THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOSEPH L. SCARPACI,
Grievant,

v. **DOCKET NO. 2013-2229-CONS**

WEST LIBERTY UNIVERSITY,
Respondent.

DECISION

Grievant, Joseph L. Scarpaci, filed two grievances against his employer, West Liberty University, on May 20, 2013, when he was not awarded tenure, and then was provided notice that he would be given a terminal contract of employment. As relief, Grievant seeks tenure at West Liberty University.[1]

The parties agreed to waive levels one and two of the grievance procedure, and the two grievances were consolidated at level three. The parties then requested the opportunity to meet in a mediation session, and a mediation was held on September 23,

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[1] Grievant argued that he should be awarded attorney fees, based on a finding of bad faith. "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). 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). The undersigned cannot equate the arbitrary and capricious action found herein to an extreme instance of bad faith. *Gall v. W. Liberty Univ.*, Docket No. 2011-1649-WLU (Dec. 14, 2011).

2013. A level three hearing was held before the undersigned Administrative Law Judge on October 2, 2013, in the Grievance Board's Westover office. Grievant was represented by Yolanda G. Lambert, Esquire, Shrader, Byrd & Companion, PLLC, 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 November 12, 2013, on receipt of the last of these proposals.

Synopsis

Grievant applied for tenure after being employed at West Liberty University for one year. When Grievant was hired, he accepted the position with the understanding that he would be allowed to apply for tenure after one year, and that three to four years of his prior experience would be considered when he applied. This offer was approved by the President of West Liberty University, in writing. West Liberty's Policy 216 states that a professor must be employed at West Liberty University for five years before he can apply for tenure. The Tenure Review Committee determined that it had no authority to review the application for tenure because of the Policy 216 requirement. The Dean of the College of Business recommended Grievant for tenure. The new Provost acknowledged that Grievant had been told he could apply for tenure early, but refused to look at Grievant's record prior to his time at West Liberty, and recommended that tenure be denied. The President questioned whether Grievant could apply for tenure, and then denied tenure based on the Provost's written denial, and issued Grievant a terminal contract. A terminal contract is provided for in Policy 216 for the employee's seventh year after tenure is denied, and as Grievant had not been an employee for six years, this provision was not applicable. Respondent's actions were arbitrary and capricious. WLU entered into an

agreement with Grievant to waive the provision of Policy 216 which required that he be employed at WLU for five years before he could apply for tenure. That agreement included that Grievant's last three to four years of work, prior to his employment at WLU would be considered in the tenure review.

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

Findings of Fact

1. Grievant has been employed by Respondent, West Liberty University ("WLU"), as an Associate Professor of Marketing in the Gary E. West College of Business, since May 2011.

2. Sometime prior to 2011, Dr. Loren Wenzel accepted a position at WLU as Dean of the Gary E. West College of Business, and was hired as a tenured professor. WLU President Robin C. Capehart had worked with Dr. Wenzel at Marshall University. President Capehart told Dr. Wenzel that he wanted to have the best college of business in the State of West Virginia, and he should do whatever he needed to do to achieve that goal. Dr. Wenzel began trying to recruit faculty with the academic credentials necessary to move the college of business forward. Dr. Wenzel is no longer employed at WLU.

3. Prior to accepting a position at WLU, Grievant was employed at Virginia Tech University as an adjunct professor of marketing, and had acquired tenure at Virginia Tech. Grievant has a Ph.D. in Geography, and a Certificate in Marketing stating he is Academically Qualified from the Association to Advance Collegiate Schools of Business (AACSB). He has been an Assistant, Associate, Emeritus, or Adjunct Professor at various

institutions since 1985, and prior to that he was an Instructor at the University of Florida from 1980 to 1985.

4. By memorandum dated May 13, 2011, Dr. Wenzel recommended to Dr. John McCullough, Vice-President of Academic Affairs, Provost, at WLU, that Grievant be hired for a tenure-track appointment. The memorandum further stated, "[g]iven that Dr. Scarpaci has been tenured at Virginia Tech I am also recommending that WLU allow Dr. Scarpaci to apply for tenure after his first full year (during his second full year). A successful application would result with him receiving tenure in his third year of faculty employment at WLU."

5. By letter dated May 16, 2011, Dr. McCullough advised President Capehart of Dr. Wenzel's recommendation that Grievant be hired. Dr. McCullough stated that, "if approved, [Dr. Scarpaci's] appointment would be at the rank of **Associate Professor** (Marketing) in a **Tenure-Track** position." (Emphasis in original.) The letter concluded by stating, "Dean Wenzel is also recommending **that credit [be] given for Dr. Scarpaci's previous experience** and that he be provided a 'fast track' to tenure, with his application for tenure being accepted during his second year (2012-2013) at West Liberty." (Emphasis added.) Dr. McCullough did not further address this recommendation on tenure. President Capehart initialed the letter as "approved" on May 17, 2011, without reading it. Grievant signed the letter as requested, and returned it to WLU. Grievant's Level Three Exhibit Number 1.

6. Dr. McCullough did not tell Dr. Wenzel that his recommendation that Grievant be allowed to apply for tenure after his first year had been rejected, or that none of

Grievant's work prior to the time he began his employment at WLU would not be considered when determining whether to grant tenure.

7. Tenure was very important to Grievant. It was Grievant's understanding when he accepted the offer that his existing experience and his outstanding publication record would be considered by WLU when he applied for tenure. This was also Dr. Wenzel's understanding. Grievant was specifically told that WLU would accept three or four years of Grievant's prior work record. Grievant recalled that Dr. McCullough had specifically told him that WLU would absolutely consider his previous time. Grievant had already accepted a position at Rollins College in Florida, which is an AACSB certified school. WLU is not AACSB certified. Only five percent of the business schools in the country are AACSB certified. Grievant would not have accepted the job at WLU had he not been assured that he could apply for tenure after one year, and that his prior work would be considered when he did so.

8. Dr. Wenzel made similar offers to two other professors hired into the Gary E. West College of Business. One of those professors, Maurice Lockridge, had applied for promotion at Marshall University, which was granted, and was one year away from applying for tenure. He was told by Dr. Wenzel that he could apply for tenure after two years at WLU. He also talked to Dr. McCullough regarding whether he could apply for tenure after two years. Dr. McCullough did not tell him he would have to wait five years to apply for tenure, and he told him that his years at Marshall University "would count." Dr. Lockridge would not have accepted a position at WLU if he had not been told he could apply for tenure in two years, because he was close to being able to apply for tenure at Marshall University.

9. The other professor offered a “fast track” to tenure was John Aulerich. Dr. Aulerich was a tenured professor at the University of Wisconsin. Dr. Aulerich’s offer letter states that he has the option to apply for tenure in two to three years.

10. By letter dated May 26, 2011, Michele DeRita, Human Resources Representative at WLU, presented Grievant a summary of the offer of employment “which was orally tendered to you earlier.” The letter states that the offer of employment is as an Associate Professor in Marketing, full-time, for the period from August 16, 2011, to May 15, 2012, at a salary of $100,000.00 per year. The offer summary does not address the issue of tenure. Grievant’s Level Three Exhibit Number 2.

11. Grievant’s Notice of Faculty Appointment does not address when Grievant could apply for tenure. Grievant’s Level Three Exhibit Number 3.

12. On January 25, 2012, Grievant notified Dean Wenzel, in writing, of his intention to apply for tenure in the fall of 2012, as required by WLU Policy 216: Tenure and Promotion (“Policy 216"). Grievant’s Level Three Exhibit Numbers 4 and 21.

13. Grievant was appointed as the Interim Chair for the Management and Marketing Department at WLU in February 2012.

14. On February 14, 2012, Grievant was notified by Provost Anthony Koyzis that WLU records indicated that he had not met all the criteria for tenure consideration, specifically, that he had “not achieved five years of continuous service at WLU as per Policy #216.” Grievant’s Level Three Exhibit Number 6.

15. On February 20, 2012, Beverly Burke, sent Grievant an email which stated:

> You are correct that your Dean recommended giving you credit for previous experience, and that you be “fast tracked” to tenure. However, the recommendation letter in your file, which was approved by the President,

> clearly states that your APPLICATION for tenure will be accepted during your second year (2012-2013) at West Liberty. Since you are currently in your first year, you are not eligible to APPLY for tenure until March 1, 2013."

(Emphasis in original.) Grievant's Level Three Exhibit Number 7.

16. By memorandum dated February 28, 2012, from Dean Wenzel to Provost Koyzis, it was recommended that Grievant's "accelerated application for tenure" be accepted. The memorandum notes that Dean Wenzel believed that Grievant should have the security of tenure if he was "to be an effective leader of the Management and Marketing Department". Grievant's Level Three Exhibit Number 8.

17. Grievant submitted an application for tenure in the Fall of 2012.

18. WLU Policy 216 was effective June 13, 1995, and revised May 1, 2006, and July 1, 2010. It "establishes the following policy to govern the eligibility for and award of tenure to faculty." It states that, "[t]he Tenure applicant must have served five (5) years of continuous service at WLU before applying for tenure evaluation which would be conducted in the sixth probationary year of service." Grievant's Level Three Exhibit Number 21.

19. WLU Policy 216 provides a multi-level evaluation process for the award of tenure, beginning with the Tenure Review Committee, and the Department Chair, and concluding with the President. The appropriate Dean and the Provost must also submit their formal recommendations.

20. WLU Policy No. 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.

21. 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.

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

23. By memorandum dated September 13, 2012, Dean Wenzel notified Provost Koyzis that Jean Bailey, Michael Turrentine, Carrie Whit, Al Wudarski, and Robert Kruse, all tenured faculty at WLU, had been appointed to review Grievant's application for tenure. The memorandum notes that "[t]his notification is normally the responsibility of the Department Chair per *Policy 216 paragraph 9,* however since it is the chair of the department who is the faculty applying for tenure, the Dean made the appointments." (Emphasis in original.) Grievant's Level Three Exhibit Number 9.

24. By memorandum dated November 14, 2012, the Tenure Review Committee unanimously rendered its decision that Grievant's application for tenure "has not been received in accordance with the requirements of Policy 216 and **does not afford this**

committee the authority to recommend or deny tenure at this time." The Committee based this conclusion on the language of Policy 216 which requires that the applicant have "**five (5) years of continuous service at WLSC before applying for tenure evaluation**." (Emphasis in original.) Grievant's Level Three Exhibit Number 11.

25. By email dated December 6, 2012, Dean Wenzel asked Provost Koyzis if he had any documentation indicating that Grievant could apply for tenure in 2012. Provost Koyzis responded the next day, stating, "[a]t the time, I simply would respond to the e-mail from each request. But I can certainly say that I did support his request last year and I can also let John k[n]ow as well. I hope this helps." Grievant's Level Three Exhibit Number 11. Provost Koyzis is no longer at WLU.

26. Dean Wenzel recommended that Grievant be granted tenure.

27. In the spring of 2013, Brian Crawford replaced Dr. McCullough as Provost. Provost Crawford recommended that Grievant not be granted tenure. Provost Crawford did not believe that Grievant had presented sufficient evidence of excellence in teaching. In evaluating the area of professional or scholarly activity, Provost Crawford looked only at Grievant's publications since Grievant had been at WLU, rather than looking at his voluminous record of publications before 2011. Despite Grievant's service as Department Chair, Provost Crawford concluded that Grievant had provided no evidence in support of this criterion.

28. Provost Crawford stated in his written denial of tenure, "[a]t the time [Grievant came to WLU] he requested, and was granted, permission to apply for tenure after only a single year at the institution. This timing is not provided for in WLU Policy 216, but was

supported by the dean and approved by the Provost at that time." Grievant's Level Three Exhibit Number 15. Provost Crawford made no effort to discuss with Grievant or Dr. Wenzel what the expectations were with regard to this early tenure application, nor did he advise them of how he intended to approach the issue.

29. Provost Crawford's written denial of tenure states that Grievant "holds no academic degree in the field of Business Marketing - the field in which he seeks to earn tenure status." Provost Crawford did not address Grievant's AACSB certification.

30. Provost Crawford's written denial of tenure states that Grievant's "contract calls for him to teach 18 credit hours per academic year, he actually only taught 12 credit hours during the 2011-12 AY, with two of the four sections he taught being the introductory-level Principles of Marketing course." Provost Crawford noted that a classroom visitation form "was mostly complimentary" and student course evaluations were "generally positive," but also "show some areas for concern and possible improvement," but he did not further elaborate. He concluded that Grievant had not established excellence in teaching.

31. Professors in the Gary E. West College of Business teach three courses each semester, not four. Because Grievant was serving as Department Chair, his teaching load was reduced by Dr. Wenzel to two courses each semester. Grievant also had two courses canceled due to low enrollment. Provost Crawford was not aware that Ph.D. professors had a teaching load that was less than that of other professors at WLU.

32. Grievant has mentored many Ph.D. and Masters students, and been nominated for seven teaching awards. He won two teaching awards while at Virginia Tech. While at WLU he revised the marketing curriculum and worked with the hospitality and tourism faculty to revise the curriculum, and created a new course in Health Care

Marketing and Management. He designed three courses in International Business Administration which are waiting on approval. His contacts in Latin America will allow students taking these courses to study in Latin America as part of the course work.

33. Provost Crawford stated in his review of Grievant's professional or scholarly activity that "[w]hile Dr. Scarpaci's CV includes a long list of scholarly publications and other activities, almost all of these are in the area of Geography rather than in Marketing. In considering the activities published or presented since 2011, only one seems to be relevant for an Associate Professor of Marketing and it was clearly completed well before Dr. Scarpaci began working at West Liberty. The other scholarly activities presented are, in my estimation, better categorized as works in the field of Geography."

34. Despite these comments, however, Provost Crawford testified that he did not consider Grievant's work prior to his employment at WLU.

35. Another professor at WLU was recently granted tenure with no publications. Provost Crawford was awarded tenure in 2010, and had only one publication at that time.

36. Prior to his application for tenure, Grievant had published 37 articles in refereed journals and several books, done 78 book reviews, and been a reviewer for 80 publishers. During his time at WLU he completed his work as a co-author of a book entitled "Marketing without Advertising: Brand Preference in Consumer Choice," which was published prior to his tenure application in 2012. This book was part of a very prestigious series. He also had two publications regarding consumer behavior while at WLU.

37. Provost Crawford stated that "[n]o evidence was provided in the portfolio in support of" the criterion University Service. Provost Crawford testified, however, that

service as Interim Department Chair certainly qualified as service to the University, and he was aware of Grievant's service as Interim Department Chair.

38. By letter dated April 30, 2013, President Capehart notified Grievant that inasmuch as he had not satisfied the requirement of WLU Policy 216 that he serve five consecutive years at WLU before becoming eligible for tenure, "the provost could have - and, arguably, should have - declined to consider your application. In deference to the time and effort invested in reviewing your application before it came to my desk, I, too, have considered it fully. I accept and adopt, in its entirety, Provost Brian Crawford's recommendation that tenure not be awarded to you. Accordingly, your application for tenure is denied." Grievant's Level Three Exhibit Number 18. President Capehart did not acknowledge that he had accepted the recommendation when Grievant was hired that he be allowed to apply for tenure early.

39. WLU Policy 216 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." (Emphasis added.)

40. Grievant was issued a terminal contract on July 1, 2013, based on the language in the preceding Finding of Fact. Grievant was not in his seventh contract year.

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).

If ever there were a perfect example of unreasonable, arbitrary and capricious action, this case is it. Grievant was a tenured professor at Virginia Tech, with another offer in the wings. WLU courted him, and he accepted a position at WLU with the understanding that he would be allowed to apply for tenure after his first year at WLU. While his Faculty Appointment does not set forth the details of this understanding, the May 16, 2011 letter from Provost McCullough to President Capehart, which was approved by President Capehart, sets out this understanding, and other documents acknowledge this. It is clear that Dean Wenzel thought that Grievant would be allowed to apply for tenure after his first year, although he thought that meant Grievant could give his notice of intent to apply only after he had completed a full year, meaning the spring of 2013, not 2012, and that he believed that Grievant's accomplishments before he came to WLU would be considered when Grievant applied for tenure. Dean Wenzel made clear to everyone above him at WLU that this was the agreement. Provost Koyzis acknowledged this in his email of December 7, 2012.

Not until the application for tenure was denied by Provost Crawford and President Capehart did anyone suggest that Grievant could not apply for tenure because he did not meet the five-year requirement, and that his work record prior to coming to WLU would not be considered. Grievant pointed out, as did other witnesses who were similarly offered the same type of incentive to come to WLU, that he would never have come to WLU had he

not believed he could apply for tenure on a “fast track,” and that his prior work would be considered.

The undersigned needs to address the testimony of Dr. McCullough on this point. Dr. McCullough testified that he told Grievant his prior work record would not apply to tenure, and that he told Dr. Lockridge and Dr. Aulerich the same thing. Grievant testified that Dr. McCullough told him no such thing, and it is clear that Dr. McCullough made no such statement to Dr. Wenzel, Dr. Lockridge or Dr. Aulerich. In fact, this concept would be inconsistent with the entire idea of tenure after one year, as it would be practically impossible for anyone to establish excellence in teaching and scholarly activity in such a short period of time. When Dr. McCullough put something in writing regarding this issue, in his letter to President Capehart, he specifically noted that “Dean Wenzel is also recommending that credit [be] given for Dr. Scarpaci’s previous experience and that he be provided a ‘fast track’ to tenure,” yet he did not say that he did not believe this was possible. President Capehart then approved the recommendation. The undersigned must conclude that Dr. McCullough made no such statement to Grievant, and that Dr. McCullough’s recollection of events is not accurate.

After Grievant submitted his application for tenure, it was not even considered by the Tenure Review Committee because he had not been at WLU for five years. This was the point at which there should have been a meeting of those in the highest positions of authority at WLU to determine how to proceed in this unusual situation, and it should have been made clear to Grievant what his situation was. Nonetheless, the tenure application proceeded forward, and when it got to Provost Crawford, he decided that the application would be accepted, but that he would not consider Grievant’s record of publications and

teaching prior to his tenure at WLU. In fact, Provost Crawford did not even consider Grievant's publication record while at WLU. Provost Crawford decided he was going to unilaterally change the rules mid-stream without notice. Finally, President Capehart likewise denied tenure to Grievant based on Provost Crawford's recommendation, and then unilaterally decided that the consequence was that Grievant would be issued a terminal contract. While there is some question about whether the President of WLU can enter into an agreement with a prospective employee regarding whether the policies in place will apply to him, that issue has not been placed by the parties before the undersigned. It is clear, however, from the various written documents and the actions of Provost Crawford and President Capehart in allowing the application for tenure to go forward, that there was an agreement between WLU and Grievant to allow Grievant to apply for tenure after one year. It is also clear to the undersigned that the other part of this agreement was that WLU would consider Grievant's work record over the three to four years preceding his employment at WLU in determining whether to grant tenure. Provost Crawford and President Capehart could not unilaterally change this agreement.

Finally, Respondent cannot use WLU Policy 216 to refuse to grant tenure because Grievant has not been at WLU for five years to develop a record of achievement, and then use it to support the award of a terminal contract. WLU Policy 216 states that the terminal contract is given in the seventh year. Grievant had not been at WLU six years, so this provision of Policy 216 is not applicable here.

The question then is what relief is available and appropriate. Certainly, nothing in WLU Policy 216 allows what was promised to Grievant, or Dr. Lockridge or Dr. Aulerich. While President Capehart testified that he was unaware of the promises made to Grievant,

which is disturbing, he certainly was provided with all the information regarding Grievant's hiring, and approved Dr. Wenzel's hiring recommendation as it was presented to him, and there is subsequent documentation that confirms that Dr. Wenzel's recommendation was accepted by President Capehart. It is apparent that those in positions of authority at WLU were all willing to let the tenure application go forward, despite that Policy 216 did not address allowing a tenure application for someone with less than five years of employment at WLU. Essentially, President Capehart waived this provision for Grievant, whether he had the authority to do so or not. Accordingly, the undersigned concludes that under the circumstances presented here, Provost Crawford and President Capehart should be required to review Grievant's application for tenure again, taking into consideration Grievant's record for the three years before he was employed at WLU in determining whether he has demonstrated that he meets the applicable standards in the four areas to be evaluated. Should tenure not be granted, a terminal contract cannot be issued, and Policy 216 will then be applicable to Grievant's continued employment at WLU.

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. Grievant demonstrated that Respondent acted in an arbitrary and capricious manner.

Accordingly, this grievance is **GRANTED IN PART.** Respondent is **ORDERED** to issue Grievant a new contract for the 2013-2014 year which is not a terminal contract. Respondent is **FURTHER ORDERED** to reevaluate Grievant's application for tenure, beginning with the Provost, and to consider Grievant's work record for the three years preceding his employment by Respondent in this review, consistent with this Decision.

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 23, 2013