BYRON NELSON ,

Grievant,

v v.

Docket No. 99-BOT-514

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Bryon Nelson, PhD, is employed as an Associate Professor in the Department of English at West Virginia University ("WVU" or "University"). He filed this grievance on or about May 19, 1998. His Statement of Grievance is quite lengthy, but concerns the failure of WVU to promote him to a full professor because of insufficient significant contributions in the area of research. Grievant was found to have met the required standards in teaching and service. Relief sought is promotion to full professor, back wages, and costs.

This grievance has a long procedural history. The Level I Decision was issued on July 10, 1998, and Grievant appealed to Level II on August 31, 1998. (See footnote 1) Level II hearings were held on February 5, 1998, April 12, 1999, and May 12, 1999. On November 29, 1999, Grievant's attorney informed Respondent Grievant had prevailed by default, alleging WVU had failed to issue the Level II Decision in a timely manner. A Level II Decision dated November 22, 1999, was mailed on November 30, 1999. On December 3, 1999,Grievant's attorney received a letter from Respondent indicating it was not in default. Grievant appealed the Level II Decision to Level IV.

On December 10, 1999, Grievant filed a Writ of Mandamus with the Monongalia Circuit Court asking the court to declare a default by Respondent. After presentation of evidence of this issue, the Monongalia Circuit Court found "the facts involved in this action do not rise to the level required for a grant of default judgment." Order, Civil Action No. 99-C-489, Monongalia Circuit Court (Apr. 7, 2000).

This Grievance Board asked about the status of the grievance and received a copy of this Order on June 26, 2000. On November 9, 2000, after Notice from this Grievance Board that the grievance would be dismissed for failure to pursue, Grievant's attorney responded stating Grievant still wanted to pursue this grievance, and he requested a Level IV hearing. Subsequently, the parties decided this case could be submitted on the record developed below. (See footnote 2) This case became mature for decision on April 20, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Grievant presented two main arguments. Confusingly, the first issue was to again raise the issue of default. The second issue was whether the denial of Grievant's request for promotion based on Respondent's assessment that he failed to meet the necessary standard of significant contribution in the area of research was arbitrary and capricious. Grievant also argued he was not compared, as required by the guidelines, with other recently promoted faculty in the creative writing section of the English Department.

Respondent asserted the issue of default has been decided by a court of higher jurisdiction, and this Grievance Board has no authority to take any action on this subject. Secondly, Respondent argued the decision to deny Grievant's request for promotion was based on the Department's, College's, and University's guidelines and was not arbitrary and capricious. Respondent noted the considerable discretion granted to the university in academic issues.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been a faculty member in WVU's English Department since 1971 and was promoted to Assistant Professor in 1976 and Associate Professor in 1983. He was awarded tenure in 1982.

2. He requested promotion to Full Professor in the Fall of 1997. 3. Promotion to Full Professor is a lengthy process which requires a number of reviews by various peers, committees, and administrators. This rank is the highest teaching level within academia.

4. The candidate for promotion is expected to collect materials for these individuals and committees to review. These materials are to include, among other things, a curriculum vitae, with a list of publications, grants, and any other evidence of scholarship; past Annual Evaluations; and information about the candidate's teaching and service. Only the significant contributions from the last promotion are considered.

5. Also considered in the assessment of a faculty member requesting Promotion and Tenure are the responses of external reviewers. These external reviewers are asked to assess an applicant's research and scholarly activities.

6. The English Department guidelines note that while external reviewers help to make a Promotion and Tenure decision, they are not considered the "sole determinant of quality." Resp. Ex. No. 6, at Level II.

7. The University guidelines state these reviews are "among the many factors to be considered when evaluating the faculty member." External reviewers are to assess the quality of an applicant's work, and the "[t]he assessment of whether the quantity of the scholarly work is sufficient for promotion or tenure is a judgment best left to the local department, college, and the university." Grt. Exh. G.

8. Each group in the review process has guidelines, but all individuals and groups are governed by the University guidelines. Each Department may clarify or apply these guidelines to its own area. The English Department has written such guidelines. 9. The first step in the review process is a review of the materials submitted by the applicant's department's Promotion and Tenure Committee.

10. The guidelines of the English Department state that to be eligible for consideration for promotion to Full Professor the faculty member is "expected to demonstrate excellence in research, (See footnote 4) excellence in teaching and satisfactory performance in service." Resp. Ex. No. 6, at Level II. Excellence means "performance which meets or exceeds that of peers recently achieving similar promotion at West Virginia University and at comparable peer research universities." Id.

11. The English Department guidelines for promotion to Full Professor require that the candidate "present high-quality, published work as **evidence of an on-going research agenda** and of **continuous production of research**." Id. (Emphasis in original). The evaluation of the quality of the scholarship is a shared decision between the members of the Promotion and Tenure Committee

and the Department Chair. Id.

12. To be considered for promotion to Full Professor, the English Department candidate is expected to present a book or at least five articles or essays which have appeared in peer-reviewed journals of national or international reputation. These books and articles must have been written since the last promotion. The guidelines for promotion of creative writing faculty are different and are spelled out in the English Department guidelines. 13. "[A] single-authored book written for a scholarly audience is considered the clearest evidence of sustained and continuous research." Id. Co-authored articles are given a percentage, and are not counted as a full article.

14. In January, 1998, the English Department Promotion and Tenure Committee voted unanimously to retain Grievant at the Associate Professor level. (See footnote 5) The members noted the requirement of a book or at least five articles and found Grievant had maintained a "good' record of research, but not excellent. The Committee noted many of Grievant's publications were reviews and encyclopedia entries, and these writings were not substitutes for scholarly books and peer-reviewed articles. The Committee also noted some of Grievant's areas of research and publication were not related to his teaching, and this diversification or separateness was an area of concern. The Promotion and Tenure Committee found Grievant "has not met th[e] minimal criterion of scholarly publication." They also did not believe Grievant had evidence of an on-going research agenda and a continuous production of research, in part, because Grievant had not focused in one area. They assessed Grievant had only four and one half articles, as one of them was co- authored. (See footnote 6) While noting the external reviewers had been positive, the Committee reportedthese reviewers had been less helpful than they might have been because they focused on Grievant's ancillary work, not the scholarly articles upon which promotion must depend.

15. On September 29, 1997, five external reviewers were sent a letter requesting an objective evaluation of Grievant's "contributions to our discipline and of his ability as a researcher." The external reviewers were asked to assess Grievant's impact "on the field", and were informed Grievant must "demonstrate excellence in research to be promoted." The external reviewers were encouraged to "comment on whether the quality of work was comparable to[,] or better than[,] that of persons recently promoted and tenured at your university, or at other peer universities." Grt. Ex. Nos. 4 and 12, at Level II.

16. Each external reviewers comments will be discussed briefly. Each external reviewer spoke

to Grievant's wide range of scholarly interest and his scholarly interest and writing in music, which was outside the norm for an English professor.

A. The first external reviewer stated incorrectly that promotion was based chiefly upon a record of teaching and service accomplished since the last promotion. He remarked upon Grievant's lack of a conventional pattern of publication and found Grievant's scholarly endeavors could be characterized "as a series of studies constituting a program of worthwhile research." He believed Grievant's research formed "three such series." He noted Grievant was a gifted writer with an "unusual breadth of interests." He reported Grievant "seems to be hitting his stride with his double research projects." This external reviewer did not compare Grievant with his university's standard, but stated he thought Grievant merited promotion. B. The second external reviewer noted Grievant's scholarly articles were "first rate", and regarded Grievant as a gifted writer. He stated if Grievant were his colleague, he would "eagerly confer the rank of professor upon him."

C. The third external reviewer noted Grievant's wide range of expertise and spoke mostly about Grievant's work as a reviewer. He opined that on the basis of the material submitted he would be in favor of Grievant's promotion.

D. The fourth external reviewer noted Grievant's gift as a writer, discussed one of Grievant's articles with high praise, and examined Grievant's work as a reviewer. He did not feel comfortable reviewing Grievant's work in a non-musical area, but stated he would strongly support Grievant's promotion.

E. The fifth external reviewer noted Grievant's wide range of interests and his writing ability. He spoke in great detail about Grievant's skill as a reviewer. He also discussed, at length, one of Grievant's articles. He recommended Grievant for promotion based on Grievant's reputation outside the university, and his depth and breadth of knowledge.

17. The external reviewers did not directly address the issue of whether Grievant would have received promotion at their institution, or assess how he would compare to faculty recently promoted on their campuses. This was one of the key questions to be answered.

18. On January 29, 1998, the English Department Chair, Dr. Patrick Conner, independently reviewed the material submitted by Grievant. He did not believe Grievant presented evidence of an on-going research agenda and a continuous production ofresearch. He discussed Grievant's Annual Evaluations, and the fact Grievant had been repeatedly reminded to engage in research, and directed

and encouraged to complete the book for which he had received a sabbatical in 1986. The Annual Evaluations were given both at the Committee and Chair level.

19. Examples of the directions about scholarly activities repeatedly given in the Annual Evaluations are as follows:

A. 1988 - Chairperson - This Annual Evaluation noted with praise that Grievant had a paper recently accepted for a conference in Great Britain. The Chairperson urged Grievant "to continue his scholarly efforts in the Renaissance." This Annual Evaluation went on to say that while "we certainly appreciate Nelson's multi-faceted work and have always supported it, our graduate program might very well be served by Byron's concentration in that literary area for a while."

B. 1989 - Grievant's own Annual Evaluation - While in Britain, Grievant did research for and conceived of a book project, tentatively titled Christ Rising.

C. 1990 - Committee and Chairperson - Favorably noted Grievant was actively pursuing a research agenda for the Christ Rising book. The Chairperson stated he wanted Grievant to realize the importance of this work, and noted Grievant's need to focus his many skills on "the production of such a book length study", and this action would make promotion to Full Professor possible.

D. 1991 - Committee and Chairperson - Grievant received a sabbatical in the Fall semester to work on his book project. The Annual Evaluation offered much supportand encouragement for this project, and the Chairperson encouraged Grievant to focus his energies on this single project.

E . 1992 - Committee and Chairperson - Noted Grievant had been active in research and was continuing to work on his book project. The Chairperson stated, "The publication of his study in a good academic press will be needed should Bryon contemplate eventual promotion."

F. 1993 - Committee and Chairperson - Favorably noted Grievant's "continued scholarship" in research for his book, and the continuation of articles and presentations in this area.

G. 1994 - Committee and Chairperson - Noted Grievant now had two projects under way, although they were in the same area. This focus was seen as a "clear direction" for his scholarship. The Chairperson urged Grievant to complete his first project before he undertook another, and continued to note the value of a consistent research agenda.

H. 1995 - Committee and Chairperson - Noted Grievant was still working on his book and had other scholarly activities underway including an interest in opera. The Chairperson continued to note the importance of and need for significant efforts in the areas of research and publication.

I. 1996 - Committee and Chairperson - Noted two articles that were to be published in 1995 are now scheduled for 1996. The Committee urged Grievant to find ways to make his interest in opera relevant to his teaching. The Chairperson continuedto encourage Grievant to finish his proposed book, and noted he had presented two papers.

J. 1997 - Committee and Chairperson - Noted Grievant continued to research in areas of music, theater, and culture and had two articles published in the area of music. The Chairperson again encouraged Grievant to assist the English Department in its attempts to make a name for itself as a center for research in British and American literature.

20. The 1998 Annual Evaluation discussed and assessed Grievant's application for promotion. Dean Conner agreed with the Promotion and Tenure Committee, and he recommended Grievant be retained at the Associate Professor level. He stated the guidelines indicate the applicant should be compared to recently promoted faculty (within the past two years). Dean Conner found this comparison difficult as Grievant did not have a focus for his research. (See footnote 7) However, Dean Conner did compare Grievant, and reported Grievant did not compare favorably to faculty recently promoted within the English Department. Dean Conner noted the Promotion and Tenure Committee did not consider two of Grievant's articles as appearing in refereed journals and he concurred. Additionally, Dean Conner stated that while Grievant had many publications, these were mostly encyclopedia articles and book reviews. He found that since these writings were not peer reviewed articles or a book, they were not the type of research mandated by the guidelines and would not support promotion to Full Professor. Grt. Ex. No. 7, at Level II. 21. Since his last promotion, Grievant had not published any articles, book chapters, or books in 1984, 1985, 1986, 1987, 1992, 1993, 1994, 1995, or 1997.

22. Normally the review process would stop at this point because Grievant had not received any positive recommendations. However, Grievant asked for the process to continue and to have his information submitted to the College of Arts and Science Promotion and Tenure Committee. He prepared a rebuttal to accompany this request. This request was honored.

23. There are three subcommittees in the College of Arts and Science to deal with Promotion and Tenure issues. The Humanities Promotion and Tenure Subcommittee independently reviewed Grievant's materials. This Committee voted unanimously to retain Grievant at the Associate Professor level. They noted Grievant had numerous reviews and encyclopedia articles, but they

could not serve as substitutes for peer-reviewed writing that resulted from original research. This Committee found Grievant did not present a record which showed "the level of significant contributions in the area of research that would merit promotion to the rank of Professor." Grt. Ex. No. 1, at Level II.

24. Grievant's materials then went to the Dean of the College of Arts and Science. He independently reviewed Grievant's materials. He recommended Grievant be retained at the Associate Professor level as his research did not meet "the department's criteria for promotion to the rank of professor." He found "the number of peer-reviewed journal articles and the pattern of outstanding and continuous scholarly activity are not currently present at a level that warrants promotion to the rank of professor." The number of refereed articles since 1983, seven, were insufficient for a positive recommendation. 25. Again, normally the review process would stop at this point because Grievant had not received any positive recommendations. However, Grievant asked for the process to continue and to have his information submitted to Provost Gerald Lange, who had been delegated the final authority on promotion issues.

26. Provost Gerald Lange directed the Associate Provost for Faculty Development, Dr. C.B. Wilson, to review, in detail, the materials submitted by Grievant, and Associate Provost Wilson did this. He recommended Grievant be retained at the Associate Professor level.

27. Provost Lange then reviewed the materials, not in as great of detail as Associate Provost Wilson, but to assess whether the recommendation was supported by the materials included in Grievant's information. In a detailed, nineteen page letter, Provost Lange agreed Grievant had not shown a continuous pattern of research and an on-going research agenda. Grievant's materials did not rise to the level of excellence or a significant contribution in the area of research. He was guided in his assessment by the English Department guidelines and findings, but the main reference point for this decision was the WVU guidelines for promotion. Provost Lange pointed out that over the years Grievant had been constantly reminded what the guidelines for promotion were, and what he needed to do to meet them. He gave Grievant credit for five articles, including an article that had not yet been published, even though this action was against the University guidelines. He reported that while this number met the minimum, Grievant's failure to publish anything during many of his years as an Associate Professor, and his failure tofocus in an area did not indicate a continuous pattern or production of research required for promotion to Full Professor.

28. Provost Lange informed Grievant of his Decision and Grievant's right to grieve this Decision.

Discussion

The two issues addressed by the parties in their briefs will be examined separately.

A. Default

This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Typically, when a grievant is claiming he prevailed by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 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. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Decision. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

In this instance Grievant is requesting the undersigned Administrative Law Judge to review and reverse a default decision made by the Circuit Court. Respondent maintainsGrievant is barred from litigating the issue of default before the Grievance Board by the doctrines of res judicata, collateral estoppel, and/or Law of the Case.

"This Grievance Board is bound by [a] Circuit Court's legal conclusions in this matter as 'the law of the case.'" (See footnote 8) Parsons v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-289R (May 6, 1999); Bass v. Kanawha County Bd. of Educ., Docket No. 92-20-214 (Nov. 4, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29- 481 (Apr. 4, 1994). See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301, 24 S.E.2d 98 (1943).

As stated by the West Virginia Supreme Court of Appeals in the Syllabus Point of Lyons v. Grassilli Chemical Co., 106 W. Va. 518, 146 S.E. 57 (1928), "[t]he Decision of the Court should ordinarily, be adhered to in other actions between the same or different parties growing out of the

same cause of action, or a continuance thereof, and involving substantially the same set of facts considered in the decided case, especially where a different ruling would work great injustice to some of the litigants." (See footnote 9) Further, the WestVirginia Supreme Court of Appeals stated in State ex. rel Adkins v. Sims, 130 W. Va. 645, 46 S.E.2d 81 (1947), "in a pending suit or action, a decision of the appellate court on a question of law once made, becomes the law of the case in future proceedings in a trial court in the same case, or even in a subsequent suit or action on the same cause of action . . . . (citations omitted)." In Armstrong v. Armstrong, 201 W. Va. 244, 496 S.E.2d 194, (Oct. 24, 1997), the West Virginia Supreme Court of Appeals discussed the Law of the Case doctrine and stated, "[t]he essence of this doctrine is that a court of general jurisdiction, not sitting as an appellate court, may not overrule the decision of another court of general jurisdiction. See Chesapeake & W.R. Co. v. Washington C. & St. Louis R'y, 99 Va. 715, 40 S.E. 20, 21 (Va. 1901) ('The proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not sitting in exercise of appellate power.')."

The Circuit Court's Order held "[u]pon consideration of all the arguments presented by the parties and an independent study of pertinent law, this Court concludes that the facts involved in this action do not rise to the level required for a grant of default judgment." This statement is very clear; the issue of default has been resolved by a court of higher jurisdiction.

This Grievance Board has previously determined it "is bound by [a] Circuit Court's legal conclusions . . . as 'the law of the case.'" Parsons, supra. See Bass, supra; Runyon, supra. As such, this Grievance Board does not have the authority or the jurisdiction tooverturn a ruling by a circuit court. See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994). Accordingly, Grievant's request for the Grievance Board to review and change the Circuit Court's prior ruling of default is **DENIED**. (See footnote 10)

B. Whether WVU's decision to retain Grievant at the rank of associate professor was arbitrary and capricious?

Standard of Review

This Grievance Board's review of an institution of higher learning promotion decisions are "generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious." Harrison v. W. Va. Bd. of

Directors/Bluefield State College, 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." Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984); See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra; Gardener v. Bd. of Trustees/Marshall Univ., Docket No. 93- BOT-391 (Aug. 26, 1994). Thus, a grievant attempting to prove wrongful denial of promotion must demonstrate the action was arbitrary and capricious, clearly wrong, or aviolation of college policy. See Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-104 (Dec. 29, 1995).

"Generally, an action is considered arbitrary and capricious if the agency 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 was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Discussion of Merits

In this case involving the denial of promotion, Grievant bears the burden of proving by a preponderance of the evidence that WVU erred and acted in arbitrary and capricious manner when it did not promote him to Full Professor. See Baroni v. Bd. ofDirectors/Fairmont State College, Docket

No. 92-BOD-271 (Feb. 11, 1993); Harrison, supra. For the reasons discussed below, the undersigned concludes Grievant has failed to meet that burden.

West Virginia Board of Trustees Policy Bulletin 36 (Series 36), with regard to promotion of faculty, sets forth the following criteria:

SECTION 6. PROMOTION IN RANK

6.1 Within the following framework, each president or designee 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; publications and research; accessibility to students; adherence to professional standards of conduct; professional and scholarly activities and recognition; effective service to the institution, college, or department; experience in higher education and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field; 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.

6.1.2 There shall be demonstrated evidence that, in the process of making evaluations for promotions there is participation of persons from several different groups, such as: peers from within and without the particular unit of the institution, supervisory administrative personnel such as the department/division chairperson and the dean, and students.

6.1.3 There shall be no practice of granting promotion routinely or because of length of service, or of denying promotion capriciously.

6.1.4 The institution shall provide copies of its general guidelines and criteria for promotion to the Board of Trustees and shall make available such guidelines and criteria to its faculty.

6.2 Promotion shall not be granted automatically, but shall result from action by the president of the institution or designee following consultation with the appropriate academic units.

There are two key areas to note within these directions. Promotion will not be granted routinely or

because of length of service and shall not be denied capriciously. Id. at §6.1.3. (See footnote 11) Additionally, promotion should not be granted automatically but "shall result from action from the President of the institution following consultation with the appropriate academic units." Id. at §6.2; Gardner, supra.

After a review of all the materials presented and the assessments of the various Committees, Deans, and Provosts, the issue of whether the denial of Grievant's promotion was arbitrary and capricious must be answered in the negative. Although all the parties confirmed Grievant was an excellent teacher, and his service was adequate, it is clear WVU's decision was not arbitrary and capricious, and Grievant's research, publications, and scholarly activities did not meet the guidelines required by the English Department, the College of Arts and Sciences, or the University. It is noted that a Full Professor is a pacesetter in the academic community; a professional who is to lead by example.

Grievant was repeatedly directed to focus his multiple talents, and to focus them in an area that would serve and promote the English Department. This is not a path Grievant chose to follow. (See footnote 12) The English Department guidelines for promotion to FullProfessor require the candidate to "present high-quality, published work as **evidence of an on-going research agenda** and of **continuous production of research**." Resp. Ex. No. 6, at Level II. (Emphasis in original). All the committees, deans and provosts were in consensus; Grievant did not meet this stated criteria.

As previously stated "[t]he 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." Siu, supra; See also Carpenter, supra. "Deference is granted to the subjective determination made by the official[s] administering the process." Harrison, supra; Gardener, supra. The undersigned Administrative Law Judge finds WVU's decision to retain Grievant at the Associate Professor level was not arbitrary and capricious, and she will respect the "special competency" of the University and the committees and administrators who made this difficult decision.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. "The decision of the Court should ordinarily, be adhered to in other actions between the

same or different parties growing out of the same cause of action, or a continuance thereof, and involving substantially the same set of facts considered in the decided case, especially there a different ruling would work great injustice to some of the litigants." Syl. Pt., Lyons v. Grassilli Chemical Co., 106 W. Va. 518, 146 S.E. 57 (1928). 2. "[I]n a pending suit or action, a decision of the appellate court on a question of law once made, becomes the law of the case in future proceedings in a trial court in the same case, or even in a subsequent suit or action on the same cause of action . . . .(citations omitted)." State ex. rel Adkins v. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947). 3. "The essence of [the Law of the Case] doctrine is that a court of general jurisdiction, not sitting as an appellate court, may not overrule the decision of another court of general jurisdiction. See Chesapeake & W.R. Co. v. Washington C. & St. Louis R'y, 99 Va. 715, 40 S.E. 20, 21 (Va. 1901) ('The proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not sitting in exercise of appellate power.')." Armstrong v. Armstrong, 201 W. Va. 244, 496 S.E.2d 194, (Oct. 24, 1997).

4. "This Grievance Board is bound by [a] Circuit Court's legal conclusions in this matter as 'the law of the case.'" Parsons v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-289R (May 6, 1999); Bass v. Kanawha County Bd. of Educ., Docket No. 92-20-214 (Nov. 4, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29- 481 (Apr. 4, 1994). See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301, 24 S.E.2d 98 (1943).

5. Because the circuit court has previously determined that a default did not occur, this Grievance Board will not, and indeed should not, reconsider the issue.

6. Grievant has the burden of proving his grievance by a preponderance of the evidence. Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993).

7. "The Grievance Board's review in cases involving the denial of tenure or promotion in higher education is generally limited to an inquiry into whether the process by which such decisions are made conform to applicable college policy or was otherwise arbitrary and capricious. Deference is granted to the subjective determinations made by the officials administering that process." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

8. "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." Siu v. Johnson,

748 Fed. 2d 238 (4th Cir. 1984). See also Carpenter v. Bd. of Trustees/W. Va. Univ., Docket No. 93-BOD-220 (Mar. 18, 1994).

9. "Generally, an action is considered arbitrary and capricious if the agency 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 was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing ArlingtonHosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

10. Grievant has not met his burden of proof and demonstrated WVU's decision to retain him at the Associate Professor level was arbitrary and capricious, clearly wrong, or a violation of Policy Bulletin 36 or the University's guidelines.

11. Grievant failed to demonstrate Respondent's finding that he did not present significant contributions in the area of research through an on-going research agenda and a continuous production of research was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 the record can be prepared and properly transmitted to the

appropriate circuit court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 22, 2001

Footnote: 1

There is no indication that this filing at Level II was questioned on the basis on timeliness.

Footnote: 2

It is noted that some of the original materials discussed at hearing were not placed into evidence by the parties. However, much of the information was cited in other submitted letters and evaluations, and these were discussed at length by the parties at hearing. Additionally, there was no indication the information in the other exhibits was incorrectly quoted.

Footnote: 3

For administrative reasons this case was assigned to the undersigned Administrative Law Judge on May 23, 2001. Grievant was represented by Attorney Sean Murphy, and Respondent was represented by Assistant Attorney General Sam Spatafore.

Footnote: 4

Throughout this grievance, the terms excellence and significant contribution were used interchangeably.

Footnote: 5

The English Department Promotion and Tenure Committee noted Grievant had not included a copy of his curriculum vitae as was required, and he had not sent his curriculum vitae to the external reviewers. After the English Department Chair received this information, he gave the Committee a copy of Grievant's curriculum vitae which he requested from Grievant after he found it was not in the materials presented. The Chair was assured this information was shared with the Promotion and Tenure Committee and did not change their evaluation.

Footnote: 6

Each Committee or Dean counted the number of articles differently, but still reached the same decision that the total production was insufficient for promotion to Full Professor.

Footnote: 7

Apparently, Dr. Conner did not compare Grievant to recently promoted creative writing faculty, as they are judged by a different standard, and he did not believe this comparison would be worthwhile.

Footnote: 8

The term "Law of the Case" "as generally used, designates the principle that if an appellate court has passed on a legal question and remanded the case to the court for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. Doctrine provides that when appellate court has rendered a decision and states in its opinion a rule of law necessary to decision, that rule is to be followed in all subsequent proceedings on the same action." Black's Law Dictionary 459 (Abr. 5th ed. 1983).

Footnote: 9

Additionally, in Kaufman v. Catzen, 108 W. Va. 1, 150 S.E. 371 (1929), the West Virginia Supreme Court of Appeals stated at Syllabus Point 1, "Question Once Definitely Determined by Supreme Court of Appeals is Conclusive on Parties, Privies, and Courts in Subsequent Proceedings. It is the general rule, subject to few exceptions, that a question of law or fact once definitely settled and determined by this Court, on remanding the case for further proceedings, is conclusive on the parties and privies thereto, and uponthe court below, and upon this Court upon a second appeal or writ of error. Pennington v. Gillaspie, 66 W. Va. 643, 651. (p. 2.)."

Footnote: 10

Given the ruling on this issue, it is not necessary to address the issues of res judicata or collateral estoppel.

Footnote: 11

The Board of Trustees codified Policy Bulletin 36 as a procedural rule effective May 4, 1992. 128 C.S.R.36

Footnote: 12

The undersigned Administrative Law Judge does not feel qualified to discuss, nor did the parties raise in any detail, the issue of whether a deep interest and/or knowledge in opera, etc. would more correctly be viewed as a scholarly "hobby", as opposed to scholarly research that would serve to insure promotion in the English Department. It isnoted Grievant was encouraged to find a way to apply these endeavors to his teaching within the English Department.