ALAIN BLANCHETOT,

Grievant,

v.

DOCKET NO. 04-HE-148

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Alain Blanchetot, filed the following Statement of Grievance on January 22, 2004, with Marshall University ("Marshall" or "MU"), stating:

> The defendant agency, Marshall University is in violation of § 29-6A-1 etc. in that it has acted arbitrarily and capriciously, and has engaged in discrimination, favoritism and reprisal against the grievant, by terminating his employment as a faculty member.
>
> Relief Sought: The grievant seeks a non-terminal year's contract for the academic year 2004 - 2005, and a re-evaluation of his performance in a way that is not arbitrary, or capricious or the product of reprisal, and Grievant asks that the negative letters by Drs. Taylor, Bragin, and Angel be expunged from his file.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on April 21, 2004. A Level IV hearing was held in the Grievance Board's Charleston, West Virginia office on July 19, 2004. This matter became mature for decision on August 23, 2004, upon receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

___Grievant's representative asserted MU's non-renewal of Grievant's contract was arbitrary and capricious, the result of discrimination and favoritism, and an act of reprisal. Respondent argued the decision to not renew Grievant's contract for the reasons stated was not arbitrary and capricious

and was within the considerable discretion granted to MU on academic issues.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. It is noted that because Grievant elected not to appear at any time during the grievance process and only called one witness, a student, the testimony of Respondent was unrebutted. (See footnote 2)

Findings of Fact

1. Grievant was hired as a probationary faculty member in Marshall's Integrated Science and Technology Department ("IST") in July 2002. Elizabeth Murray, Head of Biotechnology, highly recommended Grievant for the position.

2. During the interview for this position, MU's non-traditional curriculum, mission, and program was explained to Grievant, and he stated he could work within its structure.

3. As with all probationary, tenure-track faculty, Grievant was given a one year contract.

4. A negotiated addendum to this contract stated Grievant would be given release time from teaching his first year to start his research program, and after that time he would submit proposals for external support. Additionally, Grievant would receive $33,000 in start up funds the first year, and $30,000 in additional start up funds the secondyear. Grievant would also receive $3,000 in moving expenses, and MU agreed to pay up to $1,000 for an expedited visa application. (See footnote 3)

5. Grievant was given release time for the first two semesters in order to get his research under way. Dr. Murray willingly accepted an overload so Grievant could start his research duties.

6. For the Fall semester of 2002, Grievant was assigned to team-teach in the Connections I course. A member of the science faculty is assigned to this team-taught course and is expected to participate in all aspects of the course including teaching, assisting students, and grading student submissions and presentations.

7. Andrew Gooding was the coordinator of the Connections I course. He verbally complained to Ralph Taylor, Chairperson of IST, about Grievant's behavior in the course, and then placed this information in a letter dated November 14, 2003, at the request of Dr. Taylor. Resp. No. 2 at Level IV.

8. Dr. Gooding reported Grievant made few attempts to prepare for the course, was poorly prepared for his teaching sections both in content and materials, wanted someone to tell him what to

teach and then reacted poorly to suggestions, and did not exert much effort in grading students' final presentations. Resp. No. 2, at Level IV.

9. Grievant reacted with intense hostility when he was given portfolios to grade by Dr. Gooding. This grading assignment was part of Grievant's agreement in teaching the class. Grievant informed Dr. Gooding through e-mails that Dr. Gooding was not to give him orders and placing the portfolios on his desk was a "direct PROVOCATION," told Dr.Gooding if this type of action occurred again he would report him to the Dean, and told Dr. Gooding, "Sir you are RUDE and disrespectful back off now." Dr. Gooding forwarded all these e-mails to Dr. Taylor and Dr. Joseph Bragin, Dean of the College of Science. Grievant has refused to speak to Dr. Gooding since that time and averts his eyes when they pass in the hallway. Resp. No. 2, at Level IV.

10. During this same fall semester, Grievant was hostile and threatening to students in his DNA Technology class. He changed the grading system mid-course, was non-responsive to questions, and did not follow his syllabus. Two students who received D's in the class won a grade appeal, an event which almost never happens at MU. Resp. Nos. 2 & 4, at Level IV.

11. Also in the DNA Technology class, when a student questioned him about the course, Grievant's response was he had an eighth degree black belt, and the student should not threaten him because he would take action. Level III Tr. at 68-9.

12. The first semester Grievant taught, Fall 2002, he received atrocious student evaluations. (See footnote 4)

13. Per MU's faculty guidelines, Dr. Taylor evaluated Grievant, and they met to discuss this evaluation on January 28, 2003. Dr. Taylor had not seen the student evaluations at the time he performed this evaluation. He rated Grievant as "GOOD" in instruction and advising and "Excellent" in research and scholarly activities. The overall rating was "GOOD." The teaching portion noted there had been some problems with thestudents that Grievant did not deal with very well, and this issue was discussed with Grievant. Grievant was informed at this meeting that he could not threaten faculty and students, and he needed to treat these groups with greater respect. The research evaluation portion noted Grievant needed better lab space, but had one published paper and had submitted two proposals for funding.

14. Dr. Taylor did not want to be too negative in Grievant's first evaluation, so instead of placing Grievant's behavior in the evaluation in detail, he just alluded to it, and then discussed it with

Grievant at the meeting. Dr. Taylor believed his actions in this regard would be helpful to Grievant. Level III Trans. at 108-09.

15. Grievant became quite upset during this discussion of his evaluation and refused to speak to Dr. Taylor, his direct supervisor, after that time.

16. On January 29, 2003, Grievant wrote to Dr. Bragin to complain about his evaluation. He stated he had never received "any input, guidance and advice from Dr. R. Taylor. . . ." Grievant noted how hard he had worked the past semester and his enthusiasm for teaching. Resp. No. 12, at Level IV.

17. Dr. Bragin also evaluated Grievant on February 13, 2003, and recommended Grievant for reappointment. Basically, this evaluation noted Grievant's activities so far and outlined the expectations for the future.

18. In Spring 2003, Grievant taught two small classes, and the student evaluations in these courses were much better, but were still not to the level of the other IST faculty. 19. On April 21, 2003, Grievant requested certain lab equipment totaling $6,000. It is unclear from the record whether this request was granted. It was noted by Dr. Taylor that Grievant received $6,100 for teaching supplies.

20. Grievant complained frequently about his lab space and refused to share space with others. It is an expectation at MU that the more costly pieces of equipment will be shared.

21. Numerous attempts were made to find Grievant a place where he would and could conduct his research. These attempts included Dr. Murray giving her space to Grievant and also finding him additional space. These attempts were routinely unsuccessful. Grievant frequently did not use the space provided, was dilatory in examining new space when it became available, and complained when he did not receive the $106,000 worth of equipment he requested in one year. (See footnote 5) See Resp. No. 2, at Level IV.

22. On May 12, 2003, Grievant wrote Dr. Bragin requesting to renegotiate his contract and pointing out that the terms of his contract had never been fulfilled. He noted Dr. Bragin had met with him on May 5, 2003, about these matters, and stated "the opportunity of having lab space is not enough," because he had been discriminated against in many respects including position, salary, and promises. Grt. No. 5 at Level IV.

23. On August 9, 2003, Grievant responded to an e-mail from Dr. Taylor to discuss Grievant's

new office and lab. Grievant responded by complaining about Dr. Taylor's failure to renegotiate his contract. Grievant noted he would "decline any meetingwith you to discuss or negociate (sic) my personal situation and my future." Grt. No. 5 at Level IV.

24. On August 11, 2003, Dr. Taylor responded he had nothing to do with Grievant's contract, as that was the responsibility of the Dean. He reiterated the meeting was only about the new lab space he had found, and if Grievant was not interested please let him know. Grt. No. 5 at Level IV.

25. On August 27, 2003, faculty member Brian Morgan wrote Dr. Taylor and Dr. Bragin to complain about Grievant's behavior in front of him and a student. This behavior included Grievant cursing about Dr. Taylor and stating Dr. Taylor was incompetent, should be fired, and was a joke. Mr. Morgan felt threatened by Grievant's actions. Mr. Morgan noted Grievant's outburst included eight "F-ing expletives directed at [Dr. Taylor]." Resp. No. 2, at Level IV.

26. In the Fall of 2003, Grievant only had a few students sign up for his classes.

27. On September 5, 2003, Dr. Bragin wrote Grievant and reviewed the expectations of his contract, especially noting the negotiated addendum to Grievant's contract. Dr. Bragin observed Grievant was offered shared lab space and had indicated he needed his own space for his research. Dr. Bragin pointed out that he and Dr. Taylor had attempted to speak to Grievant in recent weeks, and Grievant had refused to discuss the matter with them. Dr. Bragin informed Grievant that they must agree on a plan for establishing Grievant's research program no later than September 26, 2003, he had scheduled him an appointment for September 15, 2003, and if Grievant continued to refuse to discuss his "professional obligations" he would be subjected to disciplinary action which could include a recommendation for termination. Resp. No. 11 at Level III. 28. On September 19, 2003, Dr. Bragin wrote Grievant to memorialize their prior discussion. The decision reached included where Grievant would conduct his research, Grievant's responsibility to inspect the space and identify his needs for equipment and refurbishment, and directed Grievant to discuss his issues with Dr. Taylor. Dr. Bragin stated Grievant could not refuse to discuss his professional obligations with Dr. Taylor and Dr. Bragin, and if this behavior persisted he could be subjected to disciplinary action which could include a recommendation for termination. Resp. No. 11 and Grt. No. 10 at Level III.

29. Grievant submitted a list for equipment that totaled at least $106,000. Dr. Bragin responded by e-mail on October 15, 2003, reminding Grievant that he had $30,000 to spend, expensive equipment must be shared, and asking Grievant to prioritize his request. Dr. Bragin also requested

Grievant's written assurance that Grievant would begin his research with the items MU was able to purchase at this time. Resp. No. 11 at Level III.

30. On that same day, October 15, 2003, Grievant wrote Sara Denman, Provost and Vice-President of Academic Affairs, complaining about Dr. Bragin's request to prioritize his equipment request, noting his equipment request was "reasonable and modest," and stating MU had failed to honor any of the written items in his contract. He indicated Dr. Bragin's requirement to provide a written statement that he would conduct his research when he did not have the proper equipment was unreasonable, and he could not write such a letter because he could not perform his research under these conditions. Resp. No. 11 at Level III. 31. In the Fall of 2003, Dr. Taylor asked Dr. Murray to put her complaints about Grievant into writing. She explained the steps she had used to assist Grievant, lighten his load, and to try to get him to be successful at MU. Dr. Murray noted she had taught in the Connection II course in Grievant's stead. She noted Grievant's anger toward MU, hostility toward students and faculty, and incessant complaints about lab space and desire to change the curriculum. She stated, "I'm afraid we won't have a program if he continues in the program." She described Grievant as "intimidating and exhausting" and concluded Grievant was "not a good fit for our program." Resp. No. 2.

32. Pursuant to MU's policies, Grievant received his second evaluation on November 18, 2003. Resp. No. 20 at Level IV. Grievant was rated as unacceptable in all categories. Dr. Taylor noted student enrollment in Grievant's classes had declined and no student, as of the evaluation date, had preregistered for his spring semester classes. Grievant's failure to conduct the research he was hired to perform was discussed. The difficulties in getting him to examine lab space and make reasonable monetary request for lab equipment was noted. Grievant had no publications accepted or in press, no in-work- preparation, and his annual report did not list plans to pursue research of any kind. (See footnote 6) Grievant's refusal to communicate with Dr. Taylor and Dr. Bragin except in written form was addressed, as this refusal made the resolution of problems almost impossible. Grievant's tendency to denigrate students and faculty was examined, and his hostile, aggressive interaction style was seen as creating a negative impact on the IST program. Resp. No. 3, at Level IV.

33. Grievant refused to sign this evaluation, and he wrote to Dr. Bragin on December 3, 2003, to complain. He protested the evaluation and said it was "offensive and vicious." He stated he had good relationships with colleagues in other departments, and he asked for a transfer to the Biology

Department. Resp. No. 3, at Level IV.

34. On December 11, 2003, Dr. Bragin completed his evaluation of Grievant for the 2003-2004 academic year. He reported he had read Dr. Taylor's evaluation and agreed Grievant's performance was unacceptable. He confirmed he would recommend Grievant's appointment not be renewed. Dr. Bragin explained his decision by noting Grievant's poor relationships with faculty and students, refusal to communicate with other faculty, and failure to establish a research program. He reported there were still no students preregistered for his spring classes. Resp. No. 3, at Level IV.

35. By separate letter also dated December 11, 2003, Dr. Bragin informed Grievant that despite repeated warnings and discussions, Grievant had failed to honor the terms and conditions of his contract. Dr. Bragin noted Grievant was hostile toward the students, and no students had signed up for his spring courses. Additionally, Grievant failed to work collegially with other faculty members and did not establish a research program. He informed Grievant he was not recommending renewal of his contract. Resp. No. 13 at Level III.

36. Contrary to the assertions of Grievant's representative, MU and Dr. Taylor and Dr. Bragin played no role in the students' failure to sign up for Grievant's classes. While it is true Grievant's classes were not listed online, this is because they were all upper level "permission" classes, and students could not sign up unless they had the instructor's permission. No "permission" classes are listed for online sign up. Grievant's courses, likeall other "permission" classes are listed in paper course listings readily available on campus, are listed online for informational purposes, and students are advised regarding what courses are available each semester. Other faculty members who had "permission" classes had students sign up for their courses. Test. Dr. Taylor and Dr. Bragin at Level IV Hearing; Resp. Nos. 17-18 at Level IV.

37. By letter dated December 12, 2003, Grievant received his notice of non- reappointment from President Dan Angel. Information concerning the grievance process was included.

38. Grievant then wrote Dr. Taylor on January 22, 2004, and asked him to reconsider his evaluation and termination and to please consider this memo as part of the grievance process. Dr. Taylor responded on the same day and informed Grievant he would not change his recommendation. Dr. Taylor also told Grievant how to file a grievance and where to go to obtain the papers. Grt. No. 1 at Level III.

39. Grievant elected to not appear in person for any portion of these grievance proceedings.

Grievant's representative explained this process would be too emotionally upsetting for Grievant.

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. Turman v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-199 (Nov.8, 1999); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidencewhich is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

MU's faculty handbook, the Greenbook, and Series 36 govern MU's actions and provide that the appointments of probationary faculty members are "issued on a year-to- year basis." Probationary faculty, such as Grievant, may be terminated at the end of the contract year "for any reason that is not arbitrary, capricious, or without factual basis." Series 36 § 9.4; Grt. No. 14 at Level III. These rules provide Respondent with broad discretion.

"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 Res., 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 todetermine 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. See Hattman v. Bd. of Directors, Docket No. 98-BOD-439 (Apr. 30, 1999).

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. See generally Siu v. Johnson, 784 F.2d 238 (4th Cir. 1984); Smith v. Univ. of N. Carolina, 632 F.2d 316 (4th Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); Cohen v. W. Va. Univ., Docket No. BOR1-86-247-2 (July 7, 1987). See Siu, supra; Kauffman v. Shepherd College, Docket No. BOR1-86-216-2 (Nov. 5, 1986).

This strategy generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspectsof arcane scholarship beyond the competence of individual judges." Kunda, supra, at 548. See also Bina v. Providence College, 39 F.3d 21 (1st Cir. 1994), cert. denied, 115 S. Ct. 1406 (1995); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).

The issues to be decided in this grievance are whether MU's nonrenewal of Grievant's contract was arbitrary and capricious, not founded on a factual basis, or done as a form of discrimination, favoritism, and/or retaliation. Additionally, Grievant asserts the primary reason for the renewal of his contract was collegiality and this is an impermissible reason according to the Grievance Board's case of Broziak v. Board of Trustees/Marshall University, Docket No. 98-BOT-142 (Nov. 30, 1998).

A. Merits - Arbitrary and capricious/without factual basis

MU elected not to renew Grievant's probationary contract beyond the 2003-2004 academic year in accordance with authority contained in Series 36 of the Procedural Rules. As previously noted, the standard of review is whether the action taken by MU was arbitrary and capricious or without factual

basis.

Particularly relevant to the merits of this grievance are the following provisions relating to probationary faculty members:

> 9.4. During the probationary period contracts shall be issued on a year-to-year basis, and appointments may be terminated at the end of the contract year. During said probationary period, notices of non-reappointment may be issued for any reason that is not arbitrary, capricious, or without factual basis. Any documented information relating to the decision for nonretention or dismissal shall be provided promptly to the faculty member upon request.
>
> 9.5. After the decision regarding retention has been made by a President, he or she will notify the probationer of the decision as soon as practicable. In cases of nonretention of faculty who began service at the start of the fall term, formal notification shall be given:
>
> . . .
>
> 9.5.2. Not later than December 15 of the second academic year of service. . . .

Grt. No. 14 at Level III.

Obviously, MU is bound by the substantive and procedural requirements set forth in its Greenbook; however, the burden of proof in this matter rests with Grievant.

Grievant has not met his burden of proof and demonstrated by a preponderance of the evidence that his nonretention was arbitrary and capricious or without a factual basis. The record is replete with Grievant's history of multiple problems as demonstrated in the Findings of Fact in this Decision. Grievant did not relate well with the students, changed the course syllabus in mid-semester, was non-responsive to his duties as an instructor, and failed to set up a research program involving students. While it is true Grievant's student evaluations did improve, it is clear students did not wish to take his courses because they did not sign up for his spring classes.

Additionally, Grievant did not relate well to his supervisor and other IST faculty members. He was demeaning to these colleagues and disparaged their work. He refused to pull his weight in the Connections I course, and no one wanted to teach with him. Grievant's behavior required Dr. Murray to take over his Connection II course work.

As for the very important research component, Grievant just never fulfilled this requirement. He had many excuses and constantly complained about his lab space and lack of funding, but Grievant was aware before he came that funding and space was limited as demonstrated in the addendum to his contract. While it may be true that Grievant could not conduct all the research he wanted with the limited resources, it wasunclear why Grievant did not at least begin to conduct some research and involve students in this process.

Although Respondent did not have the burden of proof in this situation, it established Grievant was unacceptable in teaching and unacceptable in research and scholarly activities. Nothing ever appeared to be Grievant's fault. Attempts to point out Grievant's errors were seen as forms of harassment or retaliation, and Grievant's response was exceedingly childish. Grievant's refusal to speak to his first and second level supervisors, Dr. Taylor and Dr. Bragin, was inappropriate and appears to be a plan designed to ensure failure. Dr. Bragin and Dr. Taylor tried to point out to Grievant that it was necessary to communicate face-to-face to reach a resolution of the lab space issue. It would appear Grievant was not desirous of any comprise, as seen by his request for $106,000 budget when he was asked to submit a request for $30,000. Respondent's decision not to renew Grievant's probationary contract was not arbitrary and capricious or lacking a factual basis.

B. Collegiality

Grievant asserts he was terminated because of his failure to be collegial with his fellow faculty members. He notes in Brozik that the administrative law judge found that, "it is arbitrary and capricious and clearly wrong to include collegiality as a factor in evaluating an application for promotion." The Brozik grievance does not apply to this case and is readily distinguishable. The grievant in Brozik was already tenured and was applying for promotion. The standard for review for promotion is very different from the standard for renewal of a probationary contract. As stated by the Greenbook at 6.1:

> 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; accessibility to students; professional and scholarly activities and recognition; significant service to the institution community; experience in higher education and at the institution; possession of the doctorate special competence, or the highest earned degree appropriate to the teaching field; publications and research; potential for continued professional growth; and service to the people of the State of West Virginia. (See footnote 7)

Grt. No. 14 at Level III.

The standard in non-retention cases is, "for any reason that is not arbitrary, capricious, or without factual basis." Clearly the two standards are different and are to be used for different purposes. As stated by Dr. Taylor, it is appropriate to assess a faculty member's ability to relate to students and faculty when the instructor is probationary, and the goal is to build a strong Department.

Further, it must be noted that Grievant's behavior was not just a lack of collegiality. Grievant's attitude toward teaching, as demonstrated by his treatment of the grading process, was so inappropriate that two students won their grade appeals. Grievant's behavior in the Connections I class, while exceedingly rude to Dr. Gooding, did not end there and had an effect on the content and quality of the course. Additionally, Grievant failed to fulfill his teaching responsibilities, and he appeared to try to intimidate Dr. Gooding to the point where he would not have to perform the requirements of the course.

C. Discrimination and favoritism

Grievant has alleged the action of Respondent are based in discrimination and favoritism. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 8) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't ofCommunity Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not met his burden of proof and established a prima facie case of discrimination and/or favoritism. He did not demonstrate he was similarly situated to another faculty member that was treated differently. In fact, there was no evidence presented by Grievant about any other faculty member, as he called only one witness, a student, and this student did not speak to discrimination or favoritism.

D. Retaliation

Grievant has also alleged his treatment was the result of reprisal. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory

motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Although somewhat unclear, Grievant's representative appeared to assert Respondent violated Grievant's right to academic freedom. Basically no evidence was presented on this issue, as Grievant did not call any witnesses about this issue. Accordingly, this assertion will not be discussed further.

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

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. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). See Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993). 2. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

3. "[A]n allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegations by a preponderance of the evidence." Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). In addition, a grievant must show the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as “harmless error.” Bradley, supra; Dadisman v. W. Va. Div. of Rehab. Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999).

4. Grievant failed to demonstrate that MU did not abide by the remedies and procedures it had established.

5. Appointments of probationary faculty members are issued on a year-to-year basis and may be terminated at the end of the contract year "for any reason that is not arbitrary, capricious, or without factual basis." 128 C.S.R. 36 § 9.4 (1997); Grt. No. 14 at Level III.

6. "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 ofHealth and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra. See Hattman v. Bd. of Directors, Docket No. 98-BOD-439 (Apr. 30, 1999).

7. Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. See generally Siu v. Johnson, 784 F.2d 238 (4th Cir. 1984); Smith v. Univ. of N. Carolina, 632 F.2d 316 (4th Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). 8. In applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty, this decisional, subjective process is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); Cohen v. W. Va. Univ., Docket No. BOR1-86-247-2 (July 7, 1987). See Siu, supra; Kauffman v. Shepherd College, Docket

No. BOR1-86-216-2 (Nov. 5, 1986). 9. Respondent's decision to not renew Grievant's probationary contract was not arbitrary and capricious or without factual basis.

10. Because Grievant was a probationary faculty member, MU is allowed to consider his failure to interact appropriately with faculty in deciding whether to renew his contract. See Broziak v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-142 (Nov. 30, 1998).

11. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

12. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

13. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). 14. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v.

W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

15. Grievant did not meet his burden of proof and did not establish a prima facie case of discrimination and/or favoritism.

16. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

17. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

18. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

19. Grievant failed to establish a prima facie case of reprisal.

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 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: September 29, 2003

Footnote: 1

Grievant was represented by W. Joseph Wyatt, Chair of Marshall University's West Virginia Federation of Teachers. Marshall was represented at Level IV by Jenndonnae Houdyschell, Assistant Attorney General.

Footnote: 2

MU filed a Motion to Dismiss because of Grievant's failure to appear in person. Because there is no rule or regulation that requires a grievant to appear in person during the grievance process, this Motion was denied.

Footnote: 3

Grievant is originally from France, but moved to West Virginia from Fargo, North Dakota.

Footnote: 4

Grievant's representative asserted Grievant did not receive these evaluations. Dr. Taylor testified he sent Grievant's evaluations just like he did all other faculty members, and none of them, including Grievant, complained they were not received. As Dr. Taylor's testimony was unrebutted, it was accepted as true.

Footnote: 5

Grievant compared his equipment and funding to faculty in the Biology Department and found himself wanting. Several faculty in the Biology Department had received funding from ESPCORE, but these monies were not given to Grievant's section.

Footnote: 6

A comparison of Grievant's two annual reports demonstrates a decrease in Grievant's research and publications.

Footnote: 7

It is noted a candidate for promotion and tenure is typically required to demonstrate effective performance in all of his major areas of responsibility, and to demonstrate excellence in two or more such areas, including either teaching and advising or research and scholarly activities.

Footnote: 8

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).