MICHELE SCHIAVONE,

Grievant,

v.

DOCKET NO. 02-HEPC-152

HIGHER EDUCATION POLICY

COMMISSION/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Michele Schiavone, filed the following Statement of Grievance on March 28, 2002, with the Higher Education Policy Commission/Marshall University (“Marshall” or "MU"), stating:

> I received a letter on March 19, 2002[,] (dated March 11, 2002) from Marshall University President Dr. Dan Angel denying my promotion to Full Professor. This denial was in violation of the Greenbook because it was arbitrary and capricious.
>
> Relief Sought: I am asking that the promotion to Full Professor be granted. Or, if that is not done, that a re-evaluation be done in a manner that is not arbitrary and capricious. Should the appeal process or re-evaluation carry past the mid-August start date on my 2002 - 2003 contract, I ask for back wages and interest consistent with the amount lost from mid-August 2002 on.

This grievance was denied at Level III, and Grievant appealed to Level IV on May 28, 2002. A Level IV hearing was held in the Grievance Board's Charleston, West Virginia, office on September 16, 2002. This matter became mature for decision on October 16, 2002, upon receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Bob Brown at the Level IV hearing, but the post-hearing proposals were signed by Chris Barr, both from the West Virginia Federation of Teachers. Marshall was represented at Level IV by Jenndonnae Houdyschell, Assistant Attorney General.

Issues and Arguments

___Grievant asserted the denial of her request for promotion to Full Professor was arbitrary and capricious. She averred Respondent's assessment that she failed to meet the necessary standard of excellence in two of the three areas of scholarly activities, teaching, and community and university service, was incorrect.

Respondent argued the decision to deny Grievant's request for promotion to Full Professor was based on Grievant's failure to meet the Department's, College's, and University's guidelines, and it was not arbitrary and capricious. Respondent noted the considerable discretion granted to the university in academic issues.

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

Findings of Fact

1. Grievant is a faculty member in Marshall's English Department, and she was promoted to Associate Professor in 1995.

2. She submitted her application for promotion to Full Professor in the Fall of 2001.

3. Promotion to Full Professor is a lengthy process which requires a number of reviews by various peers, committees, and administrators. This review includes an assessment of the applicant's performance, including the student evaluations, since the last promotion. The rank of Full Professor 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 vita, with a list of publications, grants, and any other evidence of scholarship; past annual evaluations; a representative sample of student evaluations, and information about the candidate's teaching and service. Only the significant contributions from the last promotion are considered. The materials submitted by the applicant are evaluated, and the various committees or administrators do not perform a separate investigation. (See footnote 1)

5. To be promoted to Full Professor, "[a] candidate must have demonstrated effective performance in all of his or her major areas of responsibility, and he or she must have demonstrated

excellence in two or more such areas, including either teaching and advising or scholarly and creative activities." Grt. Ex. No. 1, at Level IV. (See footnote 2) In terms of publications, "referred publications are of paramount importance." Grt. Ex. No. 2, at Level III; Test. Dr. Murphy, Level IV Hearing.

6. The specific areas to be evaluated are teaching and advising, scholarly and creative activities, service to the university, and service to the community. Grievant asserted she was excellent in teaching and advising, scholarly and creative activities, and service to the community.

7. The first step in the process is a review of the submitted materials by Grievant's Departmental Promotion and Tenure Committee. In Grievant's case, this committee is called the Faculty Concerns Committee ("FCC"). 8. The FCC found Grievant to be excellent in scholarly activities and teaching, as well as service, and it recommended Grievant for promotion to Full Professor. This recommendation, dated January 7, 2002, stated some of the reasons for this recommendation were 1) Grievant's many book reviews, professional consultations and published articles; (See footnote 3) 2) Grievant's "Writing across the Curriculum" certification; 3) Grievant's popular courses and positive evaluations from students and colleagues; and 4) Grievant's service in the areas of editorial skills and her performances as a cantor and choir member at her church. This recommendation explained Grievant was "an amiable and insightful colleague; a productive and promising scholar in a growing field; an enthusiastic and successful teacher; and she is a valued member of the Marshall University and Huntington communities. We consider her a 'keeper.'" Grt. Ex. No. 13, at Level III.

9. The next step for Grievant's portfolio was the Chair of the English Department, Dr. David Hatfield. Dr. Hatfield is required to make an independent review of the materials presented by Grievant. (See footnote 4)

10. As the Chair, Dr. Hatfield is to certify the accuracy of the results of Grievant's student evaluation surveys to the rest of the reviewers. He was unable to certify Grievant's self-report on her student evaluations as it was incorrect and misleading.

11. Student evaluations consist of two parts: one section is computer graded and the other section provides for written comments. 12. Grievant reported in her "Summary of student evaluations" that she had received negative remarks on student evaluations in two composition classes in the past seven years. One group was in Spring 1996 and the other was in Spring 2001.

Dr. Hatfield found, in his review of the student evaluations, that this statement was incorrect. He noted that while the student evaluations were "generally positive" there was a "thread of negative student remarks" indicating Grievant was "rude," "sarcastic," and "disrespectful." This thread was not limited to only two years or just to composition classes. When Dr. Hatfield reviewed the student evaluations, he found 84 written comments from Spring of 1998 through Spring 2001. Of these comments: 14 were positive, 47 were neutral, and 23 were negative and of the type discussed above. (See footnote 5)

13. Professors at Marshall are expected to treat students with respect and to encourage classroom discussion and the exchange of ideas. This exchange of ideas is especially important in English classes where critical thinking is taught. Test. Dr. Hatfield, Dr. Murphy; Level III and IV Hearings.

14. When Dr. Hatfield discovered this problem, he contacted Grievant and gave her an opportunity to correct the discrepancy and devise a plan to resolve the problem. He told her he would certify the student evaluations if she took these actions. Grievant agreed to write an addendum to her "Summary of student evaluations."

15. In this addendum, Grievant addressed in more detail the negative remarks she had received in the two composition classes in 1996 and in Spring 2001. Grievant didnot speak to the other negative remarks in any of the other classes or on the student evaluation statistical sheet. Grievant also did not include a plan to decrease the number of these remarks, but did say, "I am working on understanding what it is I say that appears to be rude to some students. I know that sometimes my sense of humor is not understood, and that to some extent my New York manner is considered abrupt. However, because these comments appeared in only two semesters, I do not feel that they are representative of my teaching." Grt. Ex. No. 6, at Level III.

16. One question on the student evaluation form specifically relates to these types of issues. Students are asked to rate their response to the following question, "When I have a question or comment I know it will be respected." The possible ratings are "Strongly Agree," "Agree," "Neutral, "Disagree," and "Strongly Disagree." The expectation is a large majority of students will agree with this statement. While there were some years and some classes where students rated Grievant highly in this area, there were others where this was not true. Additionally, Grievant has not shown consistent improvement in this area. In the two classes for which Grievant submitted student

evaluations forms from Spring of 1998, Grievant received scores of 55% and 83% of students in agreement with this statement. At the same time only 10% and 11% disagreed with this statement. In the one class reported for Fall 1998, Grievant received 60% agreement on this question, but the number of disagreements had risen to 20%. In Spring 1999, Grievant had fallen to 39% and 47% agreement, and the disagreements had risen to 44% and 36%. The Fall of 1999 evaluations resulted in mixed results; in one class 66% agreed and 11% disagreed; and in the other, 35% agreed and 39% disagreed. The Spring 2000 results were 66% and 69% agree and 17% and 17% disagree. While the agreements had increased, thedisagreements did not show a corresponding decrease. The results for Spring 2001 were somewhat mixed; in one class 79% agreed and 16% disagreed; and in the other class 47% agreed and 18% disagreed.

17. An additional review of the student evaluation statistics demonstrated the majority of students did not rate Grievant as excellent. When asked to rate Grievant as excellent, good, average, below average, and poor: 21% rated Grievant as excellent, 41% rated Grievant as good, 25% rated Grievant as average, 10% rated Grievant as below average, and 3% rated Grievant as poor. The results to the question, "My overall rating of this instructor is excellent" are similar, although the question asked is less clear due to the rating system of "Strongly Agree," "Agree," "Neutral, "Disagree," and "Strongly Disagree." (See footnote 6) Fifty-one percent agreed, and 24% disagreed with this statement. (See footnote 7)

18. Dr. Hatfield was disappointed Grievant had not followed his directions, had not identified a method to resolve the problem, and continued to say the problem existed in only two composition classes. He did not certify her "Summary of student evaluations."

19. Dr. Hatfield noted Grievant had excellent letters of observation, her student evaluations were generally positive, and she had developed several special topic classes. However, because of the negative remarks in the student evaluations he was unable to rate her as excellent in teaching at this time.

20. Dr. Hatfield rated Grievant as excellent in the area of scholarly activities, and noted Grievant was well on her way to "making a name for herself" in sports literature. 21. Dr. Hatfield found Grievant's service to the university to be effective.

22. In assessing Grievant's service to the community, Dr. Hatfield did not find the majority of Grievant's service in this area to fall within the CoLA guidelines. (See footnote 8) In her application,

Grievant had emphasized her cantoring for church services, weddings and funerals, as well as her participation in her church choir. She also discussed editing she had done in the community. The guidelines require service to the community to be "activity benefitting the community that is based upon one's professional expertise." Dr. Hatfield found Grievant's musical and cantoring activities did not fall within the above description, as these were not based on her professional expertise. Grt. Ex. No. 2, at Level III.

23. On January 18, 2002, Dr. Hatfield notified Grievant he could not support her application to Full Professor, but would like to work with her in the future so he could support her next application.

24. Grievant's application then went to the CoLA Promotion and Tenure Committee. The Committee submitted its unanimous recommendation to the Dean of CoLA on January 30, 2002. Initially, the CoLA Committee did not report its rating in the area of service to the community, as it had already found Grievant had not established excellence in either teaching and advising or scholarly activities. This omission was subsequently rectified, at Grievant's request, by letter dated February 4, 2002.

25. The CoLA Promotion and Tenure Committee did not find Grievant to be excellent in any of the three contended areas. On Grievant's teaching and advising, the Committee found Grievant's student evaluations to "suggest adequacy or at besteffectiveness as a teacher." Grt. Ex. No. 10, at Level III. The Committee noted the responses to the two questions discussed in Findings of Fact 15 and 16 about "rating your instructor as excellent" and "respect for questions." The Committee members found the same pattern of negative responses as Dr. Hatfield, and regarded the negative comments as significant, especially for an applicant requesting promotion to Full Professor.

26. In assessing Grievant's scholarly activity, the CoLA Committee stated Grievant had "great potential," but that potential was not yet realized. CoLA believed Grievant would be in a "better position for excellence" after she had published her papers. (See footnote 9) Grt. Ex. No. 10, at Level III.

27. In assessing Grievant's Service to MU, the CoLA Committee ascertained it did not rise to the standard of excellence, as it was not beyond the norm for an associate professor, and excellence required more than the norm.

28. Her service to the community was problematic in both the areas Grievant asserted to be excellent. Only one member of the CoLA Committee believed proofreading and editing could be

counted as service to the community. The rest of the members did not view this act as service to the community because it benefitted only one person. In assessing Grievant's cantoring, all the members of the committee noted church related activities had not been counted as service to the community in the past, and should not be counted in this case. Grt. Ex. No. 9, at Level III. 29. Grievant's application went to the Dean of CoLA next. Dr. Christina Murphy did not find Grievant to be excellent in any of the three areas Grievant asserted. In teaching and advising, Dr. Murphy agreed with Dr. Hatfield and the CoLA Committee that there was a negative thread in her student evaluations, and the "profile" was "not one of 'Excellence.'" Dr. Murphy also noted Grievant's assessment of these negative ratings was incorrect. Grt. Ex. No. 11, at Level III.

30. In the area of scholarly activities, Dr. Murphy stated Grievant's record was not "one of excellence." She noted Grievant's published scholarship was "too focused on book reviews" and was a "limited body of published work." This absence of "original scholarship" had been noted by Dr. Murphy in Grievant's annual review, and she noted she had encouraged Grievant to publish articles or write a book. (See footnote 10) In her curriculum vitae, Grievant had listed work she had submitted that had not yet been published or had not yet been accepted for publication. Grievant was directed to wait until these projects bore fruit, so their excellence could be judged. Id.

31. In evaluating Grievant's service to the university, Dr. Murphy agreed with the CoLA Committee that Grievant's university service was "not beyond the norm." In appraising Grievant's service to the community, Dr. Murphy determined Grievant's cantoring and singing in the choir did not meet the guidelines specified in the Greenbook, as this service was not based on her "professional expertise." Id.

32. Grievant's request for promotion was also denied at the final two levels. 33. Grievant had received annual reviews/evaluations during the past six years. These evaluations are based on the materials submitted by the faculty member and no further materials are reviewed, and no further investigation or inquiry is conducted by the Chair. Student evaluations are not submitted or summarized by the faculty member, and are not a part of this evaluation process. Typically these evaluations are very positive, as they are based on the positive self-assessment of the faculty member.

34. The annual reviews do not assess a faculty member in the same depth, in the same way, or for the same reasons as the evaluation for promotion and tenure. Annual reviews do not include as

much detailed data, the student evaluations, or a review of the past six or seven years of performance. The purpose is to assess how the faculty member is performing his or her duties at his or her current rank. Test. Hatfield; Murphy, Level IV Hearing.

35. Grievant's annual reviews for the past six years have been mostly excellent with some good ratings, except in the area of service to the community which was rated good/effective. It was clear from the assessments that the raters were aware of Grievant's singing activities, and did not rate them as excellent.

36. The annual evaluation forms have been changed, and the past two years included a section on progress toward promotion and tenure. This section was not completed on Grievant's evaluations.

Discussion

The focus of the grievance is whether Marshall'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 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." Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93- BOD-400 (Apr. 11, 1995); Nelson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-514 (June 22, 2001). "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." Cohen v. W. Va. Univ., Docket No. BOR1-247-2 (July 7, 1987). (See footnote 11) See Siu v. Johnson, 748 F. 2d 238 (4th Cir. 1984)(Tenure review is "a subjective, evaluative decisional process by academic professionals." The standard of review is whether the decision is "manifestly arbitrary and capricious.") 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 collegepolicy. 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 excellence 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 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 MU erred or acted in an arbitrary and capricious manner when it did not promote her to Full Professor. Nelson, supra. See Harrison, supra; Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11,1993); For the reasons discussed below, the undersigned concludes Grievant has failed to meet that burden.

West Virginia Higher Education Policy Committee Procedural Rule, Title 133, Series 9, (See footnote 12) sets forth the following criteria with regard to promotion of faculty:

SECTION 7. Promotion in Rank

> 7.1. Within the following framework, each institution shall establish, in cooperation with the faculty or duly-elected representatives of the faculty, guidelines and criteria for promotion in rank . . . :

7.1.1. 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; professional and scholarly activities and recognition; accessibility to students; adherence to professional standards of conduct; effective service to the institution, college, or department; significant service to the community; experience in higher education and at the institution; possession of the earned 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.

7.1.2. 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.

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

7.1.4. The institution shall provide copies of its institutional guidelines and criteria for promotion to the Policy Commission and shall make available such guidelines and criteria to its faculty.

7.2. Promotion shall not be granted automatically, but shall result from action by the institution, following consultation with the appropriate academic units.

(Emphasis Added.)

There are two key areas to note within this Policy. Promotion will not be granted routinely or solely because of length of service and shall not be denied capriciously. Id. at §7.1.3. Additionally, promotion should not be granted automatically but "shall result from action by the institution, following consultation with the appropriate academic units." Id. at §7.2; Nelson, supra; Gardner, supra.

After a review of all the materials presented and the assessments of the various Committees, Dean Murphy and Grievant's Department Chair, the issue of whether the denial of Grievant's promotion was arbitrary and capricious must be answered in the negative. All the witnesses confirmed Grievant was effective in the areas of teaching and advising, scholarly activities, and service to the university, and her service to the community was adequate, but only the members of

the English Department's Promotion and Tenure Committee found Grievant had achieved the necessary excellence in two designated areas.

Grievant has failed to demonstrate MU relied on criteria that was not intended to be considered, arrived at a decision in a manner contrary to the evidence, or reached a decision that was so implausible that it could not be ascribed to a difference of opinion. Grievant's teaching and advising, publications and scholarly activities, and service to the community did not meet the guidelines to establish excellence as required by the English Department, CoLA, or the University as a whole. It is noted that a Full Professor is to bea pacesetter in the academic community; a professional who is to lead by example. Nelson, supra.

Two additional areas of conflict between the parties will be addressed. Grievant argued forcefully that her student evaluation assessment was not incorrect, and the student evaluations were given too much weight. A review of the evidence of record revealed a "negative thread" in the student comments and evaluations, and demonstrated Grievant's assessment to be incorrect.

This Grievance Board has previously held poor student evaluations may support a finding that teaching and advising does not meet the effectiveness standard, even when classroom observations by peers have resulted in good evaluations. Brozik v. Bd. of Trustees, Docket No. 98-BOT-142 (Nov. 30, 1998); Shackleford v. W. Va. Bd. of Directors, Docket No. 96-BOD-414 (Oct. 9, 1997); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995). Despite their arguable shortcomings, student evaluation scores constitute an accepted method for evaluating teaching performance. Brozik, supra. See Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995). It cannot be seen as arbitrary and capricious for the academic leaders and evaluators at MU to decide to weigh this evidence rather heavily since Grievant was seeking to obtain the highest rank within the academic structure, and she was required to demonstrate excellence in teaching and advising.

Grievant also argued her annual evaluations did not prepare her for rejection of her promotion bid. Dr. Hatfield and Dr. Murphy clearly stated the purpose of the annual evaluations was to assess performance at the current academic rank and was based on the faculty member's own assessment. Student evaluations were not considered, and thisyearly review was not an evaluation based on multiple years or a faculty member's bid for promotion. Additionally, it is clear from these evaluations that Grievant's performance in service to the community was not rated as excellent during the time in question, so an argument of false expectations could not be made for this area.

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." Cohen, supra; See Siu, 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 MU'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. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (2000); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that areasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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." Cohen v. W. Va.

Univ., Docket No. BOR1-247-2 (July 7, 1987). See 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).

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 andcapricious actions have been found to be closely related to ones that are unreasonable. State excellence 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 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 her burden of proof and demonstrated MU's decision to retain her at the Associate Professor level was arbitrary and capricious, clearly wrong, a violation of Series 9, or of the University's guidelines.

6. Grievant failed to demonstrate Respondent's finding that she did not meet the established guidelines 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 the county in which the grievance occurred." Any such appeal must befiled 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 § 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: November 22, 2002

Footnote: 1

For the Chair to certify the "Summary of student evaluations", it may be necessary to review the original data.

Footnote: 2

The abbreviation Grt. Ex. No. is used to specify Grievant's documents and their numbers. Something was spilled of Grt. Ex. No. 4, from Level II, and this document was recopied, and some letters were clarified, but nothing was changed.

Footnote: 3

Grievant has no published articles, but she has published five or six book reviews.

Footnote: 4

In the past, there has been a close interaction between the FCC and the Departmental Chair on issues of promotion and tenure.

Footnote: 5

Dr. Hatfield had gone through all of the student evaluations submitted by Grievant and reviewed the written comments. He only counted negative remarks of the sort identified above. He did not include negative remarks that discussed grading or the failure to return papers in a timely manner.

Footnote: 6

It is unknown what "Neutral" would mean to this question.

Footnote: 7

These tallies were from the total number of student answers over the years.

Footnote: 8

The CoLA acronym stands for the College of Liberal Arts.

Footnote: 9

Grievant had listed several book reviews and small articles in the Encyclopedia of Appalachia as "forthcoming." She also listed an article as "submitted." It is the usual practice of the assessing committees and individuals to take into

consideration only the materials that have been published.

Footnote: 10

Dr. Murphy had also spoken to Grievant at other times to encourage her to increase the depth and breadth of her published work, noting book reviews were not her work, only the assessment of the work of others.

Footnote: 11

It should be noted this quote has been frequently attributed by the Grievance Board as coming from Siu and not Cohen.

Footnote: 12

The wording in this Policy Bulletin is extremely similar to Board of Trustees Policy Bulletin 36 which previously controlled these issues. The new Policy Bulletin was effective December 25, 2001.