AUBREY MILLER ,

Grievant,

v v.

Docket No. 01-HE-037

HIGHER EDUCATION INTERIM GOVERNING

BOARD/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Aubrey Miller, PhD, is employed as an Assistant Professor in the College of Chemical Engineering and Mineral Resources ("CEMR") at West Virginia University ("WVU" or "University"). He filed this grievance on or about August 31, 2000. His Statement of Grievance reads, "I am appealing the decision to deny me tenure and promotion to Associate Professor." The relief sought is to be awarded tenure and/or promotion. Respondent found Grievant had not demonstrated significant contributions in the key areas of teaching and research. His contributions in service were satisfactory.

The Level I Decision was issued on August 31, 2000, and Grievant appealed to Level II. Level II hearings were held on November 28, and December 13 and 15, 2000. A Level II Decision denying the grievance was issued on February 9, 2001, and Grievant appealed to Level IV on February 15, 2001. The parties agreed to submit the grievance on the record developed below, and this case became mature for decision on April 23, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

The issue is whether the denial of Grievant's request for promotion and tenure, based on Respondent's assessment that he failed to meet the necessary standard of significant contribution in the areas of research and teaching was arbitrary and capricious. Adjunct arguments to support these contentions were: 1) The ratings on the Student Evaluation Forms were statistically incorrect,

especially in the calculation of the standard deviation; 2) Respondent is required to compare Grievant with faculty members who had received promotion and tenure during his entire time at WVU, not just the last two years; and 3) Even though the quantity of Grievant's scholarly output is low, because the quality of his research was so high, Provost Lang should have found Grievant had made significant contributions in research so as to warrant promotion and tenure. Although not in his Statement of Grievance, Grievant also argued he received lower scores on the Student Evaluation Forms because he is an African-American. (See footnote 2) Respondent argues the decision to deny Grievant's request for promotion and tenure was based on the Department's, College's, and University's guidelines and was not arbitrary and capricious. Respondent notes the considerable discretion the University has 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 an Assistant Professor in the Chemical Engineering Department of WVU's College of Engineering and Mineral Resources since January 1994. Before that time he taught one semester as a Visiting Assistant Professor.

2. Grievant requested promotion and tenure in the Fall of 1999.

3. Receiving promotion and tenure is a lengthy process which requires a number of reviews by various peers, committees, and administrators.

4. The candidate for promotion and tenure is expected to collect materials for these individuals and committees to review. These materials are to include, among other things, a list of publications, grants, and any other evidence of scholarship; past Annual Evaluations; and information about the candidate's teaching and service. (See footnote 3) Only the significant contributions achieved since the candidate has been employed at WVU are considered. 5. The candidate's initial letter of appointment states what is expected to achieve success and receive promotion and tenure.

6. Grievant's letter of appointment, dated November 5, 1993, and signed by Grievant on that same date, states Grievant will be "expected to demonstrate excellence in teaching and research with satisfactory performance in service", and "[g]iven the importance of research in earning tenure, particular emphasis will be placed on those activities that will demonstrate your ability as a scholar;

especially in submission of grants to external agencies for funding and in publishing research articles in peer-reviewed journals in a timely fashion."

7. Pursuant to University guidelines, the final promotion and tenure decision is based largely on a candidate's Annual Evaluations conducted by the Department's Promotion and Tenure Committee and the Department Chair. These Annual Evaluation are an on-going record of the candidate's progress toward the goals set out in the appointment letter and the expectations for promotion and tenure. 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 their own guidelines as long as they do not conflict with the University guidelines.

8. CEMR has developed its own guidelines. A candidate for promotion and tenure must achieve significant contributions in the areas of research and teaching to receive promotion. These guidelines indicate that to be awarded tenure, the faculty member must undergo a rigorous assessment of accomplishments and an assessment of whether the faculty member's performance will be maintained. "Refereed publications ofhigh quality are expected as evidence of scholarly productivity." Grt. Ex. No. 8, at Level II. Quality is considered more important than quantity, and significant evidence of scholarly merit may be either a single work of considerable importance or a series of studies constituting a program of studies, investigations, or creative works.

9. The categories for rating faculty members in the Annual Evaluations are excellent, good, satisfactory, and unsatisfactory, and "should apprise tenure-track faculty members of performance deficiencies." Id. A faculty member with a preponderance of satisfactories and unsatisfactories in an area of significant contribution would not qualify for promotion and tenure. Id.

10. In teaching, an applicant is expected to meet or exceed the contributions of their peers recently achieving (within the past two years) promotion and tenure in CEMR. To achieve significant contributions in research, the applicant is expected to meet or exceed the contributions of his peers recently achieving (within the past two years) promotion and tenure at peer universities.

11. Performance measures spelled out in CEMR's guidelines for teaching specifically require the use of student feedback measured by Student Evaluation Forms. In research, applicants are expected to disseminate scholarly findings in peer-reviewed publications, invited papers, non-reviewed publications, and/or at conferences. Faculty seeking promotion and tenure are also expected to seek funding through the submission of research proposals. These funded proposals are

expected to lead to peer-reviewed publications. Inventions and patents are also evidence of scholarly activity. 12. Both CEMR and University guidelines mandate that "positive recommendations for promotion and/or tenure should be supported both (a) by a series of annual reviews above the 'satisfactory' level, and (b) beyond those reviews, by performance which is judged to the meet the more rigorous standard of 'significant contributions'". Grt. Ex. No. 8, at Level II.

13. Also considered in the assessment of Grievant's request for promotion and tenure were four responses of external reviewers. These external reviewers were asked to assess Grievant's research and scholarly activities. (See footnote 4) Generally, the external reviewers found Grievant's work to be of high quality, but of small quantity. Three recommended Grievant for promotion and tenure, but incorrectly considered his work prior to his appointment to WVU in their assessment.

14. Grievant's first Annual Evaluation was dated February 1, 1994. The then Chair of the Department of Chemical Engineering, Eugene Cilento, noted Grievant had some difficulty in teaching, but this was to be expected in the beginning of his career. Grievant's teaching was rated as average at this point in time. (See footnote 5) Dr. Cilento reminded Grievant that excellence in teaching would be required for promotion and tenure. Dr. Cilento also noted Grievant was expected to "to achieve a research program that is externally sponsored and that can be sustained." He reported Grievant had applied for several small grants that were not funded, and directed Grievant to consider carefullywhere he would submit future proposals. Dr. Cilento also noted excellence in research was required for promotion and tenure.

15. Grievant's Annual Evaluation for 1994 is dated February 6, 1995. Dr. Cilento judged Grievant's teaching to be satisfactory, but told Grievant he needed to be more proactive in the design courses, as Grievant was hired to assume a leadership role in these courses. Dr. Cilento also noted Grievant had submitted several proposals and published one peer-reviewed article in 1994, and these activities were an excellent start. Dr. Cilento informed Grievant he needed to respond to the several programs he had suggested and to do so in a timely fashion. The Promotion and Tenure Committee's Annual Evaluation dated March 22, 1995, noted Grievant was below average in Student Evaluations when compared to the university and college norms, and would need to improve in the future. The Committee offered to help Grievant in many ways. In terms of research, Grievant was told he needed to publish peer-reviewed articles at the rate of one or two a year, train graduate students, and make serious attempts to obtain external funding. Specific places for new faculty to apply for

funding were cited. Again, the Committee offered to help Grievant improve his funding options.

16. On May 2, 1996, Grievant received his 1995 Annual Evaluation from Dr. Cilento. Grievant's teaching performance was rated as unsatisfactory even though Dr. Cilento noted there was an improvement in the evaluation scores. Grievant was told he needed to improve his teaching effectiveness significantly. Dr. Cilento noted many of the issues rased by the students had been pointed out to Grievant before and had not been resolved. Dr. Cilento advised Grievant that colleagues had expressed concern about hislack of interest and input in the design class, since he was hired to assume a major role in that course in the near future. Dr. Cilento recounted Grievant had to be reminded to participate and had failed to demonstrate the commitment needed. In the area of research, Dr. Cilento noted Grievant had one peer-reviewed article published while he was at WVU, but this article was based on work done prior to his employment. There had been no other articles or presentations since that time. Dr. Cilento reported Grievant had received one faculty funding award in 1995, and submitted proposals to other agencies without success. Dr. Cilento pointed out he continually had to remind Grievant of deadlines, and these were often missed. Grievant had not evolved proposals for resubmission, and he had not sought the guidance of other faculty, because of the lateness of his submissions. Grievant's research was rated as satisfactory. The Promotion and Tenure Committee did not review Grievant's work as his materials had not been updated.

17. Grievant's next Annual Evaluation by Dr. Cilento for 1996 is dated April 13, 1997. Dr. Cilento noted Grievant's teaching had improved, was rated as good, but was not yet rated as excellent as required for promotion and tenure. Grievant still needed to be more proactive in the design course. Grievant's research was rated as unsatisfactory. Grievant had published no further peer-reviewed articles and had only two presentations. Dr. Cilento noted Grievant had no external funding and had submitted only one proposal. Deadlines were still not being met. Dr. Cilento again reminded Grievant he must be "rated excellent" in both research and teaching to achieve promotion and tenure. On April 23, 1997, the Promotion and Tenure Committee again informed Dr. Cilento they were unable to complete an updated review of Grievant's performance for the last two years becausehe had not updated his files. They again included the March 22, 1995 review, and stated Grievant "should be instructed that his documentation should be complete, submitted on time, and carefully follow University policies."

18. On February 20, 1998, the Promotion and Tenure Committee completed Grievant's 1997 Annual Evaluation. The Committee rated Grievant as good in teaching, satisfactory in research, and satisfactory in service. They reported that since the start of his career at WVU Grievant had published one peer-reviewed article, one peer-reviewed paper, one unrefereed paper, one DOE technical report, and made three presentations. Grievant had submitted three proposals prior to 1997, with one award. Grievant submitted five proposals and two pre-proposals in 1997, one was not funded, and the others were pending. Grievant was again directed to apply for funding especially earmarked for new faculty. In teaching, the Committee believed Grievant had made significant improvement, and expected if he continued to improve he would soon be judged excellent.

19. Dr. Cilento's 1997 Annual Evaluation of Grievant is dated April 13, 1998, and noted the new terminology of significant contributions was required for promotion and tenure. (See footnote 6) Dr. Cilento stated Grievant's "overall performance in research requires significant improvement in order to receive a positive consideration for promotion and tenure." He indicated Grievant still had no external funding, although he had submitted four proposals and two pre-proposals. Dr. Cilento reviewed the Student Evaluation Forms scores onquestions 1, 2, and 27, (See footnote 7) found Grievant's performance had improved, and rated Grievant's teaching as "good". Grievant was still encouraged to become more proactive in the design classes. Dr. Cilento ended his assessment with the following statement, "[r]emember that teaching and research are significant areas of contribution, and must be rated at a sufficient level of excellence to receive positive recommendation for promotion and tenure. . . . "

20. Grievant's 1998 Annual Evaluation from the Promotion and Tenure Committee was dated February 26, 1999. They rated Grievant as good in teaching, good in research, and good in service. On question 27, where a faculty member is rated against all other faculty, the Committee combined Grievant's "average" scores and his "among the best" scores. (See footnote 8) In the area of research the Committee reported Grievant had given one presentation in 1998, published a peer-reviewed article in a symposium proceeding, had no graduate students, and submitted six proposals and five pre-proposals. Two of the proposals were funded with Grievant and another faculty member identified as co- investigators. The Committee encouraged Grievant to publish, noting the thesis work of his three graduate students had not been developed into articles. 21. The new Chair of the Department of Chemical Engineering, Dr. Dady Dadyburjor, in his 1998 Annual Evaluation dated April

9,1999, found Grievant's teaching and research to be good. However, he also found the Student Evaluations in one of his Spring 1998 courses to be mixed and below the college and university means. The Student Evaluations in the Fall 1997 ChE 111 course were within the college and university means. Even after rating Grievant as good, Dr. Dadyburjor then noted Grievant had done little in the way of papers and presentations, and that "these were not good indicators of research performance." Dr. Dadyburjor noted positively the two successful proposals for which Grievant had received funding and stated "[t]his was a start _ a good start, but only a start." He strongly urged Grievant to publish in peer-reviewed journals. Dr. Dadyburjor stated maintaining the good rating in both research and teaching would require improvement in both areas.

22. The first step in the review process for promotion and tenure is the submission of the applicant's materials to the Department's Promotion and Tenure Committee.

23. The review by the Department Promotion and Tenure Committee was not included in the exhibits, but the Committee recommended promotion and tenure. It is not known exactly what word they used in rating Grievant. The recommendation for promotion and tenure from Dr. Dadyburjor was included in the exhibits. Dr. Dadyburjor found Grievant's teaching to be excellent and consistent with those of other CEMR faculty who were promoted to Associate Professor and tenured in the last two years. Dr. Dadyburjor also found Grievant had made significant contributions in the area of research, and herated this area as "good". Dr. Dadyburjor pointed out Grievant's recent success in finding funding and compared that with his success rate from 1993 - 1997, the nineteen unfunded proposals. Dr. Dadyburjor stated the quantity of Grievant's presentations and peer- reviewed articles had been "disappointingly small", but the quality was excellent. Dr. Dadyburjor expected Grievant would publish in the future, and found Grievant's research record was consistent with recently promoted CEMR faculty members.

24. Grievant's material went next to the CEMR Promotion and Tenure Committee. This Committee rated Grievant's teaching as good and maintained the Student Evaluation Forms showed continuous improvement, were above average, and within the range of other CEMR faculty recently granted promotion and tenure. This Committee characterized Grievant's research as satisfactory, and noted Grievant had published only one peer-reviewed article since his appointment at WVU. This Committee believed the research record as a whole, with the limited number of publications and graduate students, and only recent attainment of funding in 1998 - 1999, reflected Grievant had not

made a significant contribution in the area of research, and fell below the range of those recently promoted. The CEMR Promotion and Tenure Committee did not recommend Grievant for promotion and tenure.

25. The Dean of CEMR noted Grievant's scores on the Student Evaluation Forms had consistently improved over time, were either at or just below college peers who successfully achieved tenure, and found Grievant had made significant contributions in this area. The Dean of CEMR confusingly found Grievant's publication productivity "below that of peers achieving promotion and tenure in the College over the last two years", but thenfound because the quality of work was "high", Grievant had made significant contributions in the area of research. Although specifically against University guidelines, the Dean noted the dissertation work and resulting peer-reviewed publication Grievant had done prior to his appointment at WVU. He was convinced research and publications would increase in the future. Dr. Dadyburjor recommended Grievant for promotion and tenure.

26. The next review was in the Provost's Office. Provost Gerald Lang, has been delegated the final authority on promotion and tenure issues. Provost Lang directed the Associate Provost for Faculty Development, Dr. C.B. Wilson, to review the materials submitted by Grievant, in detail, and Associate Provost Wilson did this. Associate Provost Wilson recommended Grievant not receive promotion and tenure.

27. Provost Lang then reviewed the materials to assess whether the recommendation was supported by the materials included in Grievant's information. In a detailed, twenty-one page letter, Provost Lang found Grievant's materials did not rise to the level of excellence or a significant contribution in the areas of teaching or research. He was guided in his assessment by the CEMR guidelines and findings, but the main reference point for this decision was WVU guidelines for promotion and tenure. Provost Lang pointed out that over the years Grievant had been constantly reminded what the guidelines for promotion and tenure were, and what he needed to do to meet them. Provost Lang noted that although the Department Promotion and Tenure Committee and the Dean of the College of Chemical Engineering and the Dean of CEMR reported Grievant's Student Evaluation scores had consistently increased and were consistent with recently promoted peers, this assessment was incorrect. Provost Lang included in hisletter a numerical comparison of Grievant's scores with recently promotion peers and the peers seeking promotion for the 1999 - 2000 year. Grievant's scores were consistently lower than the scores of these two groups.

28. Grievant's scores, as reported by Provost Lang, did not exhibit a consistent increase from his first years to his last years. The scores of the Student Evaluation Forms from the last year were higher than they had been at first, but they had fluctuated over the intervening years. In two of the courses Grievant taught consistently, the scores were as follows on the key questions examined by the promotion and tenure reviewers, with five as the highest and one as the lowest. Chemical Engineering 110: (See footnote 9)

SEMESTER	Question No. 1	Question No. 2	Question No. 27	% of W/B (See footnote 10)
Fall 1993	3.67	3.50	3.39	8/42
Fall 1994	3.29	3.19	3.20	13/37
Fall 1995	3.77	3.58	3.38	4/28
Fall 1996	3.55	3.26	3.16	10/26
Fall 1997	3.70	3.55	3.29	4/33
Aggregate	3.60	3.40	3.29	8/35

29. Grievant's Student Evaluation Form scores for Chemical Engineering 172 are as follows:

SEMESTER	Question No. 1	Question No. 2	Question No. 27	% of W/B
Spring 1994	2.95	2.85	2.90	30/20
Spring 1995	2.50-	2.32-	2.57	39/14
Spring 1996	3.21-	3.04-	3.04	13/13
Spring 1997	3.67	3.47-	3.37	00/37
Spring 1998	3.20	3.05-	3.10	5/20
Spring 1999	3.96	3.82	3.52	4/48
Aggregate	3.25	3.08	3.09	15/26

30. Minuses indicate Grievant's score is a standard deviation below the norm.

31. Provost Lang also compared Grievant's scores to the three faculty members in his College who were recently promoted, as well as the eight faculty members from his college who were up for promotion and/or tenure.

Faculty	Question No. 1	Question No. 2	Question No. 27	% of W/B
1998 - 1999	4.40	4.50	4.39	1/86
2000	4.13	4.20	4.05	2/76
Grievant	3.44	3.29	3.22	11/32

32. Provost Lang noted Grievant's score on Question 27, the one that compares Grievant to faculty members in his college. Grievant's score on the Student Evaluation Forms was the lowest, by a large margin, of the eight people in his College requesting promotion and/or tenure.

33. Provost Lang found CEMR, especially Grievant's Department, had not consistently applied its guidelines and had not actually compared Grievant's StudentEvaluation Form scores on a year to year basis, as their conclusion that Grievant's Student Evaluations scores had consistently improved over the years was incorrect.

34. Provost Lang found Grievant did not meet the standard of significant contributions in the mandated area of teaching.

35. Provost Lang also reviewed Grievant's research and found he had not made significant contributions. He noted the number of papers and presentations was limited, there were years without any publications, and Grievant's research did not reach the level of excellence. Grievant did not meet the Department's or University's guidelines. Provost Lang also pointed out Grievant had received clear direction over the years that he needed to seek more funding and write more proposals so he could receive this funding. Provost Lang noted almost all of Grievant's funding had occurred in the last two years and had not produced any publishable results yet.

36. Promotion and tenure recommendations must be supported by a series of annual reviews above the satisfactory level, and performance which is judged to meet the more rigorous standard of "significant contributions". Grt. Ex. No. 8, at Level II. 37. Grievant was not rated in research in 1994 and 1995, as it was seen as too early to expect results in this area. Grievant was rated as satisfactory in 1996, unsatisfactory in 1997, satisfactory in 1998, good in 1999, even while the assessors noted he had limited presentations, and good in 2000, the critical year. (See footnote 11)

38. The statistical methodology used to calculate the scores of the Student Evaluation Forms, including the standard deviation, was approved by the University Faculty Senate.

39. The standard consistently used for comparison of applicants for promotion and tenure is peers who have been promoted and tenured within the last two years. This same standard is applied both in the teaching and research areas.

40. The faculty member to whom Grievant wishes to compare himself in terms of research, received tenure in 1996. This time frame is outside the two year period identified in Finding of Fact 39. Additionally, this faculty member, while not having a peer- reviewed publication, had multiple

other presentations, numerous proposals funded, several patents, numerous unrefereed articles, and a published book. (See footnote 12)

41. In a letter dated May 15, 2000, Provost Lang informed Grievant of his decision and Grievant's right to grieve this Decision.

Discussion

The issue to examine is whether WVU's decision to not promote and retain Grievant was arbitrary and capricious. 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 whichpromotion 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 a violation 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 requiredto 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.

In this case involving the denial of promotion and tenure, Grievant bears the burden of proving by a preponderance of the evidence that WVU erred, and its decision not to promote and tenure him was an abuse of discretion or arbitrary and capricious. See Baroni v. Bd. of Directors/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.

Policy Bulletin 36 states promotion and tenure will not be granted routinely or because of length of service and shall not be denied capriciously. Id. at §6.1.3. (See footnote 13) Further, 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, and an examination of Grievant's arguments, the question of whether the denial of Grievant's promotion and tenure was arbitrary and capricious must be answered in the negative. 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.

A review of the record demonstrates Grievant's Department did not consistently follow its guidelines when assessing Grievant's teaching and research. Grievant, while improving his overall Student Evaluation Forms scores, still continued to be rated lower than his peers who were recently promoted. Also it is clear Grievant did not demonstrate a steady improvement over the years, rather his scores fluctuated. Given these factors, it was not arbitrary and capricious for Respondent to find Grievant had not made significant contributions in the area of teaching.

In the area of research, it would appear the best assessment of Grievant's performance is "too little, too late." It is unclear why Grievant did not submit more proposals earlier so he could receive funding for his research. This need was pointed out to him numerous times, and he was offered help

by the Department Promotion and Tenure Committee and his Department Chair. It is unknown why Grievant missed the deadlines for the submission of these funding proposals, and as Grievant stated it was his choice what funding he sought. While that was certainly his choice, his decision resulted in no funding which equaled little to no research and no peer-reviewed publications, other thanthe one he published in January 1994, approximately two weeks after he received his faculty appointment.

The Department Chair and Department Promotion and Tenure Committee rated Grievant as excellent and good, respectively, in research based on what they belived he would and could do. This is not the issue. Grievant's review must be based on what he has done since his appointment to his tenure-track position. It was not arbitrary and capricious for Respondent to find Grievant did have significant contributions in the area of research, and it was not an abuse of discretion to deny Grievant promotion and tenure. Additionally, the undersigned Administrative Law Judge is directed to respect the "special competency" of the university and the administrators who are tasked with making this difficult decision.

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

Conclusions of Law

1. 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).

2. "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).

3. "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).

4. "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.

5. Grievant has not met his burden of proof and demonstrated WVU's decision to deny him promotion and tenure was arbitrary and capricious, an abuse of discretion, or a violation of Policy Bulletin 36 or the University's guidelines.

6. Grievant did not demonstrate Respondent's decision to limit comparison of him to peers recently promoted within the past two years was incorrect, and this decision is based on the written University guidelines.

7. Grievant did not demonstrate Respondent's use of statistical methodology approved by the Unversity Faculty Senate to tabulate the Student Evaluation Forms was in violation of any rule, regulation, policy, or statute or 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 the 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 29, 2001

Footnote: 1

For administrative reasons, this case was assigned to the undersigned Administrative Law Judge. Grievant was represented by Attorney Patricia Stiller, and Respondent was represented by Assistant Attorney General Sam Spatafore.

Footnote: 2

Apparently, this issue was referred to WVU's Office of Social Justice with the agreement of the parties. No finding of racial prejudice was found. Grievant continued to argue that Student Evaluation Forms rated minorities lower, and the Office of Social Justice had not performed the investigation it had promised. Grievant also testified he did not know how the Office of Social Justice had reached its conclusion, or what the Office of Social Justice had done to arrive at its results, but that he did not trust Office of Social Justice, and they were just a "rubber stamp" for the administration. Grievant presented no evidence to support his theory on lower Student Evaluation Forms, and no evidence that the Office of Social Justice had failed to do its job, had not investigated the issue, or wasuntrustworthy. Accordingly, this issue will not be addressed further.

Footnote: 3

Grievant was found to meet the guidelines for service.

Footnote: 4

These responses were not included in the exhibits submitted at the lower levels; thus, the data they contained can only be examined through other documents which cited these assessments.

Footnote: 5

Average appears to equate with satisfactory.

Footnote: 6

With the acceptance of the new guidelines in 1997, the term excellent was changed to significant contribution as the criteria that was required to achieve promotion and tenure.

Footnote: 7

See note 8, infra.

Footnote: 8

Throughout the various assessments of the data from the Student Evaluation Forms it was noted that, at times, the

average scores were combined with the among the worst scores, and at other times the average scores were combined with the among the best scores. For ease of her understanding, the undersigned Administrative Law Judge, in her review, separated all these scores where possible, in order to achieve a truer picture of the information on the Student Evaluation Forms.

Footnote: 9

Question No. 1 asked the student to rate the overall quality of the course, Question No. 2 asked the student to assess the quality of instruction, and Question No. 27 asked the student to compare the instructor to all other instructors. Contrary to Grievant's assertion in his proposals, these were the questions usually examined by the various committees and administrators reviewing the application data. The rating choices on Question 27 were from high to low: the best; among the best; average; among the worst, and the worst.

Footnote: 10

W/B indicates Worst/Best, the two extreme ends of Question 27.

Footnote: 11

It is again noted the parties did not submit the Department Promotion and Tenure Committee's review. The above conclusion that Grievant was found to be "good" in this area is based on statements in exhibits.

Footnote: 12

Attached to Grievant's post hearing submissions were several additional documents, one which referred to an unknown faculty member. This data was not considered.

Footnote: 13

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