THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBERT S. GALL,
Grievant,

v. **DOCKET NO. 2011-1649-WLU**

WEST LIBERTY UNIVERSITY,
Respondent.

DECISION

Grievant, Robert S. Gall, filed a grievance against his employer, West Liberty University, on May 11, 2011, when he was not promoted to the rank of Professor or granted tenure. After he filed his grievance, Grievant was given notice that he would be given a terminal contract of employment. As relief, Grievant seeks promotion to Professor and tenure at West Liberty University.

The parties agreed to waive levels one and two of the grievance procedure, and a level three hearing was held before the undersigned Administrative Law Judge on September 30, 2011, in the Grievance Board's Westover office. Grievant was represented by Elizabeth A. Slater, Esquire, Cassidy, Myers, Cogan & Voegelin, L.C., and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on November 3, 2011, upon receipt of the last of these proposals.

One additional procedural issue requires attention. In his written proposals, Grievant asserted that Respondent's Exhibit Number 17 was not a true copy of the letter West Liberty University President Robin Capehart sent to Grievant denying his application

for tenure, asserting that it omitted a critical paragraph of the letter sent to Grievant. Grievant asked that the copy of the letter he asserted was the true copy be considered evidence in this matter, and attached an affidavit from him attesting to the authenticity of the document. Grievant was represented by counsel at the level three hearing, and both Grievant and his counsel had ample time during the hearing to review Respondent's Exhibit Number 17, and to place evidence into the record. There was no objection to the admission of Respondent's Exhibit Number 17 at the hearing, and the record was closed at the conclusion of the level three hearing. Grievant specifically stated he did not wish to reopen the record. This request to place additional evidence into the record, after the record was closed, and without the opportunity for cross-examination, is **DENIED.**

Synopsis

Grievant applied for promotion to Professor and tenure in the Fall of 2010. His Department Chair and the Promotion and Tenure Committees all supported his promotion and tenure. The Interim Dean of the College of Liberal Arts, the Provost, and the President of West Liberty University did not support his promotion or tenure requests, asserting that Grievant had not demonstrated excellence in either the areas of professional/scholarly activity or teaching. Both applications were denied by the President, and Grievant was given a terminal contract of employment. Grievant demonstrated that the Interim Dean, the Provost, and the President did not fairly evaluate his professional/scholarly activity or his teaching, that they acted in an arbitrary and capricious manner, and that the conclusions of those in his department that he had met the standards for promotion and tenure had a sound basis in fact and should be upheld.

The following Findings of Fact are made based upon the evidence presented at level three.

Findings of Fact

1. Grievant has been employed by Respondent, West Liberty University ("WLU"), in the Department of Humanities, College of Liberal Arts, since 2005, as an Associate Professor.

2. Grievant teaches Philosophy and Religion courses, and is the only full-time instructor of these disciplines at WLU. WLU does not offer a major in either of these disciplines, and Grievant has no advisees. Grievant's classes are electives, however, every student seeking a Bachelor of Arts degree from WLU must take either Introduction to Philosophy, a Religion course, or a Foreign Language course. Most of the students in Grievant's Introduction to Philosophy courses have never been exposed to the concepts of Philosophy before.

3. Grievant submitted an application for promotion to Professor and an application for tenure in the Fall of 2010. Grievant's applications for both promotion and for tenure were denied by WLU President Robin Capehart, based on his finding that Grievant did not demonstrate excellence in teaching or excellence in professional or scholarly activity.

4. WLU Policy No. 216: Tenure and Promotion ("Policy 216") states that:

> The tenure review is based upon, but not limited to, the following general categories of evaluation. West Liberty University establishes four of the most important areas of faculty evaluation for tenure to be: teaching, professional or scholarly activity, service to the university, and professional conduct.

Respondent's Level Three Exhibit Number 2.

5. WLU Policy No. 217: Criteria for Faculty Rank and Promotion ("Policy 217") states that:

> West Liberty University establishes four of the most important areas of faculty evaluation for tenure to be: teaching, professional activity, professional conduct, and service. As an undergraduate teaching institution, excellence in classroom teaching is the most important criterion, but professional activity, service, and professional conduct are also extremely important. For promotion to the rank of assistant professor, quality teaching constitutes a heavily weighted criterion for promotion. Promotion to the ranks of associate or full professor requires satisfactory completion of additional criteria which are listed in the policy which follows. For the upper two professional ranks, quality teaching constitutes a necessary but not sufficient condition for promotion.[1]

6. Policy 216 states with regard to teaching:

> Teaching excellence must be supported by evidence of positive support of students and others who have been responsible for evaluating the classroom performance of a tenure applicant. The applicant's formal and informal efforts to improve his/her instructional technique(s); the applicant's documented contributions to curriculum development and/or revision; the applicant's record of student academic advising; the applicant's departmental or university curriculum involvement will be considered in a tenure review of teaching excellence. It is the responsibility of the applicant to assure that supporting materials are completed, included in his/her permanent record, and presented during the evaluation process.

7. Policy 216 states with regard to professional or scholarly activity:

> Professional or scholarly activity must be supported by documented evidence of relevant publication since appointment to the WLU faculty, creative productions and/or showings, research activity begun or continued since appointment, presentations to profession organizations, offices in professional societies, graduate study for the doctorate, documented professional activity or expertise, or significant professional activity related to the applicant's professional field. It is the responsibility of the applicant to

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[1] Grievant was not a novice instructor. He had already achieved the rank of Associate Professor at WLU upon his hiring. This rank would indicate that his teaching was either of the quality expected by WLU, or those who hired Grievant were not interested in the quality of Grievant's teaching prior to offering him employment.

assure that supporting materials are completed, included in his/her permanent record, and presented during the evaluation process.

8. Policy 217 provides that:

To establish the quality of teaching, evaluation may make use of, but is not limited to, peer evaluation, self-evaluation, Department Chair evaluation, student evaluation, or instruments applicable to a particular academic discipline. Cumulative evaluation of classroom performance will be utilized. Instructor's materials such as goals and objectives, course syllabi, examinations, handouts, etc. will also be introduced into the analysis. It is the responsibility of the faculty member to assure that these materials are completed, included in his/her permanent record, and presented in the portfolio during the promotion review process.

9. Policy 217 provides with regard to professional or scholarly activity:

To establish the quality and/or quantity of professional activity, evaluation may make use of, but is not limited to, scholarly contributions, unrefereed publication, refereed publication, professional conference presentation, professional membership and activity, professional development, professional grants, professional honor and/or recognition, or earned degrees. It is the responsibility of the faculty member to submit these materials for inclusion in his/her permanent record with the University and to present these in the portfolio during the promotion review process.

. . .

In addition, any person being considered for promotion to this rank [of Professor] must satisfy the following criteria:

PROFESSOR CRITERIA:

1. Documented improvement in teaching.[2]
2. Documented adherence to WLU professional conduct statement
3. Ten (10) years of full-time University teaching experience
4. Documented contributions in professional activity and service to the academic community beyond those cited at the time of promotion to associate professor.

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[2] Policy 217 also provides additional criteria for promotion to associate professor. One of these additional criteria is "documented teaching skill and effectiveness." If Grievant did not possess such skill and effectiveness, he should not have held the rank of associate professor.

10. Grievant was a member of the Faculty Senate from 2007, and began serving as the Faculty Senate Chair in 2008. He has served on several committees at WLU. During the 2008-2009 academic year, Grievant was the Assistant Chair of the Humanities Department. Grievant served as the Interim Chair of the Humanities Department during the 2009-2010 academic year. Grievant met the requirements for promotion to Professor and tenure in the areas of service to the university and professional conduct.[3]

11. Grievant had two publications in very distinguished journals and had made two presentations since 2005. He was a member of four organizations appropriate to his discipline.

12. WLU Policies 216 and 217 provide a multi-level evaluation process for the award of promotion and for tenure, beginning with the Promotion or Tenure Review Committee, and the Department Chair, and concluding with the President. The

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[3] WLU President Capehart in his letter denying promotion made reference for almost an entire page to his interactions with Grievant, noting that "a review of the e-mails provided demonstrates a pattern of disrespect, acerbic criticism, unnecessary sarcasm and the baseless impugnation of one's motives that is unprofessional and unbecoming of a person in a leadership position." He concluded that "it is my finding that your conduct does not meet the measure of respect and professionalism required." Respondent's Level Three Exhibit Number 18. The letter denying tenure contained the same language. Respondent's Level Three Exhibit Number 17. Interim Dean Brian L. Crawford likewise noted in his letters opposing Grievant's applications for promotion and tenure that he had observed that Grievant "has a propensity to criticize without sufficient information and to dismiss the opinions of others." Respondent's Level Three Exhibit Numbers 9 and 10. Apparently, Interim Dean Crawford shares this propensity to dismiss the opinions of others, as will be discussed. However, Grievant's colleagues in the Humanities Department, with whom he had significant contact, and Provost John McCullough did not share President Capehart's or Interim Dean Crawford's views of Grievant's professional conduct. Curiously, Respondent stipulated at level three that Grievant had met the standard for promotion and tenure in the areas of service to the university and professional conduct.

appropriate Dean and the Provost must also submit their formal recommendations. The faculty member may include written rebuttals in the promotion file throughout this process.

13. Grievant's promotion request was first reviewed by the three member Promotion Review Committee. The Committee members were Chair Peter Staffel, Jack Hattman, and David J. Thomas. By memorandum dated November 16, 2010, this Committee recommended Grievant's promotion to the rank of Professor. The memorandum to the Department Chair advising him of this recommendation stated, "[n]ot surprisingly, we agreed that Robert has more than adequately demonstrated his academic and collegial *bona fides* for promotion to full professor."

14. Grievant's application for tenure was first reviewed by the three member Tenure Committee. The Committee members were Melinda Kreisberg, Peter Staffel, and David J. Thomas, Chair. By memorandum dated November 15, 2010, this Committee unanimously recommended that Grievant be granted tenure.

15. Dr. Thomas has been an English Professor at WLU for 26 years, and was the Chair of the Humanities Department during two of the years while Grievant has been employed at WLU, 2007-2009. Dr. Thomas had no concerns about Grievant's teaching, and he did not bring any problems with Grievant to the attention of either Committee. Dr. Thomas had observed Grievant's teaching during the two years he was Chair of the Department, and felt Grievant met the standards for promotion and tenure at WLU. Dr. Thomas was "flabbergasted" that Grievant was not granted promotion or tenure.

16. Dr. Thomas' experience with the disciplines in the Humanities Department had led him to conclude that comparing Grievant's student evaluations to those of other

faculty in the Department was like comparing "apples to zebras." Dr. Thomas had reviewed Grievant's student evaluations.

17. Grievant had more publications and presentations during the two years Dr. Thomas was Department Chair than any other faculty member in the Humanities Department at that time.

18. Grievant received 95 out of a possible 100 points on his annual faculty evaluation by Dr. Thomas for the 2008-2009 academic year, receiving 45 out of 50 points in Teaching/Job Effectiveness, and the maximum points available in Professional Activities, Service, and Flex Points. For the 2007-2008 academic year he received 90 out of a possible 100 points from Dr. Thomas on his faculty evaluation. For the 2006-2007 academic year he received 85 out of a possible 100 points, having received 35 out of 50 points in Teaching/Job Effectiveness. Department Chair Sarah Coyne noted that Grievant "[s]till needs to help students understand course and do the work!" She noted beside Professional Activity, "[e]xcellent work!" For the 2005-2006 academic year, the Department Chair gave Grievant 70 out of a possible 100 points, noting he "[n]eeds to be more involved in department and college committees and activities," and making several suggestions for improvement in the area of Teaching/Job Effectiveness, and assigning 30 out of 50 points in this area.

19. Grievant's annual faculty evaluations show an improvement each year in his teaching performance.

20. Faculty evaluations are to be used by the department chair to identify areas that need improvement and they are used for merit pay purposes. The department chair should be moving the faculty member toward promotion. The faculty evaluations are

typically reviewed every year by the Dean of the College. None of the four Deans of the College of Liberal Arts during Grievant's five years of employment commented on Grievant's faculty evaluations.

21. Dr. Hattman was an English Professor at WLU for 47 years, and served on 25 to 30 promotion or tenure committees. Dr. Hattman is now retired. His experience has been that WLU has never placed a premium on publications. Dr. Hattman characterized Grievant as a tough teacher who did not give away grades, and based on his discussions with Grievant over the years, he had concluded that Grievant had a deep interest in improving his teaching, and that of others. Grievant and Dr. Hattman had discussed teaching many times over five years, and had shared articles on teaching with him. Dr. Hattman was "horrified" that Grievant was denied promotion and tenure.

22. It has been Dr. Hattman's experience with promotion and tenure at WLU that student evaluations are treated as vitally important, but they should only be a small part of the evaluation of the quality of teaching. Further, no one question in the student evaluations is to be considered more important than the other questions.

23. Grievant's promotion and tenure requests were next reviewed by Humanities Department Chair Wally Hastings, who endorsed Grievant's promotion and tenure. Dr. Hastings began his employment at WLU in August 2010, but had many years of experience at other institutions of higher education. His endorsement of Grievant's applications was based on Grievant's application materials, his personnel file, and his "own observations of his teaching and his collegial relations within the Department of Humanities." Chair Hastings found "Dr. Gall's research performance has been exceptional given the large teaching loads he has dealt with . . .. His letters and reviews have

appeared in some of the more prestigious journals in his field . . .." With regard to Grievant's teaching, Chair Hastings referred to the better student evaluations for upper level courses, and the improvement in student evaluations over the years, noting "his teaching evaluations have trended upward during his time here, a sign that he has adjusted to his students, or that they have adjusted to him." Chair Hastings specifically stated, "I had the opportunity to observe one of Dr. Gall's intro to philosophy classes during the fall term. Dr. Gall did not know I was coming until just before class time, so I must assume this was a fairly typical class. He clearly demonstrated his mastery of the topic of the day and seemed to present it at a level that should be accessible by most WLU students." Respondent's Level Three Exhibit Nos. 7 and 8.

24. It has been Dr. Hastings' experience that heavy teaching loads in the humanities, such as is the case with the professors at WLU, including Grievant, do not allow time for research and publications. Grievant teaches four courses each semester, his classes have relatively large enrollments, and three of those courses normally require separate preparation.

25. It is Dr. Hastings' opinion that not every discipline has the same standard for publication.

26. Dr. Hastings saw from the documentation he reviewed that there had been a distinct improvement in Grievant's teaching performance. He noted that many of the students responding to the student evaluation questionnaire had a C average before taking Grievant's courses. Dr. Hastings concluded from his review of Grievant's student evaluations that students made both negative and quite positive comments.

27. In reviewing Grievant's student evaluations, Dr. Hastings reviewed all the summaries, and tended to focus on the questions regarding enthusiasm, organization, and knowledge displayed. Dr. Hastings did not give more weight to the question regarding teaching effectiveness on the student evaluations, as he did not believe this was the most important question, nor did he give much weight to the student comments, although he reviewed them. He concluded that some of the comments were negative and some were quite positive. It has been his experience that the only students who write comments are those who are happy and those who are unhappy. Dr. Hastings focused on the mean score, as he believed that statistic gave him the most information. Dr. Hastings has concerns with everyone's student evaluations, and made some recommendations to Grievant on how he might engage students, but he was not overly concerned with Grievant's student evaluations.

28. Dr. Hastings did not believe that there was an appropriate peer group at WLU for Grievant's discipline.

29. In his observation of Grievant's classroom, Dr. Hastings kept in mind that concepts in Philosophy are difficult to follow, and even though this is not his discipline, he was able to follow Grievant's instruction, and found it well paced and well organized.

30. Brian L. Crawford, Interim Dean of the College of Liberal Arts at WLU, spoke to Dr. Hastings about Grievant's applications for promotion and tenure prior to Dr. Hastings' review of the same. Interim Dean Crawford told Dr. Hastings that WLU would stand behind Dr. Hastings' decision on Grievant's applications. Interim Dean Crawford did not make a similar comment with regard to the other applicant from the department. Dr. Hastings found this comment to be unusual, and inferred that WLU wanted him to reject Grievant's

applications for promotion and tenure, otherwise, there would have been no reason for the comment.

31. Grievant's promotion and tenure files were forwarded to Interim Dean Crawford. Interim Dean Crawford concluded that Grievant's "level of Professional/Scholarly Activity is quite unexceptional for a faculty member seeking to earn tenure [promotion to full Professor]. The publication of two articles in peer-reviewed journals and two presentations at regional professional conferences over the course of 5 years is not significant evidence of excellence in this category." Respondent's Level Three Exhibit Numbers 9 and 10.

32. Interim Dean Crawford thought that two articles did not stand out compared to "others" he had seen. Interim Dean Crawford did not identify these other faculty members, or to what time period he was referring, and he could not state a particular number of articles that would be acceptable. Interim Dean Crawford acknowledged that publications in peer reviewed journals carry more weight than publications in non-peer reviewed journals, and he did not indicate whether the "others' to whom he referred had publications in peer reviewed journals.

33. In evaluating Grievant's professional or scholarly activity, Interim Dean Crawford found it striking that Grievant had so many fewer publications during his five years at WLU than he had prior to his employment at WLU.[4]

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[4] Interim Dean Crawford pointed out that it would be improper to consider any publications occurring prior to Grievant's employment at WLU in evaluating his professional or scholarly activity. It would seem just as improper to evaluate his productivity at WLU by comparing it to his previous publication record.

34. When Interim Dean Crawford was awarded tenure in 2008, he had no publications, although he did have 12 presentations.

35. Interim Dean Crawford did not find excellence in Grievant's teaching record. He claimed that Grievant had not included "critical materials" in his promotion or tenure portfolios which he sought out and reviewed, suggesting that Grievant's applications were not complete. Interim Dean Crawford reviewed the student evaluations Grievant had not included in his portfolios, reports of grade distributions, faculty activity reports, and reports of withdrawal rates from Grievant's courses. Interim Dean Crawford acknowledged that Grievant was not required to place any of these documents in his applications.

36. Grievant included in his applications the student evaluations for all of his courses from the Spring of 2007 forward, although not all the comments were included. Grievant also included student evaluations for some of his courses prior to the Spring of 2007. The other student evaluations were in Grievant's personnel file which was available to all those reviewing Grievant's applications.

37. Interim Dean Crawford discounted the recommendations of the Promotion and Tenure Review Committees, stating that the brevity of their letters of recommendation suggested to him that they did not think they were doing anything very important. He felt the Committees should have explained in their letters how they arrived at their conclusions, although he acknowledged that they were not required to do so. He also suspected that neither Dr. Hastings nor the Committees had reviewed all of Grievant's student evaluations or his faculty activity reports, because he felt they would not have recommended Grievant for promotion and tenure had they done so. Dr. Hastings had reviewed Grievant's personnel file, which contained all his student evaluations and his faculty activity reports.

38. Interim Dean Crawford found the "required support of students is clearly lacking here, particularly in Dr. Gall's lower-level courses. His consistently low student course evaluations, along with grade distributions that show low average grades and high rates of withdrawals, *combine* to describe a far-less-than-excellent level of teaching and learning. His student course evaluations have consistently been the lowest among full-time faculty in the Humanities Department." Respondent's Level Three Exhibit Numbers 9 and 10. (Emphasis added.) Interim Dean Crawford believed that Grievant continued to have more negative comments on student evaluations than positive, and that the rate of withdrawal from his courses was "2.65 times the University average with grade distributions consistently skewed toward the low end of the spectrum. The most recent data available indicate, for example, that 49% of Dr. Gall's students received a grade of D or F or withdrew from his courses last semester. This compares very poorly to the University average of only 15% in these categories." Id.[5]

39. Neither WLU Policy 216 or 217 makes reference to using grade distributions or withdrawal rates in judging teaching excellence. Grievant was not aware that this information would be considered in evaluating his teaching, and no one ever told him that the grades he was giving were unacceptable or even an issue.

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[5] Grievant pointed out in his response to Interim Dean Crawford that his courses emphasize critical thinking skills, similar to courses in natural sciences and mathematics, which he had been informed also had higher rates of failure. Respondent's Level Three Exhibit Numbers 11 and 12. Of course, students are exposed to science and math at any early age, whereas, Grievant's course is the first exposure to Philosophy for most WLU students.

40. Interim Dean Crawford gave more weight to student responses to the question regarding teaching effectiveness on the student evaluations than to the other questions.

41. Interim Dean Crawford's reading of the student comments on student evaluations was that there was a pattern of Grievant belittling students, students were uncomfortable asking questions and engaging in discussion, Grievant was unable to effectively explain concepts, and the silences during class made students uncomfortable.[6]

42. Interim Dean Crawford stated in his letters recommending the denial of promotion and tenure that Grievant's "annual faculty evaluations have consistently indicated a need to make improvements, and/or an acknowledgment of the poor overall performance in teaching."

43. Grievant's last two Department Chairs, Dr. Hastings and Dr. Thomas, both concluded that Grievant had demonstrated quality performance in teaching. Dr. Hastings did not read the faculty evaluations as indicating poor performance in teaching, and he pointed out that just because suggestions have been made for improvement, this does not indicate that teaching performance is poor. Dr. Thomas had no concerns about Grievant's teaching, and did not intend to indicate on the faculty evaluation that he had concerns. He believed that a rating of 45 out of 50 possible points stated as much.

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[6] Grievant noted in his response to Interim Dean Crawford that philosophy requires that "one use critical thinking skills." That being the case, one would expect that there would be some silences during class to allow the students to engage these skills. Interim Dean Crawford did not explain why he was concerned that students were uncomfortable with these silences. This may be yet another indication that the WLU administration did not really understand Grievant's discipline. It may also be an indication that the students taking the Introduction to Philosophy course were not prepared for the course, and it may explain why they were uncomfortable asking questions and engaging in discussion.

44. Interim Dean Crawford's interpretation of Grievant's faculty evaluations is wrong.

45. Interim Dean Crawford did not give Grievant's faculty evaluations a lot of weight in making his recommendation. He gave the student evaluations as much weight as the faculty evaluations, if not more.

46. Grievant's applications for promotion and for tenure next went to WLU Provost John McCullough. Provost McCullough recommended that Grievant be denied promotion and tenure based on his conclusion that Grievant had not met the requirements of excellence in teaching or in professional or scholarly activity.

47. Provost McCullough found Grievant's publication record to be "limited." He could not state a particular number of publications and presentations that would be required, but in his opinion, an average of one per year would be a reasonable expectation. Provost McCullough did not point to any other faculty member at WLU who had been held to this standard, nor did he indicate that Grievant had been made aware of this expectation. Like Interim Dean Crawford, Provost McCullough also compared Grievant's publication record while at WLU to his publication record before joining the WLU faculty.

48. Provost McCullough concluded that Grievant's course materials were of good quality.

49. Provost McCullough gave more weight to the question regarding teaching effectiveness on the student evaluations than to other questions. He also focused on the comments by students indicating that they thought the introductory course taught by Grievant was too hard, opining that a quality instructor would make an adjustment, although he acknowledged that such a comment was not necessarily a negative comment.

50. Provost McCullough considered the grade distributions in Grievant's classes and the withdrawal rates. His review showed that Grievant had the highest number of D's and F's in the Humanities Department, and one of the highest in the College of Liberal Arts. He found this to be an exceedingly high number of D's and F's. He had never brought this to Grievant's attention prior to this.

51. Provost McCullough did not consider it to be significant that Grievant's introductory philosophy course would be the first exposure to philosophy for most students, comparing philosophy to business and economics courses, and suggesting that philosophy is no more abstract than economics; although he admitted that he was not well versed in philosophy.[7]

52. Finally, Grievant's applications for promotion and tenure were reviewed by WLU President Robin Capehart. President Capehart relied on the expertise and recommendations of Interim Dean Crawford and Provost McCullough in arriving at his decision to deny promotion and tenure, although he did review Grievant's portfolio. President Capehart's review of Grievant's student evaluations led him to the conclusion that the student comments were "overwhelmingly negative."

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[7] The undersigned is frankly miffed at the suggestion from a Provost at a university that economics is as abstract as philosophy. Even a simple review of the dictionary definitions of the two disciplines demonstrates this to be an inaccurate comparison. Economics is defined simply as "[t]he science that deals with the production, distribution, and consumption of commodities." The American Heritage Dictionary. Philosophy, however, has many definitions, including "[t]he synthesis of all learning," and "[t]he investigation of causes and laws underlying reality." Id.

53. Neither Interim Dean Crawford or Provost McCullough took into consideration in reviewing Grievant's student evaluations that none of the students in his introductory courses are pursuing a major in the discipline.

54. WLU Policy No. 216 states at paragraph number 20 that, "[s]hould tenure be denied, the applicant's right to appeal will be communicated in the President's notice." President Capehart did not communicate to Grievant that he had the right to appeal the denial of tenure.

55. WLU Policy No. 216 also states at paragraph number 20 that, "[i]f the President denies tenure, the tenure track faculty member will be concurrently notified by the President that the seventh contract year will be a terminal contract." By letter dated June 9, 2010, President Capehart notified Grievant that his contract for the 2011-2012 academic year would be a terminal contract of employment. This notice was dated June 9, 2010, more than a month after the letters notifying Grievant of the denial of his requests for promotion and tenure. President Capehart did not provide this notice at the time required by WLU Policy because he forgot.

Discussion

Grievant has the burden of proving his 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 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. BOR1-86-247-2 (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-BOT-220 (Mar. 18, 1994). "Deference is granted to the subjective determination made by the official[s] administering the process." *Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995); *Gardener v. Bd. of Trustees/Marshall Univ.*, Docket No. 93-BOT-391 (Aug. 26, 1994). Thus, the review of an institution of higher learning promotion decision is "generally limited to an inquiry into whether the process by which such decisions are made conforms to applicable college policy or was otherwise arbitrary and capricious." *Harrison, supra*; *Nelson v. Bd. of Trustees/W. Va. Univ.*, Docket No. 99-BOT-514 (June 22, 2001); *Baroni v. Bd. of Directors/Fairmont State College,* Docket No. 92-BOD-271 (Feb. 11, 1993).

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).

Further, "[t]he undersigned 'is limited to considering the record before the decision-maker at the time of the decision. An applicant is responsible for informing the decision-maker of [his] qualifications for promotion. If [he] does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a promotion grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it.' *Baker v. Bd. of Trustees*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citations omitted). *See also, Castiglia v. Bd. of Trustees*, Docket No. 97-BOT-360 (May 27, 1998)." *Brozik v. Bd. of Trustees,* Docket No. 98-BOT-142 (Nov. 30, 1998).

"In higher education, promotions are not a statutory right nor a reward for a faculty member's years of service." *Baker, supra; Hart v. Bd. of Directors*, Docket No. 95-BOD-198 (Mar. 6, 1996). However, "[p]romotion and tenure are paramount professional and economic goals of a teacher. Grievant has a valuable property interest in this expectation

of tenure. *State ex. rel. McLendon v. Morton,* 162 W. Va. 431, 249 S.E.2d 919 (1978)." *Finver v. Bd. of Trustees,* Docket No. 97-BOT-271 (Oct. 15, 1997).

Grievant's applications for promotion and tenure were denied by President Capehart based on a finding that he had not demonstrated excellence in teaching or in professional or scholarly activity. President Capehart relied on the recommendations of Interim Dean Crawford and Provost McCullough in making his decision, but it is also clear from President Capehart's letters that he had a personal dislike of Grievant.

There is no doubt that the evaluation of teaching excellence and excellence in professional or scholarly activity is subjective, and that the undersigned certainly has no means to make an independent judgment as to whether Grievant met the criteria of WLU. In this case, the undersigned is presented with a situation where four faculty members and the Department Chair, who had the most familiarity with Grievant's teaching and the standards of his discipline, came to the conclusion that he met the standards set by WLU, while three administrators did not. So the question is, which group got it right? Having heard the explanations offered by various individuals, and having reviewed the somewhat scathing letters written denying Grievant's applications, the undersigned must conclude that it is the conclusions of the Committees and the Department Chair which should be given deference, while the opinions of the three higher level administrators should be discounted.

It appears from the evidence that Interim Dean Crawford, Provost McCullough, and President Capehart had issues with Grievant, and had already decided prior to reviewing his applications that they would not be granted. Their written decisions go out of the way to criticize the decisions of the Promotion and Tenure Committees and Dr. Hastings, going

so far as to suggest that the Committees did not take their role seriously. It appears to the undersigned that it is Interim Dean Crawford, Provost McCullough, and President Capehart who did not take their roles seriously, basing their decisions on their personal problems with Grievant, rather than his professional record of achievement.

Grievant clearly demonstrated that the conclusions reached by Interim Dean Crawford, Provost McCullough, and President Capehart with regard to his professional or scholarly activity met all the factors representing arbitrary and capricious conduct. Respondent put forward no information whatsoever regarding the number of peer-reviewed publications by any other faculty member at WLU who had *ever* been granted promotion or tenure, let alone close to the time of Grievant's application. The only number placed in the record was that Interim Dean Crawford had NO publications prior to his award of tenure. While Interim Dean Crawford stated that Grievant's publication record did not stand out compared to others he had seen, he provided no testimony regarding these "others." Further, he clearly compared Grievant's publication record while at WLU to his publication record prior to his employment record at WLU, stating that it was "striking" that he had so many fewer publications during his five years at WLU. This comparison is improper, and further calls into question Interim Dean Crawford's judgment. The issue before those evaluating Grievant's applications was whether he met the standards for excellence at WLU.

Grievant, however, placed into the record his faculty evaluations on which he had earned the maximum points in the area of professional or scholarly activity, with no indication that he was not doing what was expected of him, and he presented the testimony of Dr. Thomas that Grievant had the **most** publications and presentations in the

Humanities Department while he was chair. Dr. Hastings pointed out that not only was Grievant interim chair of the department for one year, but WLU faculty have heavy teaching loads, both of which translate into reduced publications. He also noted that Grievant's publications were in very distinguished journals. Dr. Hattman pointed out that WLU has never been a publish or perish institution. Grievant demonstrated that his professional or scholarly activity met or exceeded the standards expected by WLU for promotion to Professor and tenure.

As to Grievant's teaching, Grievant had excellent faculty evaluations, and those who actually observed his instruction felt he met the standard of quality required by WLU. Even Provost McCullough acknowledged that his course materials were quality materials. Those who felt he did not meet the standard of excellence relied solely on student evaluations, grade distributions, and withdrawal rates, and their misguided interpretations of his faculty evaluations.

This Grievance Board has previously held that student complaints *and* poor student evaluations may support a finding that teaching and advising does not meet the standard of effectiveness, even where classroom observations by peers have resulted in good evaluations. *Schiavone v. Higher Educ. Policy Comm'n/Marshall Univ.*, Docket No. 02-HEPC-152 (Nov. 22, 2002), *aff'd* Cir. Ct. of Kanawha County, Civil Action No. 02-HEPC-152 (Dec. 22, 2004); *Shackleford v. W. Va. Bd. of Directors,* Docket No. 96-BOD-414 (Oct. 9, 1997); *Gomez-Avila* [*v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT-524 (Mar. 14, 1995), aff'd Cir. Ct. of Cabell County, Civ. Action No. 95-C-266 (Sept. 19, 1995), ref'd (Feb. 7, 1996)]. In *Gomez-Avila,* the grievant not only had low ratings on the student

evaluations, but she also had received a poor rating on her most recent faculty evaluation in the area of teaching, and had been placed on an improvement plan.

In this case, there was no evidence of any student complaints about Grievant. Interim Dean Crawford and Provost McCullough seemed to rely heavily on grade distributions, and withdrawal rates, as well as their interpretation of student evaluations. The only justification provided for using grade distributions and withdrawal rates was Provost McCullough's opinion that the best teachers do not have a high number of D's and F's or high withdrawal rates. Neither WLU Policy 216 or 217 lists grade distributions or withdrawal rates as information which is to be considered in evaluating teaching. Grievant opined that using grade distributions to measure teaching performance comes close to infringement on academic freedom, and he pointed out that students withdraw from classes for any number of reasons. There is no indication that any survey was conducted of those withdrawing from Grievant's classes. This statistic standing alone is meaningless in rating teaching performance, and it was inappropriate to consider it under these circumstances. As to grade distributions, this statistic is also meaningless standing alone. Dr. Hastings pointed out that most of Grievant's students already have a C average. One would not expect students with a C average to do well in their first exposure to Philosophy. The undersigned must discount the opinions of Interim Dean Crawford and Provost McCullough further based on their substantial reliance on this information.

It is clear from the testimony of the witnesses supporting Grievant's promotion and tenure and the testimony of the witnesses opposed to Grievant's promotion and tenure, that, although this Grievance Board has allowed great emphasis to be placed on student evaluations, they are like many statistics: they can be manipulated to achieve the result

desired. Those supporting Grievant's applications had absolutely no issue with the student evaluations, and had reviewed all of them despite Interim Dean Crawford's speculation to the contrary. Those opposed to Grievant's applications saw the student evaluations differently, and used them to criticize his teaching. The undersigned cannot find from these divergent opinions that Grievant's student evaluations support a finding of poor teaching performance. Once again, the undersigned finds from the evidence presented that the recommendations of the Promotion Review and Tenure Committees and Chair Hastings are entitled to deference in evaluating Grievant's teaching performance. Grievant has demonstrated that President Capehart acted in an arbitrary and capricious manner in denying his applications for promotion and tenure.

Given the outcome, the failure of President Capehart to advise Grievant of his appeal rights, and the delayed notice to Grievant of his terminal appointment because President Capehart forgot, are moot issues, and need not be addressed.

Finally, Grievant requested for the first time in his Proposed Findings of Fact and Conclusions of Law that the undersigned award attorney's fees, arguing that no statutory authorization is necessary for such an award when a party has acted in "bad faith, vexatiously, wantonly or for oppressive reasons," citing *Sally-Mike Properties v. Yochum*, 179 W. Va. 48, 365 S.E.2d 246 (1986). "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: '(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be

borne by the party incurring the expense.'" *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). However, an Administrative Law Judge has the statutory authority to "make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs." W. Va. Code § 6C-2-4(c)(6). It is important to note that this relief had not previously been requested, and Respondent was not put on notice that it needed to respond to this argument. Accordingly, even were the undersigned with authority to award attorney's fees, this request was not properly raised in a timely fashion. Moreover, the undersigned cannot equate the arbitrary and capricious action found herein to an extreme instance of bad faith.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his 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 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. BOR1-86-247-2 (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-BOT-220 (Mar. 18, 1994).

4. 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).

5. The conclusions of the Interim Dean, Provost, and President of WLU that Grievant did not meet the standards at WLU for promotion and tenure in the area of scholarly/professional activity were not supported by substantial evidence or a rational basis, and are clearly wrong.

6. The conclusions of the Interim Dean, Provost, and President of WLU that Grievant did not meet the standards at WLU for promotion and tenure in the area of

teaching were not supported by substantial evidence or a rational basis, and are clearly wrong.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to grant Grievant's applications for promotion and tenure, and to issue him the appropriate contracts of employment to reflect this. Grievant's untimely request for an award of attorney's fees is **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. *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: December 14, 2011