LARRY ADAMS,

Grievant,

v. Docket No. 03-HEPC-198

HIGHER EDUCATION POLICY COMMISSION/

SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Larry Adams ("Grievant"), employed by Shepherd College ("Shepherd") as an Instructor of Computer and Information Science, filed a grievance directly to level four on July 2, 2003, after his request for promotion was denied. For relief, Grievant requests promotion to the rank of Assistant Professor. Shepherd concurred that the matter should be heard at level four, and an evidentiary hearing was conducted on the Shepherd College campus on August 20, 2003. Grievant was represented by David J. Joel, Esq., and Shepherd was represented by Kristi McWhirter, Assistant Attorney General. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before October 7, 2003.

The essential facts of this matter are not in dispute, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant was first employed by Shepherd College as a part-time Instructor in 1998, and as a Visiting Instructor in 1999. Grievant has been employed on a regular, full-time basis as an Instructor of Computer and Information Sciences (CIS) in the Division of Natural Sciences and Mathematics, since August 2000. This is a tenure-trackappointment. At the time of his appointment in 2000, Grievant held a Bachelors Degree in Political Science and a Masters Degree in Business Administration. He was working towards a second Masters Degree of Science in Computers in Education, which he completed in 2002.

2. In his undated letter of application for the position of Instructor, Grievant stated that

upon completing his second Masters degree, he would pursue a Ph.D. in Instructional Technology with a minor in Computer Science at George Mason University. 3. Dr. David L. Dunlop, President of Shepherd College, notified Grievant of his appointment by letter dated May 4, 2000. President Dunlop noted that,

[t]his offer is made with the express agreement between you and Shepherd College that a successful progression through the tenure-track will include attainment of the terminal degree with reasonable promptness. Therefore, it is expected as a condition of this offer that you provide to the Vice President for Academic Affairs prior to April 1, 2005 written verification of your successful defense of your dissertation. Should you fail to achieve this requirement the College will take action to make the 2005-2006 academic year a terminal year of service for you.

4. Grievant subsequently enrolled at Shenandoah University, where he has completed twenty-seven hours of doctoral studies in Education Administration and Leadership, with a concentration in Educational Technology. Grievant's transcript shows that he has completed a number of computer classes offered by the school's Education Department, but no classes were taken through the Computer Science Department.

5. Dr. Ben Benokraitis, and other faculty members who have subsequently held the position of CIS Department Chair, have approved this course of study, and Grievanthas received tuition reimbursement from Shepherd for the hours completed toward this degree. **(See footnote 1)**

6. During the 2002-2003 academic term Grievant compiled and submitted for review an application for promotion to the position of Assistant Professor.

7. The Shepherd College Faculty Handbook lists the minimum criteria for promotion to Assistant Professor as: a Masters degree plus 15 hours of graduate study in the field (emphasis added); three years of excellence in teaching or professional experience; evidenced interest in the profession of college teaching and in professional growth; and, character reputation beyond reproach.

8. Promotion review is a multi-level process which begins with the Department Chair. Parvin Rahnavard submitted a brief memorandum dated November 15, 2002, in which she stated concern that "[b]ecause Grievant's undergraduate degree is in a non- related science

field, some formal training in the area of theory would be helpful to construct for the student the inner foundation of computer science techniques. I would suggest that professor Adams to [sic] pursue ways to strengthen his theoretical foundation." Ms. Rahnavard did not specifically state whether she supported Grievant's bid for promotion, and was later requested to revisit her review. By memorandum dated April 29, 2003, Ms. Rahnavard essentially restated her earlier comments, but added that she did not support the application for promotion, "because the students in his class are trained on how to use products. I support the idea of having our students intellectuallychallenged to understand the science beneath the computing system and the use of products as practice tools."

9. Grievant's promotion file was next reviewed by the Promotion and Tenure Committee of the School of Natural Sciences and Mathematics. This Committee recommended that Grievant be promoted to Assistant Professor by a vote of three to two, but expressed concern regarding his professional development. Specifically, the Committee noted that he was working toward a doctorate in a field not directly related to his teaching responsibilities, and had no publications or other work in his area of expertise.

10. Dr. Don Henry, Dean of the School of Natural Sciences and Mathematics, did not recommend Grievant for promotion, finding his professional development record to be weak. Dean Henry found that Grievant's graduate studies were not directly related to the courses he teaches, and no other certifications or publications were evident.

11. The College Professional Status Committee recommended that Grievant's request for promotion be denied, citing concerns regarding Grievant's professional growth and academic achievement, including his matriculation in a field not directly related to his teaching responsibilities.

12. Grievant's application was next reviewed by Mark Stern, Vice-President for Academic Affairs, who also recommended the request for promotion be denied for the same reasons expressed by the previous reviewers. (See footnote 2) **13. By letter dated May 23, 2003, Dr. David Dunlop, President of Shepherd College, advised Grievant that his application for promotion was being denied. President Dunlop stated the basis for his decision as follows:**

I am very concerned with your professional development and the manner in which that relates

to excellence in teaching. In particular, as has been noted, you are now pursuing the Doctor of Education Leadership at Shenandoah. . . I join the previous expressions of concern as to the viability of the program choice that you have made in the context of your employment here.

I do not believe that the Ed. D. in Administrative Leadership, even with a concentration in Educational Technology, qualifies as an 'in-field' degree. In reviewing your personnel file, I note that when you applied for the position of Instructor, you expressly represented to us that you would be pursuing a Ph. D. from George Mason University in Instructional Technology. I am not accusing you of misrepresenting your intentions, but changing the nature of the doctoral degree program which you would pursue is a material change that I am not prepared to endorse as satisfactory for the College's needs.

I believe that the nature of your professional development is relevant to the issue of excellence in teaching. It has been noted that recurrent student observations, together with the average grades in your courses, suggest that the rigor of your courses is at least somewhat suspect. Lack of personal professional depth in the computer science field would directly contribute to this issue and is not a helpful condition.

Discussion

This Grievance Board's review of promotion and tenure 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); Nelsonv. 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 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 college policy. See Kilburn v. Bd. of Directors/W. Va. State College, Docket No. 94-BOD-104 (Dec. 29, 1995).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized asarbitrary 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 school administrators. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievant argues that Shepherd improperly denied him promotion when his course of study had been approved by the Department Chair, and no other faculty member or administrator had ever advised him that his program was not appropriate, or should be changed in any way. Further, Grievant opines that Shepherd approved of his program of study, at least tacitly, as evidenced by the reimbursement for his tuition. Shepherd denies that it acted in an arbitrary and capricious manner, and asserts that Grievant's promotion application was denied because he did not meet the minimum requirement of completing fifteen, in-field graduate credit hours.

President Dunlop testified that the Chancellor of the Board of Governors advocates the hiring of more faculty with an in-field doctoral degree as it is vital to the integrity of the

schools' academic programs, particularly in highly technical areas, such as computer science. President Dunlop further stated that Shepherd plans to develop a Masters Degree program in Instructional Technology, and faculty must hold a degree level higher than that which they teach.

The sole issue in this matter is whether Grievant's chosen doctoral program qualifies him for promotion. The evidence presented supports a finding that it does not. Shepherdwants, and needs, faculty with a "hard," technological, computer science background to teach computer science classes. President Dunlop opined that Grievant's work would support a promotion in the Education Department, but not in the Computer Science Department. It is a question of whether Grievant wants to teach computer skills to teachers, or teach computer science to technology majors. Unfortunately, Grievant relied upon representations of various Department Chairs in pursuing his doctoral program. These individuals were apparently unaware of the criteria for promotion or the goals of higher administration, and their advice was detrimental to Grievant's promotion. Their representations to Grievant; however, are not binding upon the school. Neither is the fact that Grievant was reimbursed for the course work controlling, because virtually all continuing education is reimbursable, and there is no requirement or limitation that the classes be for the purpose of promotion. While Grievant would have computer classes offered though the Education Department considered for his promotion, to do so would be contrary to Shepherd's needs and promotion policy.

In part, Grievant is the creator of his own misery. He specifically advised Shepherd administrators that he would be pursuing a doctoral degree in Instructional Technology with a minor in Computer Science at George Mason University. President Dunlop testified that prior to reviewing the promotion file, he believed that was the program Grievant was pursuing. Grievant elected to pursue an entirely different program without advising anyone other than the Department Chair. The reason for denying the promotion was neither arbitrary and capricious or contrary to policy.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving his 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); Schiavone v. Higher Ed. Policy Comm'n /Marshall Univ., Docket No. 02-HEPC-026 (Nov. 22, 2002); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). See W. Va. Code § 29-6A-6. "The preponderance standard generally requires proof that a reasonable 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 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 a board of education.

5. Grievant has not met his burden of proof and demonstrated the decision to retain him at the Instructor level was arbitrary and capricious, or in violation of applicable promotional guidelines.

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 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 itsAdministrative 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.

DATE: OCTOBER 24, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Dr. Benokraitis was no longer at Shepherd when Grievant was hired as a regular, full-time Instructor.

Footnote: 2

[2]Grievant's lack of in-field work was not the only weakness cited, but was the primary one noted at all levels.