discipline. The goal of the Lewis College of Business merit/market system is the same as Marshall's merit system goal.

The testimony was that each faculty member's base salary is compared to the mean salary for business faculty at other schools which are certified as Marshall's business school is. This mean salary obviously cannot reflect the appropriate target salary for both a 5 year faculty member and a 25 year faculty member. It is for this reason that longevity becomes a factor. It is this mean salary comparison which is adjusted for "longevity", so that it more accurately reflects the mean salary for a faculty member at another school with the same years of experience. For example, Grievant Zapalska has 11 years of experience. However, the Lewis College of Business formula assumes that the mean salary represents the salary of a faculty member with 13 years of experience. Accordingly, the mean salary was adjusted for two years, at the rate of \$500.00 per year. Then her salary was compared to the real target salary, to see how much of a gap existed between her salary and that of comparative schools, and the merit/market increase was calculated. Thus, as the goal is to offer salaries which are competitive with other schools, which also seems to be a reasonable goal, and one with which Grievants did not quibble, it is necessary to adjust the mean salary in order to effect a proper comparison.

As to Grievants' claim that the method of distributing merit increases is "inappropriate" and unfair, the undersigned has found no violation of any policy, rule, regulation, or law. To the contrary, the policies in place support the method by which merit increases are distributed, and the majority of the faculty members of the Lewis College of Business have decided that this method is appropriate and fair.

Grievants simply do not like the method of distribution because they are currently on the short end of the stick. Dean Kent pointed out, however, that not long ago, both Grievants were in different ranks with many years of experience, and therefore benefitted from this system. Grievants did not find a problem with the system at that time.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievants to establish their allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987).
2. Generally, an action is arbitrary and capricious if factors that were intended to be considered were not relied upon, important aspects of the problem were entirely ignored, it is explained in a manner contrary to the evidence, or is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of the facts. Black's Law Dictionary, 55 (abr. 5th ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." See Trimboli v. W. Va. Dep't of Health and Human Servs., Docket No. 93-HHR-322 (June 27, 1997).
3. The Lewis College of Business policy of considering longevity as a factor in allocating merit increases in an effort to bring the salary of every qualified faculty member up to a competitive market salary, is not arbitrary and capricious, unfair, or inappropriate.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 28, 2000

[Footnote: 1](#)

Grievants did not pursue the claim of discrimination at the Level IV hearing, or in their post-hearing written submission, and this argument is deemed abandoned.

[Footnote: 2](#)

The grievance was denied at Level I on April 22, 1999. Grievants appealed to Level II where a hearing was held on July 20, 1999. A Level II decision denying the grievance was issued on July 27, 1999. Grievants appealed to Level III, where the Board of Trustees waived participation. Grievants appealed to Level IV on August 17, 1999. A Level IV hearing was held on November 3, 1999. Grievants were represented by Steve Angel, and Respondent was represented by Beth Ann Rauer, Esquire. This grievance became mature for decision upon receipt of the last of the parties' post-hearing written arguments on January 6, 2000.

[Footnote: 3](#)

Grievant Brozik mentioned in his testimony at the Level II hearing that there had been no basis or rationale provided to the faculty for these numbers. Then in Grievants' post-hearing written submission at Level IV, Grievants argued for the first time that these numbers are not supported by any data. This Grievance Board does not allow parties to bring up new arguments for the first time in post-hearing written submissions. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). Moreover, Grievants bear the burden of proof. No evidence was presented that these numbers were wrong, or that some other numbers were more accurate. The burden does not shift to Respondent to demonstrate a basis for these numbers simply because Grievants testify they do not know the origin of the numbers, and question their legitimacy.

[Footnote: 4](#)

Dean Kent testified the faculty also initially approved this method in 1992. However, he was not employed by Marshall at that time, and Grievant Brozik did not recall such a vote. Grievant Brozik initially stated no such vote ever occurred, but then later testified he did not recall any vote, and if the faculty did vote on this, no one explained it to them. As the minutes of the faculty meeting were not produced, and no other witness was presented who had knowledge of any faculty vote in 1992, the undersigned cannot make a finding that the faculty approved this method in 1992.