BARBARA BEARD, et al.,

Grievants,

v. **Docket No. 99-BOD-268**

BOARD OF DIRECTORS/SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Grievants, Barbara Beard, Roland Bergman, V.J. Brown, Momodou Darboe, Roger Hamood, Edward S. Phillips, G. Norris Rath, Kathleen L. Reid, Cinda Scales, John Schultz, Joseph W. Thatcher, and Irving Tucker (Beard Grievants), employed by the Board of Directors as faculty at Shepherd College (Respondent), individually filed level one grievances on or about January 28, 1999, in which they alleged that merit increases for the 1997-98 academic year were awarded in violation of an unspecified policy, and that Respondent acted in an arbitrary and capricious manner resulting in favoritism. They requested a "comparable wage adjustment" effective the 1998-99 academic year.

The grievance was denied at levels one and two. Grievants elected to bypass consideration at level three, and advanced their claim to level four on June 25, 1999. A level four hearing was conducted on the Shepherd College campus on September 21, 1999, at which time Grievants were represented by Grievant Cinda Scales, and Respondent was represented by K. Alan Perdue, Esq. (See footnote 1)

Grievant Joyce G. Webb, filed a grievance on December 22, 1998, in which she alleged that she had "made application for merit pay and was denied only to find out merit pay was granted to others who had not applied." Grievant Webb requested that she beawarded the same amount of merit pay as those individuals who did not apply. The record does not indicate this grievance was reviewed at level one. Shepherd College President David Dunlop denied the grievance at level two, and Grievant advanced her claim to level four on May 24, 1999. Shortly after the level four hearing was conducted for the Beard grievants, Grievant Webb's representative, Harvey Bane of WVEA, contacted the undersigned and requested that the matters be consolidated for hearing. Because the facts and issues are similar, and absent any objection from Ms. Scales or Mr. Perdue, the request was

granted. Following a delay in the production of the level four transcript, the matter became mature for decision with the submission of proposed findings of fact and conclusions of law on or before February 8, 2000.

The following facts are derived from the record developed at levels two and four.

Findings of Fact

1. Since 1996 Respondent has implemented a series of modified policies regarding merit pay. Because the policy utilized for the 1997-98 academic year was the subject of discussion, and at least one grievance, the policy was revised for the 1998-99 academic year.

2. On March 13, 1998, Mark Stern, Vice President for Academic Affairs, issued a memorandum to all faculty advising them of the merit pay process which would be in effect for the 1998-99 academic year. This policy required that any faculty member wishing to be considered for merit pay submit an application with supporting information by April 15, 1998. 3. Grievants Beard, Bergman, Brown, Darboe, Hamood, Phillips, Rath, Reid, Scales, Schultz, Thatcher, and Tucker made an informed decision to not apply for merit pay.

4. Grievant Webb made a timely application for merit pay; however, her claim was denied.

5. Consistent with the process in place for the 1998-99 academic year, the Division Chairs reviewed the applications for merit pay.

6. Following the deadline for application, and after the review process had begun, the Chairs and the Vice President recognized that faculty on sabbatical leave had been unable to reasonably react to the March 13, 1998 policy statement by the April 15 deadline, and had not been considered for merit pay. To correct this situation, it was determined that all faculty who were on sabbatical leave that semester would receive one- half unit of merit pay.

7. It was also determined during the review process that coaches who are employed as full-time faculty would be evaluated using a special criteria, reflective of their different duties and responsibilities, that had been developed and used in prior years.

8. One faculty member was evaluated using “an unorthodox process”, in that the Provost of the Community and Technical College evaluated her performance as Assistant to the Provost, and made a recommendation for merit pay in that capacity. The Division Chairs and Vice President agreed with the Provost's recommendation.

9. After the Division Chairs submitted their recommendations to the Vice President for awards

of merit pay in May 1998, the Vice President advised they would beconsidered for merit pay if they submitted a written account of their accomplishments during the 1997-98 academic year. Three Chairs were subsequently awarded merit pay.

10. Respondent provided formal notice of all merit pay allocations in conjunction with the issuance of faculty contracts for the 1998-99 academic year on May 29, 1998. Information as to the identity of merit pay recipients was publicly available after that date.

11. On August 17, 1998, Vice President Stern issued a memorandum to the faculty addressing the merit pay process for 1998-99, in which he specifically stated that faculty on sabbatical leave in Spring 1998 had been awarded a one-half unit of merit pay, even if an application had not been filed. He further noted that this practice would be revised for the upcoming academic year, and those individuals on sabbatical leave would be required to submit an application.

12. The matter of merit raises was discussed by the Faculty Senate in November/December 1998, and on December 7, 1998, Senate President Anders Henriksson forwarded a number of concerns to President David Dunlop.

13. Grievants Beard, Bergman, Brown, Darboe, Hamood, Phillips, Rath, Reid, Scales, Schultz, Thatcher, and Tucker, requested an informal grievance conference on December 8, 1998.

14. Grievant Webb initiated her grievance at level two on December 22, 1998.

Discussion

Respondent moved to dismiss this grievance as untimely filed under the provisions of W. Va. Code §18-29-1, et seq., the grievance procedure for education employees. Specifically: 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.

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. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely

manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

Respondent has proven that Grievants were made aware of the process to be used in awarding merit raises when Vice President Stern issued the March 13, 1998, memorandum. It has also been established that each faculty member was notified of whether he or she had received a merit pay increase on May 29, 1998. Finally,Respondent proved that Grievants were advised by memorandum of August 17, 1998, that faculty on sabbatical had received a merit increase even if they did not submit an application. Respondent argues that Grievants were aware that notice of individual awards was issued on May 29, 1998, and that the information was publicly available at that time. If constructive notice is deemed inadequate, Respondent asserts that Grievants were provided actual notice of at least one deviation from the terms of the March 13, 1998. policy by Vice President Stern's August 17, 1998 memorandum, and argues that any grievances should have been initiated within fifteen work days of the distribution of that document.

Grievants assert they were not aware of the situation until the facts were discussed during a Faculty Senate meeting in December 1998. It is undisputed that Vice President Stern advised the faculty in his August 17, 1998, memorandum that, “[l]ast year, individuals who were on sabbatical leave or professionally related leave, and may not have been available to apply for merit, but who achieved outstanding performance, were awarded a ½ unit of merit pay upon the recommendation of the division chairs.” However, under cover letter dated December 7, 1998, Anders Henriksson, President of the Faculty Senate, forwarded a Senate Resolution to President Dunlop advising him that the Faculty Senate was notified by Vice President Stern on November 16, 1998, that three division chairs had been awarded merit pay even though they had not applied. Based upon this information, it was requested that President Dunlop respond to a number of concerns.

Vice President Stern replied on December 15, 1998, in a memorandum memorializing a meeting

with Faculty Senate officials, stating that “a review of how merit pay was awarded in several situations [was] not previously explained publicly. . . .” Hecontinued to address merit pay awarded to division chairs, coaches, individuals assigned to the Community and Technical College, and those on sabbatical leave. The language of this memorandum supports Grievants' assertion that they were not fully aware of the situation relating to coaches, Chairs, the Assistant to the Provost, until December 1998. Because Respondent has proven that Grievants were notified by memorandum of August 17, 1998, that faculty on sabbatical had received a merit increase, that claim was not timely filed. However, Grievants have proven that they were not aware of the situation regarding merit raises given to other faculty until December 1998. Regarding those matters, they are covered by the "discovery rule" exception to the fifteen-day filing limit, i.e., until an employee knows of the relevant facts giving rise to his grievance, the time limitations contained in W. Va. Code §18-29-4(a)(1) are tolled. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (W. Va. 1990); Holloway v. Bd. of Educ., Docket No. 97-35-291 (Mar. 20, 1998).

Respondent next asserts that because the Beard Grievants did not apply for merit increases they lack standing in this matter. Grievant Webb also lost standing to challenge the legitimacy of the implementation decisions, Respondent argues, when she chose not to grieve the decision denying her merit pay. Grievants assert that they have demonstrated harm from Respondent's decisions, and therefore, have standing.

"Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must allege an injury in fact, either economic or otherwise, which is the result of the challenged action andshows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

Because Grievants' complaint is now limited to individuals who applied for merit pay, and they intentionally did not apply, they do not have standing to pursue this matter. Grievant Webb also lacks

standing. While she did apply, but was denied a merit increase, she does not allege that the improper criteria were applied to her, or that she should have been evaluated using the criteria applied to other employees. In short, she was properly evaluated.

Even if Grievants were found to have standing, they cannot prevail on the merits of the grievance. Grievants argue that Respondent acted in an arbitrary and capricious manner, resulting in favoritism and discrimination, when it granted merit increases to Division Chairs and coaches who hold contracts additional to faculty appointments, and to an individual who was assigned as an assistant to the provost on a half-time basis at a community college. Respondent denies that it acted arbitrarily or contrary to institutional policy.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their 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 situations cited by Grievants as arbitrary and capricious applications of the merit pay policy are undisputed by Respondent. However, it notes that a separate criteria for coaches had been adopted the previous year, and the lack of reference to it in the March 13, 1998, memorandum was due to an implicit assumption that no change was intended regarding those criteria, because they had not been part of the ongoing discussion with the Faculty Senate regarding revisions of merit awards.

Awarding a merit increase to the individual who is assigned as Assistant to the Provost was characterized by Respondent as “substantially consistent” with the March 13, 1998 policy statement, considering her dual appointment.

Finally, Respondent characterizes the award of merit increases to Division Chairs as irrelevant to Grievants because the faculty merit policy placed it under no obligation to treat Division Chairs exactly the same as faculty for this purpose. Respondent concludes that the decisions of which Grievants complain were made in an effort to provide fairness to all the individuals in the merit review process, and were not intended to discriminate or show favoritism.

Respondent's policy statement, set forth in Vice President Stern's memorandum to “All Faculty”, dated March 13, 1998, states in its entirety:

The purpose of the memorandum is to inform all faculty members of the processes involved in the

annual evaluation and merit pay. Attached are the time-lines for each of the latter processes and the appropriate forms to be employed in each process. In addition, attached is a copy of the criteria that will be employed for the determination of merit pay awards.

Consistent with recommendations of the Faculty Senate, the annual evaluation of faculty process will be distinctly separate from the merit pay process. As you will not in the attached document, “Time-Line for Annual Evaluation,” each faculty member will submit an annual report to his or her department chair by April 1. The Annual Report Form remains the same as last year. Please not the various evaluation reports due on April 30.

As of April 15, a faculty member who wishes to apply for merit pay consideration will provide a letter of application and supporting documentation to his or her division chair.

In agreement with the Faculty Senate recommendation, the allocation of new pay monies, after the funding of promotion pay increments and a one-time stipend allocation for department chairs, will be: 49 percent for across-the-board pay raises; 10 percent for merit funding; and 41 percent for equity pay adjustments.

The attachment titled, “Criteria for Merit Awards” stated in part:

Merit is awarded for exceptional, specific, documented achievement in teaching, professional development and professional service. It is assumed that a faculty member is meeting expectations considered sufficient for promotion or tenure.

Only full-time faculty who normally have completed at least two years of full-time employment at Shepherd College are eligible for merit. An eligible person who wishes to be considered for merit must apply and supply supporting evidence.

* * *

The criteria listed below for each of the three categories of faculty evaluations are not exhaustive, not in strict priority order, and not all necessary for merit.

As indicated, these documents are very general, and do not address specific groups or individuals within the faculty. Although Division Chairs hold an administrative contract, they are functional members of the faculty, and there appears to be no reason to excludethem from merit consideration.

Grievants express concern that it was the Division Chairs who first evaluated the faculty applications; however, this does not appear to create any conflict, since the Chairs did not evaluate themselves or each other. The evidence indicates that the Chairs were not even initially considered, but were allowed to petition for consideration after their level of review was completed.

The fact that coaches were evaluated under a somewhat different set of criteria is a deviation from the policy statement, but should hardly be a surprise to anyone. Individuals acting in a coaching capacity are clearly functioning differently than individuals in a purely academic setting. Indeed, it would be impossible to evaluate faculty who serve as coaches solely on academic credentials. Although this matter was not addressed in the policy statement, the decision to apply performance based criteria to coaches was not improper.

The claim regarding the individual who is a member of the Division of Business and Social Sciences faculty, and serves as Assistant to the Provost of the Community and Technical College appears problematic; however, the undersigned lacks sufficient information to make a determination. The record does not reflect whether the Community and Technical College is a subdivision of Shepherd College, or whether the individual in question is employed by one entity or two. While this merit increase appears suspect, there is simply not enough information in the record to make such a determination.

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 andHuman Servs., 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). Grievants failed to prove that Respondent acted in an arbitrary and capricious manner in the allocation of merit pay for the 1998-99 academic year.

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

formal conclusions of law.

Conclusions of Law

1. W. Va. Code § 18-29-4(a)(1) provides that a grievance be filed within fifteen days following the occurrence of the event upon which the grievance is based, or fifteen days of the date on which the event became known to the grievant, or fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance.

2. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, he employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Trans., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ.,Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); 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 Services, Docket No. 90-DHS-524 (May 14, 1991).

3. Respondent has proven that Grievants did not initiate these proceedings within fifteen days of the award of the merit raises, or within fifteen days of being given notice that merit raises were given to faculty on sabbatical.

4. Grievants have proven they filed the grievance within fifteen days of learning the facts surrounding the award of merit pay to administrators, coaches, and an individual assigned part-time to a community college.

5. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute,

regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). 5. Grievants lack standing in this matter.

6. Respondent did not award merit increases for the 1997-98 academic year in a manner which was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. 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: April 27, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Although Ms. Scales is an attorney, she clearly stated that she was not acting in a legal capacity, and was simply spokesperson for the group.