T. RICK WHITELEY,

Grievant,

v. **DOCKET NO. 01-HEPC-562**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA STATE COLLEGE

Respondent.

DECISION

Dr. T. Rick Whiteley filed this grievance against West Virginia State College (WVSC) on or about July 22, 1999. Level I was bypassed, and a Level II hearing was convened after several continuances on February 18, 2000. Following 24 days of hearing, Grievance Evaluator Robert F. Parker, II issued a Level II decision on September 28, 2001, denying the grievance, which decision was adopted by the president of the college.

On appeal to Level IV, Grievant submitted a new grievance form setting forth additional allegations of grievable events. Respondent, on November 21, 2001, filed a Motion to Dismiss, arguing that Grievant had failed to timely appeal the Level II decision, but had instead filed a new grievance at the wrong level. On December 20, 2001, a teleconference was held to discuss Respondent's motion. Thereafter, the undersigned Administrative Law Judge issued an order dismissing the new allegations, but finding that Grievant had substantially complied with the appeal procedure. The Statement of Grievance and Relief Sought as originally filed are:

Statement of Grievance

1. In the first case, Dr. Carter is in violation of the time period of response allowed under [36 C.S.R. 131 § 15.2]. For this reason, the letter of nonretention with respect to my contract for the 1999-2000 Academic year has no standing. (See enclosed letter of response to Dr. Carter pertaining to this issue, dated July 22, 1999.)

2. In the second case, the requirement for a change in the content of the Notice of Appointment is based on the grievance filed herein. Details are provided below.

> Dr. Carter's letter of response setting out the "statement of reasons for nonretention" includes reasons which (1) are inaccurate, (2) are based on information which was obtained in violation of Faculty Personnel Committee procedures with respect to the administering of student evaluations, (3) are based on information which the Faculty Personnel Committee has declared to be "tainted," (4) are based on information which was obtained from the Retention Committee which, in turn, was obtained in violation of the remedy sought in a grievance filed against Prof. Patty Shafer with respect to the meeting of the retention Committee and the use of student evaluations from the Fall 1998 term, and (5) fails to reflect the content of the self-reports and documentation for the period of consideration filed by the grievant.

Relief Sought

> Change the statement within the Notice of Appointment from "this is a terminal appointment for the period and purpose specified herein" to "This is a full-time tenure track appointment."

Grievant represents himself in these proceedings, and Paula L. Wilson, Esq., Senior Assistant Attorney General, represents Respondent. The parties agreed to submit the matter for decision based on the Level II record, supplemented by their proposed findings of fact and conclusions of law. Grievant was to mail his brief by January 28, 2002, Respondent to mail its brief no later than 30 days after receipt of Grievant's brief, and Grievant was to mail his rebuttal brief no later than 15 days after receipt of Respondent's brief if he wished to do so. No reply brief having been received from Grievant, this matter became mature for decision on March 26, 2002.

Based on a review of the Level II record, the undersigned makes the following findings of relevant facts:

FINDINGS OF FACT

1. Grievant was at all times relevant to this grievance employed by Respondent as Associate Professor of Business Administration. The 1999-2000 academic year (See footnote 1) was Grievant's fourth year of employment with Respondent as a probationary, tenure-track faculty member.

2. On May 11, 1999, Janet Amos, Acting Chair of the WVSC Retention Committee, informed Grievant by letter that the committee recommended against his retention at WVSC. [Gr. Exh. 21-A] She stated in part:

> The committee is very concerned about your total disregard for college policies and expectations for professional conduct. The Committee has concerns regarding your deportment based on consistently low student evaluation mean scores, numerous student complaints, and classroom management techniques. In short, in the opinion of

> this Committee, your professional and classroom conduct does not meet the expectations for collegiality at West Virginia State College.

3. The Retention Committee reviewed Grievant's retention portfolio, which was prepared by Grievant himself, and reviewed the recommendations of his Dr. Shafer, Grievant's department chair and of Dean Lantz, Grievant's division dean. The committee collaborated to prepare a standard faculty evaluation form that covers six specific areas, rated on a scale of 1 (very poor) to 5 (exceptional), and with each area scored by both the faculty's department chair and the Retention Committee. In addition to the numerical rating, the committee included written comments in all categories, a separate section for comments, and a section for general comments of the committee. Grievant was rated as follows:

Category	Department	Committee
I. Classroom Expectations	2.75	3
II. Student Input	2	2.5
III. Departmental Service	2	3
IV. College Service	3	3.5
V. Professional Development	4	5

The sixth specific area, Community Service, was marked, “No Activities Listed.” Under “Classroom Expectations,” the committee commented:

> [V]ery thorough syllabi - outlines student expectations, course objectives, assignment guidelines, due dates, and grading criteria. However, as reported by Chair, students in his Principles of Marketing classes complain of his actual classroom performance and the required purchase of a text they did not use and the necessity to obtain a copy of a text authored and published by the instructor (not selected by the Department.)

Under “Student Input,” comments were:

> Spring, 1998 - official faculty evaluation results not included. Dr. Whiteley, however, did include his own faculty evaluation analysis - listed Spring, 1998, means ranging from 3.03-4.10. Fall, 1998: BA-305-03 mean*3.90, BA-335 mean=4.23, BA-411 mean=4.05. BA-305-01 was not included “because of the manner in which they were obtained.” Overall Spring, 1998, mean from unofficial analyses was 3.76 and overall Fall, 1998, mean was 4.06 (excluding BA-305-01). His overall mean for six of his seven classes during Spring and fall, 1998, is 3.89. *Faculty average is 4.4+ range for Spring and Fall, 1998; Dr. Whiteley at 3.89 over both semesters is therefore significantly lower than the faculty mean.

"Departmental Service" comments were:

> Spring, 1998, teaching 3 different preps; assigned 30 advisees - Chair notes "marked decline in productive participation" and in "cooperative attitude" in Department Meetings since December, 1997, Chair Evaluation. Dr. Whiteley does not address fall, 1998. Does not attend graduation - received an Instructional Technology grant in 1997 which was to "enhance the image of WVSC and the Dept. of Business Administration." See Chair report concerning the refusal by Dr. Whiteley to follow college regulations with grants which seemed to provoke animosity toward the Chair. Conducted theWVSC Marketing Management Simulation Competition for Charleston area high schools.

Under "College Service," the committee remarked:

> Served on Bus. Adm. Dept. Student Recruitment & Retention Committee. Participated in on-campus visits by area high school students and College Day at the Civic Center. Member of college-wide Enrollment Management Committee and is a faculty senator from his Division.

"Professional Development" comments were:

> Lists 3 professional memberships but does not list dates of membership. Attended Spring, 1998, Assoc. for Bus. Simulations & Experiential Learning Conf. - Maui, Hawaii. Attended Spring 1998 Western Decision Sciences Institute, Reno, NV. Lists 4 presentations/publications in 1998 (not sure if Spring or Fall.

"Community Service" comment was, "[M]ost services listed on self-report are probably departmental and college service." In the area for listing community service activities, the committee notes, "No actual services that qualify as community service were listed in the self-report."

Under "Comments: Any areas," the committee stated:

> NOTE: Self report was dated 1997-1998 Academic Year.
>
> Chair does not recommend retention.
>
> > Dean "strongly" recommends Dr. Whiteley's retention. Dean reviewed neither the Retention Portfolio nor the Chair's evaluation and observations in making his recommendation.

The Retention Committee's general comments were identical to those listed in its letter to Grievant as recited in Finding of Fact No. 2, above.

4. On May 12, 1999, Dr. Barbara J. Oden, Vice President for Academic Affairs, sent a letter to Dr. Hazo W. Carter, Jr., President of WVSC, recommending that Grievant be given a terminal contract for the 1999-2000 academic year. Dr. Oden noted thatnonretention had been recommended by both the department chair and the Retention Committee. [Exhibit 1] This letter stated in part:

> Dr. Whiteley has failed to reach a standard of even “adequate” as a faculty member at West Virginia State College. His student evaluations are well below the college average, his department chair evaluations, except for Professional Development, are well below average and student complaints are numerous. The poor teaching performance is exacerbated by his contentious behavior as a faculty member. Dr. Whiteley has shown total disregard for College policies and expectations of faculty members. His failure to comply with textbook policies, reporting of absence from classes, non-participation in required college activities, refusal to return signed Notice of Appointment and refusal to comply with my reasonable request concerning a change of grade are but a few examples of his effectiveness as a faculty member. His productivity in terms of credit hour production does not justify his continuation.
>
> In conclusion, Dr. Whiteley is neither a good faculty member nor good teacher. I, without reservation recommend that he be sent a notice of non retention.

5. On May 14, 1999, Dr. Carter informed Grievant by letter that he would not be retained as a faculty member at WVSC after the conclusion of the 1999-2000 academic year. This letter also informed Grievant of his right to appeal the nonretention decision. [Exhibit 2]

6. Grievant, by letter dated June 1, 1999, requested of Dr. Carter, “in accordance with Section 15.2 of Title 131 - Procedural Rules - State College System of West Virginia - Board of Directors - Series 36," a statement of reasons for the nonretention decision. [Exhibit 3] 7. On June 11, 1999, Dr. Carter mailed the statement of reasons to Grievant at his address of 1002-99 Chatham Street East, Windsor, Ontario N9A 6V1, Canada (See footnote 2). These reasons were:

> 1. The documentation presented to me demonstrated a level of teaching that has deteriorated over the last three years. Instead of showing a reasonable degree of improvement in your teaching skills, your students and department chair, the faculty retention committee, and the vice president for academic affairs, indicate in their assessment that you have shown a lack of improvement in your teaching effectiveness. This concerns me because West Virginia State College weighs teaching more heavily than any other criterion that a faculty member must meet in order to be retained.
>
> 2. The documentation also seems to reflect a pattern or practice, wittingly or unwittingly, to regularly resist compliance with College practices, rules or regulations. It appears that the spirit of several of your actions were in conflict with particular provisions of the Faculty Handbook. For someone with your experience in higher education, it is difficult to understand your actions surrounding the utilizing, ordering, and selling of textbooks in a manner that was not in accordance with College policy

> and state law; your failure to attend commencement as required by College policy; your failure to hold classes for the periods noted in the College time schedule; your failure to hold final examinations at the time and place designated by the office of the vice president for academic affairs; and, your insubordinate behavior, periodically, regarding your department chair in grant related areas.

[Exhibit 4] This letter was returned by postal authorities marked “No such address.” [Exhibit 4A]. It was then re-sent to Grievant at the correct address, via registered mail, on June 28, 1999.

8. Grievant received the Statement of Reasons on July 13, 1999. On July 22, 1999, Grievant informed Dr. Carter by letter that, “Since the ten (10) days allowed for a response from your office under Section 15.2 was exceeded, your letter of Nonretention with respect to my contract for the 1999-2000 Academic year has no standing.” [Exhibit 8] 9. In the meantime, on or about June 24, 1999, Grievant was sent a Notice of Appointment , notifying Grievant of his “appointment as **Associate Professor-Department of Business Administration** at West Virginia State College as a full-time tenure-track faculty member for the 1999-2000 academic year. Included in this appointment was the statement, “ **This is a terminal appointment for the period and purpose specified herein.**” Grievant signed the document on July 7, 1999, under the statement, “I accept the appointment as a full-time faculty member at West Virginia State College in accordance with the terms specified above.”

10. When Grievant returned his signed Notice of Appointment to Dr. Carter on July 7, 1999, he included a letter objecting to its contents, and requesting: 1) that he be appointed as a full professor; 2) that the salary be changed to match that of a full professor; 3) that the language making it a terminal appointment be stricken; and 4) that the merit pay included in the original salary “be adjusted to reflect a merit pay based on an evaluation of 10 out of 10.”

11. On July 27, 1999, Dr. Carter responded to both Grievant's letter claiming his contract “had no standing,” and requested modifications to his appointment. This letter explained to Grievant that the Statement of Reasons for nonretention had originally been sent within the required time, and also rejected the proposed modifications.

12. Grievant was not reappointed following the 1999-2000 academic year.

13. On October 22, 1999, Grievant filed a Motion to Recuse Robert F. Parker, II, as the hearing examiner assigned to the grievance at Level II, stating:

> Since Mr. Robert F. Parker (formerly associated with the Research and Development

> Corporation situated on the campus of West Virginia StateCollege, an organization which was directly involved with the Higher Education Technology Grant of which I was the senior investigator) will be called as a witness by the **Grievant**, Dr. T. Rick Whiteley, in this matter, Mr. Parker's role as **Hearing Examiner** in this matter places him in a **conflict of interest** situation. For this reason, it is necessary that Mr. Robert Parker be removed from the latter capacity.

[Exhibit 19]

Following a hearing on the motion held before Mr. Parker on October 27, 1999, and after consideration of a brief on the matter filed by Grievant on November 3, 1999, [Exhibit 21] Mr. Parker issued a ruling denying the motion on November 10, 1999, [Exhibit 22] finding that Grievant "failed to show cause or establish that the hearing evaluator has an interest in the proceeding or is prejudice[d] in the matter. Additionally, the arguments put forth fail to show any relevancy between the operation of the R & D corporation, while Mr. Parker was its business manager, and the reasons cited for grievant not being retained as a faculty member . . . ."

14. On February 17, 2000, Grievant filed a second grievance directly at Level IV, requesting again that Mr. Parker be recused, seeking another contract for the 2000-2001 academic year, and asking that he be allowed to forego Level II in this grievance and proceed instead directly to Level IV. This grievance was denied and was apparently not pursued further. Whiteley v. West Virginia State College, Docket No. 00-BOD-066 (Feb. 25, 2000).

15. Dr. Shafer, in addition to being Grievant's department chair, is chair of the Retention Committee. Although Dr. Shafer was present at the meeting of the Retention Committee when the issue of Grievant's retention was decided, she relinquished her position as chair to Janet Amos, and did not participate in the deliberations. Dr. Shafer didanswer questions when asked by members of the committee, but did not vote on whether to retain Grievant.

16. The members of the Retention Committee did not each individually review all of the information provided by Grievant or others. Members of the committee, excluding Dr. Shafer, divided the information, reviewed their assigned portions, and reported back to the committee as a whole. The Committee then discussed the reports and made its decision. Using this method, the Retention Committee considered all of the information provided to it by Grievant, including his written concerns about the weight or validity of any negative information.

17. The Retention Committee did not base any part of its decision on the student evaluations for Grievant's BA305-01 class that Grievant requested be excluded from consideration.

18. Dr. Shafer did use student evaluation comments that she solicited outside the formal evaluation procedure as one of the bases for her written recommendations. These solicited comments, while obtained against the recommendation of Dean Lantz, were not obtained in violation of any of Grievant's rights or in violation of any college policy.

DISCUSSION

"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) [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, theseinstitutions 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.*

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. [citations omitted]" 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 [his] judgment for that of [Respondent]. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*; Blake

v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Much of the evidence contained in the 20 volumes of lower-level record is irrelevant, as it does not further the examination of whether Respondent's decision was arbitrary and capricious. It is not the grievance evaluator's nor the undersigned Administrative Law Judge's place to second-guess the decision of the Respondent, or to replace its judgment with his own. Blake, *supra*. Instead, the undersigned Administrative Law Judge's task is to review the process followed by the Retention Committee, whether its criteria was the criteria it should have considered, whether the decision reached was contrary to the evidence on which it was based, and whether the decision violated Respondent's policies related to retention decisions.

According to the letter that informed Dr. Whiteley of the reasons for his nonretention, the criteria considered by Respondent were: student evaluations, the degree of improvement in Grievant's teaching from year to year, and evaluations by the Retention Committee, Grievant's department chair, and the vice president of academic affairs. Respondent also considered what it perceived as a lack of compliance with College policies and procedures, and insubordinate behavior.

The procedure adopted by Respondent for retention decisions is outlined in the Faculty Handbook, Section C.8. [Exhibit R-3]. The Handbook lists the materials and supervisory recommendations that are to be reviewed by the Retention Committee. These are: self reports and supporting portfolios, including summary sheets of student evaluations, in-class observation forms, examples of scholarship and research and instructional materials; and written recommendations of department chair and division dean. The committee reviews these documents and may request more information or gather other information as needed. It then makes a recommendation and forwards thatand all documents to the vice president for academic affairs, who then makes a retention recommendation to the president.

In addition to listing the materials to be reviewed, the Handbook also outlines the criteria under which the review is made. The six general criteria are: teaching effectiveness; professional growth; research and creative activities; recognized activity in professional and/or learned societies; service to the college; and public and community service. According to the Handbook, “teaching effectiveness is the most important of the six criteria, and excellence in other areas cannot compensate for a deficiency in teaching effectiveness.” Exhibit R-3 at p. 12.

The president then reviews all of the material and makes a final determination. The president may

make a decision of nonretention for any reason that is not arbitrary and capricious or without factual basis. 131 CSR 36 § 10.4.

Grievant attacks the validity of Respondent's non-retention decision on six fronts: I. The decision was based on inaccurate information; II. The decision was based on information gathered and processed in violation of procedure and Grievant's rights; III. The decision was based on information that the Faculty Personnel Committee “declared to be tainted;” IV. The decision was based on information obtained from the Retention Committee, “which, in turn was obtained in violation of the remedy sought in a grievance filed by the Grievant against Professor Shafer;” V. The decision violates the time lines pertaining to the provision of reasons for nonretention; and VI. The decision fails to reflect the content of the self reports and documentation filed by Grievant for the period of consideration. Each of these allegations will be addressed in turn, in light of the standard of review as set forth above. I.

The decision was based on inaccurate information.

Certainly, Grievant is entitled to have decisions affecting his continued employment made based on accurate information. His reference here is apparently to mean student evaluation scores for the period under examination by the Retention Committee. In the June 11, 1999 letter setting forth the statement of reasons for nonretention, Dr. Carter states: “[Y]our student evaluations not only placed you below the College faculty average, they placed you last among your peers in the business department, the largest department at the College.” [Exhibit 1]. In addition, the Retention Committee concluded, “[Grievant's] overall man for six of his seven classes during Spring and Fall, 1998, is 3.89. Faculty Average is 4.4. . . . [Grievant] at 3.89 over both semesters is therefore significantly lower than the faculty mean.” [Gr. Exhibit 21a]. One assertion presented by Grievant is that 3.89 is not actually statistically significantly different from 4.4 for this sample. However, it is clear from Dr. Amos' testimony that, as used in the Retention Committee's recommendation, the word "significantly" is used in it ordinary meaning, (See footnote 3) not in the technical sense. It was not implausible for the Retention Committee to find the difference meaningful, and therefore significant. Therefore, no matter how strong Grievant's proof is that there is no or little statistically significant difference in evaluation scores, that only proves something that is not determinative.

II.

The information relied upon was gathered in violation of grievant's rights

This portion of Grievant's challenge appears to refer to certain student evaluations which were conducted without compliance with the established procedures for doing so. During the fall, 1998 semester, Dr. Shafer administered the evaluations for Grievant's BA 305-01, BA 305-03 and BA 411 courses because she had received a number of complaints from his students. Contrary to policy, she collected the students' completed evaluations herself rather than having a student do so, and after both she and a student sealed the evaluations and signed across the seal, she delivered them to the mailroom. Grievant presented no evidence to show that this deviation was prejudicial to him in any way, except his unsupported allegations of Dr. Shafer's possible lack of integrity. There was no evidence at all that the security of the evaluations had been compromised, or that the students had been improperly influenced. Dr. Shafer also did the evaluations the same way in other professors' classes in the fall of 1998.

In response to allegations from students regarding Grievant's use of an unauthorized textbook and other complaints about his teaching, and because Grievant refused to do the official evaluations, Dr. Shafer also solicited in October and December, 1998, unofficial evaluations from students in Grievant's BA 305-01 course that semester by mailing a questionnaire to students. Grievant informed Dr. Shafer that the official evaluations for this course “will not be done at all, at any time.” [Gr. Exh. 48] Grievant, in a prior memorandum to his dean, indicated that it would be unfair to consider evaluations from this class because the students in the class were dissatisfied with his teaching and were performing poorly.

Since Grievant's department chair had the responsibility to consider student input in evaluating his performance but Grievant himself impeded and opposed her attempts to gather this information, Grievant caused this breach of normal protocol. However, noevidence was presented that soliciting student comments was a violation of policy nor a violation of Grievant's rights.

Grievant also alleges that Dr. Shafer "committed pergury [sic]" by testifying that she did not present to the Retention Committee the results of the student evaluations for this class, and then later testifying that she did discuss her written recommendation that was based in part on the questionnaires she mailed to the same class. This testimony is not inconsistent, as Grievant seeks to make the term "student evaluations" cover both the official WVSC forms given to the students in class and the questionnaires mailed by Dr. Shafer, but they are two different things.

III.

The decision was based on information that the Faculty Personnel Committee "declared to be tainted;"

Grievant failed to meet his burden of proving this allegation. His reference is apparently to student evaluations for his BA 305-01 course for the fall, 1998 semester. Dr. Mahmoud Islam, Chair of the Faculty Personnel Committee, stated in a memorandum dated March 16, 1999, that, "After careful consideration, the committee suggested that Mrs. Shafer exclude any use of a possibly tainted evaluation that Dr. Whiteley received in his BA 305-01 class in the fall of 1998 for retention purposes." [Gr. Exh. 44] Every voting member of the Retention Committee testified that the results of that evaluation were not considered and played no part in their decisions. The committee did consider Dr. Shafer's written recommendation as department chair, which in turn was based in part on her own unofficial questionnaires sent to the students in that class.

In his proposed findings of fact and conclusions of law brief, Grievant attempts to equate these "tainted" student evaluations to the questionnaires Dr. Shafer mailed tostudents in October and December, 1998, as described above. However, since he also states he knew nothing about the solicited evaluations until he subpoenaed material for this grievance, they clearly cannot be the evaluations referred to in Dr. Mahmoud's memorandum, since that memorandum was a response to Grievant's concerns before Grievant knew about the questionnaires.

IV.

The decision was based on information obtained from the Retention Committee, "which, in turn was obtained in violation of the remedy sought in a grievance filed by the Grievant against Professor Shafer."

First, the decision *must* be based on information obtained from the Retention Committee. Exhibit R-3, § C.8. Under 131 C.S.R. 36 § 16, college faculty have access to an alternative grievance procedure at the institutional level that does not utilize the provisions of W. Va. Code § 18-29-1, *et seq.* Grievant refers to a letter he wrote on December 11, 1998 to Dean Lantz, in which he complained about student evaluations from his BA3-5-01 class, and sought a statement that these evaluations were collected in violation of his rights and asked that the results not be used for any purpose. Had such a remedy been granted, it would of course be improper to use these evaluations, as doing so would be in violation of a grievance resolution. However, Grievant himself points out that Dean Lantz never acted on this request, and no relief of any kind was ever granted. Grievant failed to pursue this claim further. Therefore, it was not improper for Respondent to consider the relief

requested in that grievance, since it was never granted.

V.

Violation of Time lines

Grievant argues that the nonretention decision is invalid because Respondent failed to respond to his request for reasons within the required time. The procedural rules of theW. Va. Higher Education Policy Commission (HEPC) state: “Following receipt of the notice of nonretention, the faculty member may appeal such nonretention decision by requesting a statement of reasons and then filing a grievance as provided in Section 15 of these rules. The request for a statement of reasons shall be in writing and mailed to the president within ten working days of receipt of the notice of nonretention.” 131 CSR 36 § 10.7. Section 15.2 adds: “The president or designee shall, within ten (10) working days of receiving the request [for a statement of reasons], inform the tenure-track faculty member of the reason for nonretention.”

Grievant timely requested the reason for his nonretention, and Respondent timely mailed the reasons to Grievant. However, Respondent erred by omitting a portion of Grievant's mailing address, and the letter containing the reasons was returned as undeliverable. Respondent promptly re-sent the letter with the correct address, and it was received by Grievant. Grievant then decided to challenge the initial nonretention letter and terminal contract on the grounds that the reasons for nonretention were not sent to him in compliance with Section 15.2. He stated: “Since the ten (10) days allowed for a response from your office under Section 15.2 was exceeded, your letter of Nonretention with respect to my contract for the 1999-2000 Academic year has no standing.”

Grievant has provided no legal authority for his conclusion that failure to comply strictly with a procedural rule for hearings renders a nonretention letter invalid. Unlike Section 15.2, which governs hearings, Section 10, which governs only the issuance of a nonretention letter, does not contain the 10-day time limit. The HEPC, in enacting these rules, chose not to elaborate on the consequences of missing this deadline, but it did clearly limit its scope to the hearing procedure in Section 15. Nothing in the rule impliesthe result Grievant suggests, invalidation of the notice of nonretention, if a statement of reasons for nonretention sent in response to s Section 10 request is not sent within 10 days.

VI.

The decision fails to reflect the content of the self reports and documentation filed by Grievant for the period of consideration.

It is undisputed that the documentation Grievant prepared and submitted is part of the information that the retention decision should be based on. Grievant was required to prepare a portfolio each year, containing documentation consisting of his self-report, copies of student evaluation summary sheets, instructional materials and other supporting information. These are the documents reviewed by the Retention Committee, his department chair and division dean. The Retention Committee stated in its letter, “Based on a review of [Grievant's] retention portfolio . . .[the committee] recommends against [Grievant's] retention . . .” Each member of the Retention Committee testified that this documentation played an important part in their decisions.

The only evidence Grievant presented to support this vague allegation is that his department chair did not forward his portfolio to his dean before the dean made his recommendation. Because the only person who did not review the portfolio is also the only person who recommended for retention, it may be inferred that the contents of the portfolio were a factor influencing the decision of the Retention Committee.

In summary, the Retention Committee reviewed the totality of the information it had before it, and based its decision on that review. It did not review any information that should not have been considered. It was the responsibility of Grievant to include any and all relevant information in his self-report portfolio that he wished to be taken into consideration,so if there was something missing, it was through his own inactions. The only issue, therefore, is how the information should be interpreted. Since that interpretation is the duty of the Retention Committee, it is the Committee's opinion, rather than Grievant's, that counts, as long as it is not contrary to the facts. That unanimous opinion, seconded by the Vice President of Academic Affairs and affirmed by the college President, while open to a difference of opinion, was not implausible nor contrary to the evidence before it, 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 what was, after all, 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. 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). *See* W. Va. Code §18-29-6." Pauls v. Board of Directors/West Liberty State College, Docket No. 99-BOD- 160/175 (Dec. 12, 1999).

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. 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.* 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). "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 [his] judgment for that of [Respondent]. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

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. 131 CSR 36 § 10.4.

5. Under 131 C.S.R. 36 § 16, college faculty have access to an alternative grievance procedure at the institutional level that does not utilize the provisions of W. Va. Code §§ 18-29-1, *et seq.* Although Grievant initiated a separate grievance in December, 1998 under this alternate procedure, he failed to pursue it and was awarded no relief based on that grievance that would affect this grievance.

6. The procedural rules of the W. Va. Higher Education Policy Commission (HEPC) state: "Following receipt of the notice of nonretention, the faculty member may appeal such nonretention decision by requesting a statement of reasons and then filing a grievance as provided in Section 15 of

these rules. The request for a statement of reasons shall be in writing and mailed to the president within ten working days of receipt of the notice of nonretention." 131 CSR 36 § 10.7. Section 15.2 adds: "The president or designee shall, within ten (10) working days of receiving the request, inform the tenure-track faculty member of the reason for nonretention." The absence of the 10-day time limit imposed by Section 15.2, which relates to hearing procedure, from Section 10.7, which relates to retention decisions, implies that the ten-day limit has no affect on the validity of the retention decision, but is merely a procedural rule.

7. In order to prevail due to a procedural error, Grievant must prove he suffered prejudice or harm as a result thereof, in that a different result would have been reached if the employer had followed the prescribed procedure. *See* Vosberg v. Civil Serv. Comm'n, 166 W. Va. 148, 275 S.E.2d 640 (1981). As the retention decision procedure had already been properly concluded at the time Respondent failed to meet the hearing procedure deadline, there is no evidence there would have been a different result.

8. 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.

9. Grievant failed to meet his burden of proving that Respondent did not follow the substantive and procedural requirements set forth in its policies regulating retention of non-tenured, probationary faculty members. Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATED: April 19, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *August 16, 1999 through May 22, 2000.*

Footnote: 2 *Although the address on the letter itself was correct, the address as typed on the envelope did not include the "-99," and so was incorrectly addressed.*

Footnote: 3 *"Having or expressing a meaning; meaningful." The American Heritage Dictionary, 2d. Col Ed, Houghton Mifflin Co., Boston 1991.*