THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PURNIMA SHARMA,
Grievant,

v. **DOCKET NO. 2009-1660-NCC**

WEST VIRGINIA NORTHERN COMMUNITY COLLEGE,
Respondent.

DECISION

Grievant, Purnima Sharma, filed a grievance against her employer, West Virginia Northern Community College, on June 1, 2009, challenging the "denial of merit points under activity # 19 of Faculty Merit Pay Procedure." As relief Grievant sought, "[f]our (4) merit points for attending AAPT, and WVADE/WVCCA conferences."

A conference was held at level one on July 8, 2009, and a level one decision denying the grievance was issued on July 20, 2009. Grievant appealed to level two on July 31, 2009, and a mediation session was held on September 21, 2009. Grievant appealed to level three on October 13, 2009, and a level three hearing was held before the undersigned Administrative Law Judge on December 3, 2009, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on January 11, 2010.

Synopsis

Grievant submitted an application for merit pay in March 2009, with documentation seeking 21 points for her activities, which would have placed her at Level Three under the Faculty Merit Pay Procedure. The Merit Review Committee rejected two of Grievant's activities for insufficient documentation, recommending that she be awarded 17 points, and the President of the college accepted this recommendation, placing Grievant at Level Two under the Faculty Merit Pay Procedure. The two rejected activities were attendance at two conferences. There was no question that Grievant attended the two conferences, but rather, Respondent contended that the documentation of attendance submitted by Grievant was not the type of documentation required by the Merit Pay Procedure. Respondent's rejection of Grievant's two activities was arbitrary and capricious.

The following Findings of Fact are made based upon the evidence presented at levels one and three, consisting of the exhibits from the level one conference, and the testimony and exhibits presented at level three.

Findings of Fact

1. Grievant is employed by Respondent, West Virginia Northern Community College ("WVNCC"), and is a full professor.

2. The faculty of WVNCC have adopted a Faculty Merit Pay Procedure. The Procedure states, "Faculty merit pay at West Virginia Northern Community College will be awarded using the criteria and procedures detailed in this procedure."

3. In order to be considered for merit pay, a faculty member must submit an application, documenting his or her activities, by the first Friday in March.

4. Merit applications are reviewed by a seven member Merit Review Committee, comprised of two administrators and five faculty members. The Vice-President of Academic Affairs and the Human Resources Director are non-voting members of the Committee. This Committee makes a recommendation to the President of WVNCC, who makes the final decision on merit applications.

5. The Faculty Merit Pay Procedure provides that faculty may only submit documentation of activities on the Merit Activities List set forth in the Procedure. A faculty member earns a designated number of points for each activity. A faculty member who earns 6 points has met the Level One requirements, a faculty member who earns 12 points has met the Level Two requirements, and a faculty member who earns 18 points has met the Level Three requirements.

6. Grievant submitted an application for merit pay in March 2009. In her application Grievant submitted documentation seeking 21 points for her activities. The Merit Review Committee rejected two of Grievant's activities for insufficient documentation, recommending that she be awarded 17 points. The President of WVNCC accepted this recommendation, placing Grievant at Level Two.

7. The activities rejected by the Merit Review Committee were two conferences, both of which were held locally, so that Grievant did not incur any travel expenses. Neither conference provided certificates of attendance.

8. The first conference was a Joint Annual Conference presented on October 22-24, 2008, at the Oglebay Resort & Conference Center, in Wheeling, West Virginia, by the West Virginia Association for Developmental Education and the West Virginia Community College Association, entitled Transformations and Transitions. Grievant

submitted a Request for Travel/Vehicle form (expense report) in an effort to document her attendance, in addition to a signed verification by her Interim Division Chair. The expense report requests reimbursement in the amount of $10.10 for the 20 miles traveled to Wheeling on October 24, 2008, to attend WVCCA conference, and $75.00 for the registration fee, and was signed by Grievant, her supervisor, and a representative from the Business Office.

9. The second conference was the American Association of Physics Teachers Organization conference, held in Wheeling on October 10-11, 2008, at which Grievant presented a paper entitled "Active Learning: Context Specific Asynchronous Discussions and Exploratory Project." Grievant was the President of this conference, and did not believe she should sign her own verification of attendance. Grievant asked another officer to sign a verification of attendance for this second conference, and he failed to respond to her request. Grievant then asked the Interim Division Chair what she should do, and he told her he would sign a verification of attendance for her, stating that his signature would be acceptable, and he did so.

10. Grievant was allowed to claim as an activity by the Merit Review Committee, and received merit points for the presentation she made at the American Association of Physics Teachers Organization conference, which activity was verified only by the signature of the Interim Division Chair.

11. The Merit Activities List includes at item number 19 attendance at professional conferences as an activity for which a faculty member may earn two points each for up to three conferences. The Guidelines listed under this activity for determining whether a faculty member has sufficient documentation of this activity state, "Certificates

of Attendance, document signed by a conference authority, or the Travel Expense Settlement form[1] with all necessary approval signatures will be acceptable verification. Meeting agendas or travel requests will not be acceptable."

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The issue presented is whether Respondent's rejection of the documentation of Grievant's attendance at two conferences was arbitrary and capricious. There is no question that had Grievant presented adequate documentation of her attendance, she would have received four additional points, placing her at level three. Respondent does not dispute that Grievant attended the two conferences. Respondent's position is that the faculty adopted the Faculty Merit Pay Procedure, it must be followed, and the faculty have strictly applied the Procedure. Grievant contends that the list in the Procedure of those documents which serve as verification of attendance is not an exclusive list, and that if the Chair's signature can serve as verification for some activities, as is provided in the Procedure, then it should be acceptable in this instance. Respondent argues that the

[1] This is not the same form as the Request for Travel/Vehicle form submitted by Grievant as discussed in Finding of Fact Number 8.

failure to list in the Guidelines that the Division Chair's signature is acceptable documentation of conference attendance excludes this as an option. Grievant believes it is arbitrary and capricious to reject her activities when there is no question that she attended the conferences and she provided the verification that was available to her.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

While the faculty of WVNCC may well have applied the Faculty Merit Pay Procedure strictly in other instances, when reading the above description of arbitrary and capricious action, what occurred here falls squarely within this description. The decision to reject Grievant's documentation of her attendance at two conferences when there is no question

that she attended is contrary to the evidence, so implausible that it cannot be ascribed to a difference of view, in disregard of the facts and circumstances, and unreasonable. Further, the Procedure does not say that the Guidelines for what is sufficient documentation are the only proof that will be accepted.

Grievant also requested for the first time in her appeal to level three that she be awarded three points under activity number 16 of the Merit Pay Procedure for the 2009-2010 year, and that a finding be made that the level one decision was "without good faith." No evidence was introduced at level three regarding activity number 16, and Grievant would not be entitled to this type of relief. Grievant is asking that she be awarded something which has nothing to do with this grievance, and which she has not yet been denied. She is seeking relief which is akin to damages, which the Grievance Board does not generally award. *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006). As to Grievant's claim of bad faith, the Grievance Board has rarely made such a finding, noting that the courts, for example in claims under the Civil Rights Act of 1964 have looked at whether the action was "'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it became clearly so.'" *Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996). The undersigned, having carefully reviewed the record in this matter, does not find that Respondent acted in bad faith.[2]

The following Conclusions of Law support the Decision reached.

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[2] Grievant attempted to place additional documents into the record after the hearing, attaching them to her post-hearing written argument. The record was closed at the conclusion of the hearing on this matter, and Grievant did not present any reason why the record should be reopened to submit these documents as exhibits. These documents have not been reviewed by the undersigned, and are not part of the record in this matter.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

3. Respondent's action in denying Grievant points for attending two conferences was arbitrary and capricious.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to credit Grievant with four additional points on her merit application made in March 2009, bringing her total points to 21, and placing her at Level Three, and to award her any merit pay to which she is entitled by virtue of her Level Three placement.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 27, 2010