JOHN SMITH,

Grievant,

v. **Docket No. 02-HEPC-144**

HIGHER EDUCATION POLICY COMMISSION/

FAIRMONT STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, John Smith, employed by Fairmont State College (FSC or Respondent) as an Assistant Professor of Mechanical Engineering Technology assigned to the Department of Mechanical Engineering, filed a grievance at level three on March 18, 2002, following notification that his contract of employment would not be renewed. (See footnote 1) FSC President Daniel J. Bradley denied the grievance on May 14, 2002, and appeal to level four was made on May 21, 2002.

Grievant alleges that the decision not to renew his contract was arbitrary and capricious, and without factual basis, in violation of the FSC Faculty Handbook and 133 C.S.R. 9, §9 (2000). For relief, Grievant requests renewal of his contract for the 2002-2003 academic year. Following a mediation, a level four hearing was conducted on September 20, 2002, at which time Grievant elected to represent himself, and FSC was represented by Kristi A. McWhirter, Esq., Assistant Attorney General. (See footnote 2) The matter became mature for decision upon receipt of final post-hearing submissions on before December 5, 2002. (See footnote 3) The material facts of this grievance are set forth in the following findings.

Findings of Fact

1. Grievant was first employed by FSC as a probationary, full-time, tenure-track, Assistant professor of Mechanical Engineering Technology for the 2001-2002 academic year. Grievant holds a Bachelors Degree in Mechanical Engineering from the University of Mysore, and a Master of Science in Mechanical Engineering degree from Worcester Polytechnic Institute. He has additionally completed 48 hours of post-Masters work at the University of Pittsburgh, the University of Akron and Prairie View A & M University.

2. Prior to joining the FSC faculty, Grievant had completed nineteen years of service in higher

education, including 1.5 years at WVUIT, 2 years at the University of Akron, 4 years at Point Park College, and 2 years at Texas A & M University. (See footnote 4) Based upon this considerable experience, Grievant was granted three years credit toward tenure at the time of his appointment at FSC.

3. In addition to an instructional assignment, Grievant volunteered to serve as coordinator of the Mechanical Engineering Technology (MET) Program. Grievant resigned from this position in January 2002.

4. Grievant and a visiting professor were requested to produce a curriculum revision for the Mechanical and Manufacturing Engineering Technology programs;however, Grievant failed to meet deadlines, and separate proposals were ultimately submitted to Dr. Anthony Brizendine, Chair of the School of Technology.

5. Grievant experienced a number of negative interpersonal incidents with faculty, staff, and students, which required the intervention of Dr. Brizendine.

6. Pursuant to policy, Grievant's performance evaluation process began in early 2001. The entire review included student evaluations, Grievant's self-evaluation, an evaluation by the Chair, and two peer reviews, with Grievant selecting one reviewer, and Dr. Brizendine selecting the other. Dr. Frederick Fidura, Provost and Vice-President, submits recommended personnel actions to FSC President Bradley, who makes the final determination regarding faculty retention.

7. While both colleagues evaluated Grievant's teaching effectiveness as good, one noted that he had experienced problems in working with a few other faculty members and classified staff. This reviewer stated that Grievant was experiencing personal problems and some “day to day things are difficult.”

8. Grievant ranked lower than average on the formal “Student Response Survey”. While two students provided positive reviews, others complained that Grievant did not follow the book, did not return tests in a timely manner, and did not conduct needed laboratory experiments.

9. Dr. Brizendine's performance evaluation for Grievant completed February 22, 2002, presented the following concerns:

Grievant's student evaluations were well below the institutional level.

Grievant failed to conduct necessary laboratory experiments.

Grievant failed to return graded material in a timely manner.

Grievant failed to fulfill the duties of the MET coordinator, and eventually resigned from that position.

Grievant did not follow college policy regarding office hours.
Grievant missed class on at least two occasions and overslept on the day of one of his final exams.

Grievant engaged in inappropriate conduct toward a female staff member.

Grievant exhibited an inability to cooperate or work well with colleagues and/or staff, and,

Grievant had acted inappropriately when he conducted a “lottery” to determine which female coworker would attend a college function with him.

10. Dr. Brizendine had attempted to schedule an appointment with Grievant to discuss the evaluation prior to the February 15 deadline for faculty in the first year of academic service; however, Grievant canceled one appointment, and rescheduled another.

11. Upon review of the student evaluations, peer evaluations, Grievant's self evaluation, and Dr. Brizendine's evaluation, Dr. Fidura recommended that Grievant not be reappointed for the 2002-2003 academic year.

12. FSC President Bradley adopted Dr. Fidura's recommendation, and notified Grievant by letter dated February 26, 2002, that his contract would not be renewed for the 2002-2003 academic year.

Discussion

Grievant argues that his nonretention was arbitrary and capricious. FSC asserts that the decision not to renew Grievant's contract of employment was based upon standard factors, and was not arbitrary and capricious. "In a grievance challenging non-retention ofa probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. " Pauls v. Bd. of Directors/West Liberty State College, Docket No. 99-BOD-160/175 (Dec. 12, 1999) [citations omitted]. "Generally, institutions of higher education in West Virginia have broad discretion to terminate non-tenured probationary faculty members for any reason that is not arbitrary and capricious, or without factual basis. However, these institutions are bound to follow the substantive

and procedural requirements set forth in the policies which they promulgate. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993)." Pauls, supra. This reasoning also applies to determinations not to renew non-tenured faculty. Thus, Grievant must prove by a preponderance of the evidence that Respondent's retention decision was either arbitrary and capricious or violated one of the substantive and procedural requirements set forth in the policies which it promulgated.

"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, 196 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 the institution administrators. Hattman v. Bd. of Dir./ West Liberty State College, Docket No. 98-BOD-439 (Apr. 30, 1999). See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

While Grievant acknowledges many of the statements included in Dr. Brizedine's evaluation, he asserts that the situations were honest mistakes, misunderstandings, or were simply not his fault. Grievant further alleges that the decision to not retain him was due, in part, to discrimination. (See footnote 5) Finally, Grievant alleges that FSC committed a procedural error by not timely submitting his evaluation for review.

Dr. Fidura testified that the primary reason he recommended that Grievant not be retained was his classroom performance. Specifically, he found the student evaluations rated Grievant at just at or below average for the department, school, and institution. He also considered the classes Grievant

missed, his failure to timely return graded work, and deficiencies in course management. Overall, Dr. Fidura concluded that Grievant did not provide quality instruction.

The record developed at levels three and four establish that the mechanical engineering department at FSC was in a state of transition with the retirement of faculty,and Grievant not only failed to meet instructional expectations, but exhibited interpersonal difficulties as well. Grievant offered explanations for each matter raised in his performance evaluation.

- He was unable to conduct lab experiments because the equipment was either broken, or new and still in the package.

- Some of the equipment needed a water supply which was not available. The syllabi of his predecessors did not indicate lab experiments were conducted.

- Some experiments were conducted second semester, but he did not require written reports for them.

- Grievant admitted that he had been slow to return graded work, but apologized and promised to improve.

- He had not been appointed as MET coordinator so he held no official position from which to resign.

- He had missed class on only two occasions, once when a family crisis required he go home to Akron, Ohio, and the second time during finals when he accidently set his alarm clock for p.m. rather than a.m.

Grievant spent a great deal of effort explaining the inappropriate conduct toward a female staff member. He asserts that his relationship with the secretary was “spiritual,” that she was very kind to him, and they discussed many things. To show his gratitude he wished to purchase her a Christmas gift, but not knowing what to buy, asked her to accompany him on the pretext the gift was for someone else. Grievant suggested that she tell her spouse a “white lie” to account for her whereabouts. The secretary found this unacceptable, and brought the matter to Dr. Brizendine's attention. During a meeting withthe Chair, the secretary requested that Grievant not call her at home again. He promised he would not, but called approximately a month later. He explained that when she answered the telephone his first comment was to inquire whether it was okay to talk. She indicated it was, and he felt that he had her approval at that time.

Grievant experienced problems with another staff member regarding the procurement of a new

computer. He complained that his pentium II was too old and too slow, and that he had to make many efforts to get a new computer. Apparently, the delay was due to institutional procedures which Grievant may not have understood.

A third incident involved Grievant reporting an item stolen from his office. Another staff member had taken the item, which belonged to the school, to use without telling Grievant.

Addressing the “lottery” which Grievant held to determine which staff member might accompany him to a staff dinner, he explained that he did not want to waste a free meal, and wanted to give everyone an equal chance to attend the event. While it appeared that only female staff members were considered eligible, Grievant asserts that a male staff member was inadvertently omitted from the drawing.

When reviewed in its entirety, the evidence establishes that Grievant did not perform his instructional duties in a manner acceptable to Respondent, and engaged in a number of incidents which required the time and attention of the Chair to manage.

The President may make a decision of nonretention for any reason that is not arbitrary and capricious or without factual basis. 133 CSR 9. Dr. Fidura's recommendation not to retain Grievant, affirmed by President Bradley, was not implausible nor contrary to the evidence before them, and was based on the criteria that should be considered.Grievant has failed to prove that Respondent abused its broad discretion in deciding not to continue Grievant's probationary employment.

Conclusions of Law

1. In a grievance challenging non-retention of a probationary faculty member, the grievant has the burden of proving his complaint by a preponderance of the evidence. Pauls v. Board of Directors/West Liberty State College, Docket No. 99-BOD-160/175 (Dec. 12, 1999); Turman v. Bd. of Trustees, Marshall University, Docket No. 99-BOT-199 (Nov. 8, 1999); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995).

2. Generally, institutions of higher education in West Virginia have broad discretion to terminate non-tenured probationary faculty members for any reason that is not arbitrary and capricious, or without factual basis. Pauls, supra.

3. 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).

4. The President of the college has the duty to review all of the material related to the retention decision and to make a final determination. The President may make a decision of nonretention for any reason that is not arbitrary and capricious or without factual basis. 133 CSR 9. 5. Grievant failed to meet his burden of proving Respondent abused its discretion to retain him as a probationary tenure-track employee by making a decision that was arbitrary and capricious or without factual basis.

Accordingly, the grievance is **DENIED.**

Either party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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 §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: December 18, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The grievance could have been filed directly at level four pursuant to W. Va. Code § 29-6A-4(e).

Footnote: 2

Grievant was advised on a number of occasions that he could be represented by counsel, union representative, or anyone else who could assist him.

Footnote: 3

In November 2002, Grievant requested that the record be reopened to allow the submission of additional evidence. A

conference call was conducted on November 12 at which time inquiry was made as to why the evidence had not been presented at hearing. Grievant responded that he had intended to present it at the circuit court level, and had but recently learned that he could not provide additional evidence upon review. Because Grievant had adequate opportunity to present all of his evidence at the level four hearing, the request was denied.

Footnote: 4

Although not specifically identified, WVUIT is apparently West Virginia University Institute of Technology.

Footnote: 5

Because Grievant did not present any evidence regarding the discrimination claim, it cannot be considered.