THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FERUZ GANIKHANOV,
Grievant,

v. **DOCKET NO. 2012-1357-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Feruz Ganikhanov, filed a grievance against his employer, West Virginia University, on May 31, 2012, contesting the denial of his request for promotion and tenure. As relief, Grievant seeks "[p]romotion and tenure, and purging of Grievant's files or documents related to these matters and any and all further relief lawfully appropriate."

A conference was held at level one on July 10, 2012, and the grievance was denied at that level on July 31, 2012. Grievant appealed to level two on August 2, 2012, and a mediation session was held on September 27, 2012. Grievant appealed to level three on October 1, 2012. Two days of hearing were held at level three before the undersigned Administrative Law Judge, on February 8 and March 6, 2013, in the Grievance Board's Westover office. Grievant was represented by Jacques R. Williams, Esquire, Hamstead, Williams & Shook, 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 April 11, 2013, on receipt of the last of these proposals.

Synopsis

Grievant applied for promotion to Associate Professor and tenure in the Fall of 2011. None of the levels of review supported his promotion, and only the College Evaluation Committee recommended that Grievant be awarded tenure. None of the levels of review found that Grievant had made significant contributions in teaching, and neither the Department Committee nor the Department Chair found that Grievant had made significant contributions in research. The Provost denied the applications for promotion and tenure based on a finding that Grievant had not made significant contributions in teaching, although the Provost did find that Grievant had made significant contributions in research. Grievant did not demonstrate that his successes in teaching reached the level of significant contributions.

The following Findings of Fact are made based upon the evidence presented at levels one[1] and level three.

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University ("WVU"), in the Department of Physics, Eberly College of Arts & Sciences, since 2006, as an Assistant Professor. He was recruited as "part of an expanding program in the area of nanoscience."

2. Grievant's appointment letter states that, "tenure must be awarded by the end of your sixth year on the faculty; that is, by the end of 2011-2012 academic year, your

[1] Although a conference was held at level one, many exhibits were presented by the parties at that level. The parties agreed that these exhibits should be considered admitted into evidence without objection at level one.

‘critical year.’ If you have not earned tenure by that time, you will be offered a terminal contract for your seventh year of employment.”

3. Grievant submitted an application for promotion to Associate Professor and an application for tenure in the Fall of 2011. He included in his application student evaluations of his instruction, student comments, peer evaluations of his classroom instruction, annual evaluations, his publications, information on his grant funding, and various course materials.

4. The WVU Policies and Procedures for Annual Faculty Evaluation, Promotion and Tenure (“the University Guidelines”) provide a multi-level evaluation process for the award of promotion and tenure, beginning with the Department Promotion and Tenure Committee, and the Department Chair, and concluding with the Provost, who has been delegated the decision-making authority of the President for matters of promotion and tenure. The faculty member may include written rebuttals in the promotion and tenure file throughout this process.

5. The review process evaluates the faculty member’s performance in the mission areas of teaching, research, and service. In order to be recommended for promotion to Associate Professor and tenure, a faculty member must demonstrate significant contributions in two of the three mission areas, and reasonable contributions in the third area. The two areas in which Grievant was required to demonstrate significant contributions were teaching and research. Grievant’s initial appointment letter stated, “[c]lassroom teaching will be evaluated by the Department of Physics faculty and Student Evaluations of Instruction. Sustained evaluations of ‘good’ or ‘excellent’ combined with

documented achievement in supervising and mentoring graduate and undergraduate students in your laboratory will constitute significant contribution[s] in teaching."

6. The University Guidelines state that "[p]romotion in rank recognizes exemplary performance of a faculty member. The evaluation for promotion in rank provides the opportunity to assess a faculty member's growth and performance since the initial appointment or since the last promotion."

7. The University Guidelines define "significant contributions" in the area of teaching as "normally those which meet or exceed those of peers recently (normally, within the immediately previous two-year period) achieving similar promotion and/or tenure who are respected for their contributions in teaching at West Virginia University." The Guidelines further state that "a faculty member with a preponderance of 'satisfactory' or 'unsatisfactory' ratings, particularly in an area in which a significant contribution is required, would not qualify for promotion and tenure."

8. The Eberly College of Arts and Sciences Guidelines for Annual Faculty Evaluation, Performance-Based Pay, Promotion and Tenure state:

> The prime requisites of an effective teacher are intellectual competence, integrity, independence, a spirit of scholarly inquiry, a dedication to improving methods of presenting material, the ability to transfer knowledge, respect for differences and diversity, and the ability to stimulate and cultivate the intellectual interest of students. Supporting documentation for the evaluation of performance in teaching might include evidence drawn from such sources as the collective judgment of students, of student advisees, and of colleagues who have visited the faculty member's classes. It might also include analyses of course content, evaluation of products produced by the instructor such as textbooks or videotapes, the development or use of instructional technology and computer-assisted instruction, pedagogical scholarship in refereed publications and media of high quality, studies of success rates of students taught, or other evidence deemed appropriate and proper by the Department and College. Each department is expected to develop criteria for evaluating teaching appropriate to their discipline(s).

> Each department also is encouraged to avoid sole reliance upon student evaluations and consider multiple indices of successful teaching.

9. The Eberly College of Arts and Sciences Guidelines for Annual Faculty Evaluation, Performance-Based Pay, Promotion and Tenure defines significant contributions in teaching are "normally those which meet or exceed those of peers recently achieving tenure who are respected for their contributions in teaching at West Virginia University."

10. The WVU Department of Physics has in place a Faculty Development and Evaluation Manual, approved by the faculty on August 24, 2010, and approved by the Office of the Provost on September 28, 2010, with minor changes approved on April 20, 2012. This Manual provides that faculty shall be evaluated annually in the mission areas as "Excellent (characterizing performance of high merit), Good (characterizing performance of merit), Satisfactory (characterizing performance sufficient to justify continuation but, for areas of expected significant contribution, not sufficient to justify promotion or tenure), or Unsatisfactory."

11. The Department of Physics Faculty Development and Evaluation Manual provides as follows with regard to evaluation of teaching:

> Consistent with the Eberly College Guidelines, the Department of Physics avoids sole or excessive reliance upon student evaluation forms provided by the Faculty Senate. This is particularly important in the Department of Physics because physics courses challenge students to a level to which they may not be accustomed. Both clarity of presentation and maintaining the necessary standard for each course are equally essential. Peer review by faculty in the Department of Physics will be given significant weight by the Department in the evaluation of teaching. Peer review of assistant professors will be done each year. Peer review of others will be done in any year requested by the individual to be reviewed.

> Teaching should be documented in a variety of ways to demonstrate a faculty member's overall contribution to the teaching mission of the department. It is expected that student evaluations for all courses taught during the review period, with student comments, will be included in the file for annual review. It is expected that syllabi for all courses taught during the review period will be submitted to the evaluation file.

12. The Department of Physics Faculty Development and Evaluation Manual defines significant contributions in teaching as "performance in classroom teaching, in academic and research advising, or in other settings which meets or exceeds that of peers recently achieving tenure in the Physics Department."

13. By memorandum dated January 18, 2012, the Physics Department Faculty Evaluation Committee recommended that Grievant not be awarded promotion or tenure, noting his failure to attain sustained evaluations of good or excellent in teaching over the years on his annual evaluations. The Committee also pointed to the mean score of student responses to the question regarding teaching effectiveness on the Student Evaluation of Instruction Forms ("SEIs") over the years, which ranged from 1.67 to 3.36, for an average of 2.61. The Committee concluded that this score was well below that of the four faculty members awarded tenure in the Department of Physics in the previous two year period, of 3.76, 3.82, 4.12, and 4.49. The Committee also did not find that Grievant had made a significant contribution in research. The Committee found that Grievant had made a reasonable contribution in the area of service.

14. Department Chair Earl E. Scime reviewed Grievant's applications, and recommended that he not be awarded tenure or promoted, based on a finding that he had not made a significant contribution in teaching or research. Chair Scime pointed out that the mean scores on the SEIs over the years for the questions teaching effectiveness and

overall course rating were well below those of other faculty recently promoted, with the mean score on course rating ranging from 1.4 to 2.86, with a high score of 3.88 in one of the advanced labs. Chair Scime noted that Grievant's student evaluations have been improving. Chair Scime stated that one of the two peer evaluations for 2011 was generally positive, but the other "highlighted a series of serious shortcomings in Dr. Ganikhanov's teaching methods and effectiveness." Chair Scime discussed Grievant's work with students through his research program, concluding that Grievant "is not making a substantial contribution to the training of graduate students in physics at this time." Chair Scime also pointed out that Grievant had "not received sustained evaluations of good or excellent in teaching" on his annual evaluations.

15. Grievant's applications next went to the Eberly College Natural and Mathematical Sciences Evaluation Committee, which concluded that Grievant had not made significant contributions in teaching, although the Committee concluded that the "peer reviewers do indicate a preponderance of positive teaching skills. Perhaps an additional mentorship could bring out the best of Dr. Ganikhanov's teaching skills." The Committee concluded that Grievant "has clearly made significant contributions in the area of research," and recommended that Grievant be granted tenure, but not promotion.

16. Grievant's applications were next reviewed by Dean Robert Jones. Dean Jones did not recommend that Grievant be promoted or awarded tenure, based on a lack of significant contributions in teaching, nor did he believe that significant accomplishments were likely in the future. Dean Jones did find that Grievant had made significant contributions in research. Dean Jones stated that "[t]he preponderance of evidence in Dr. Ganikhanov's file, which includes consistently low Student Evaluation of Instruction (SEI)

scores and a lack of evidence for a strong and vibrant graduate student mentoring program, has led to a widely held opinion (across the department and college and throughout the five years of his appointment at WVU) that he has not met the requirement of 'significant' accomplishment in teaching." Dean Jones pointed out that five of the peer reviews of Grievant's teaching "indicate good quality" and small improvements in teaching. Dean Jones stated that Grievant's "most positive contribution in teaching" was that five students and one post-doctoral student were co-authors on peer-reviewed publications. However, he noted that Grievant had "chaired the advisory committee of only four Ph.D. graduate students, and of these, one settled for a M.S. degree," which he concluded was evidence of a "poor record of graduate student mentoring" and low quality mentoring. Dean Jones noted that Grievant had been warned over the years by Deans and his Chair that his teaching quality did not meet requirements, yet "[n]o substantial improvement was seen in teaching quality by 2011."

17. Grievant's applications for both promotion and for tenure were denied by Provost and Vice President for Academic Affairs, Michele G. Wheatly, by letter dated May 15, 2012, and Grievant was issued a terminal contract for the 2012-2013 academic year.

18. Associate Provost for Academic Personnel C.B. Wilson reviewed Grievant's application for promotion and tenure on behalf of Provost Wheatley, and drafted the letter denying Grievant's application. Associate Provost Wilson has served in his current position since 1993, and has reviewed over a thousand applications for promotion and tenure. Associate Provost Wilson noted that Grievant's annual evaluations did not show a preponderance of meritorious ratings of his teaching over time, and this was the key factor. Associate Provost Wilson gave deference to the expertise of the Chair of Grievant's

Department and the faculty in his Department who had evaluated him each year, as he believed they could best judge what constitutes a good Physics professor. Associate Provost Wilson also reviewed the SEIs and student comments that were part of Grievant's applications, the peer evaluations, which he concluded provided mixed reviews, and Grievant's responses to colleagues' suggestions for improvement.

19. Grievant was not assigned to teach any courses during the Fall of 2006, and was assigned a reduced teaching load in the subsequent three years in order to allow him to focus on research. Grievant taught Physics 111 in the Spring of 2008, Fall of 2010, and Fall of 2011, and two sessions of Physics 112 in the Spring of 2011, both of which are the introductory Physics courses, and had enrollments of over 99 to 115 students. Grievant also taught Physics 791, a special topics course in Nonlinear Optics, to seven students in the Spring of 2007, and Physics 774, Optical Properties of Solids, to nine students in the Spring of 2010. He taught Physics 341 in the Spring and Fall of 2009, and the Spring of 2010, which is Advanced Physics Laboratory for junior and senior Physics majors, to less than 10 students each session.

20. In Grievant's Spring 2007 annual evaluation the Physics Department Promotion and Tenure Committee did not rate Grievant's teaching because he did not teach any courses in the Fall of 2006, and it rated his research between good and satisfactory. Mary Ellen Mazey, Dean of the Eberly College of Arts and Sciences, rated his teaching as satisfactory, because he met the expectations of his assignment, and his research as good.

21. In Grievant's Spring 2008 annual evaluation for the 2007 calendar year, the Physics Department Promotion and Tenure Committee rated Grievant's teaching and

research as satisfactory, noting the SEI scores and the peer review of his instruction. Chair Scime rated Grievant's teaching as satisfactory, based on both SEIs and the peer evaluation of Dr. Nancy Giles, whom Chair Scime described as an outstanding teacher. Chair Scime stated that the peer evaluation "noted difficulties with his classroom teaching proficiency, course management issues, the level at which the course was set, and his ability to engage the students. . . . The written student comments on the SEI forms expressed nearly identical concerns to the peer review." Chair Scime rated Grievant's research as satisfactory.

22. In Grievant's Spring 2009 annual evaluation for the 2008 calendar year, the Physics Department Evaluation Committee rated Grievant's teaching and research as unsatisfactory, stating, "[e]vidence of dramatic improvement in the teaching of lecture-based courses is needed." Chair Scime rated Grievant's teaching and research as unsatisfactory, pointing out that the SEIs were "extraordinarily negative" and the peer evaluation by Professor Mark Koepke "mirrored many of the comments submitted on the student evaluations of instruction." Chair Scime stated that, "Dr. Ganikhanov is decidedly not on track for promotion and tenure review in 2011. He has not demonstrated the capability to teach effectively at WVU, his research program is without funding or significant publication activity, and he did not make substantial contributions to the operation of the department of physics in 2008." Chair Scime went on to make specific suggestions as to how Grievant might improve in all areas.

23. In Grievant's Spring 2010 annual evaluation for the 2009 calendar year, Chair Scime rated Grievant's teaching and research as good, noting that, although there was still room for improvement in Grievant's teaching, Grievant had significantly improved the

organization of the classroom facility, finding an overall modest improvement in teaching effectiveness and significant improvements in research activity. The Physics Department Evaluation Committee rated Grievant's teaching and research as good. Dean Rudolph P. Almasy stated in his evaluation for that year, "I find myself this year in the same situation of reminding you about the need to have a plethora of evidence in the file upon which a judgment can be made that you are making significant contributions in teaching and research for the Department of Physics. You also need to understand the critical need to have a preponderance of 'good' and 'excellent' descriptors to characterize your work in teaching and research during your probationary years. In my opinion you do not have that preponderance. . . . In all things, it would appear, you need to be more aggressive in attacking problems, seizing opportunities, and providing evidence of improvement for the file, particularly for the teaching portfolio."

24. In Grievant's Spring 2011 annual evaluation of the 2010 calendar year, Department Chair Scime rated Grievant's teaching and research as satisfactory, and stated that "Dr. Ganikhanov is not on track for promotion and tenure in 2012. For my opinion to change, Dr. Ganikhanov would have to be able to amass a body of published research in 2011 that is of sufficient quality and quantity to obtain positive reviews from external evaluators. His teaching would also have to improve significantly." The Department Evaluation Committee rated Grievant's teaching as good and his research as satisfactory. The Committee noted that it was "concerned that Dr. Ganikhanov's 2010 personnel file does not contain sufficient evidence to improve his case for promotion and tenure."

25. Eight peer evaluations were included in Grievant's applications, prepared by professors at WVU after observation of Grievant's classroom instruction. One was from

Grievant's first year. Three of the evaluators observed the Physics 341 Advanced Physics Laboratory, and the comments were positive. H. A. Weldon provided a peer evaluation in 2010 after observing Grievant's classroom instruction of Physics 774. Dr. Weldon stated that the material presented was appropriate to the course, Grievant was well prepared, his board work was very clear, and his voice was strong. Dr. Weldon suggested that "Dr. Ganikhanov's excellent lectures could be reinforced by regular reading assignments in some of the recommended textbooks or on websites" since there is no text for the course. Dr. David Lederman evaluated Grievant's instruction during a Physics 111 class in December 2010, finding the lecture "clear and the students were responsive and attentive. He also made use of problem set sessions to complement the lectures and some of the electronic teaching resources available through e-campus. Prof. Ganikhanov has made a significant effort to teach Physics 111 in an effective manner and he seems to have succeeded." Dr. Leonardo Golubovic evaluated Grievant's instruction during a Physics 112 class in the Spring of 2011, and made generally positive comments about the classroom instruction. Dr. Diandra Leslie-Pelecky evaluated Grievant's instruction of a Physics 111 class in November 2011. She did not believe that Grievant made sufficient efforts to engage the students, nor did she believe that Grievant was particularly interested in her suggestions, as he responded to her suggestions, "but that takes time," and he expressed to her that he was disappointed with the quality of the students.

26. The WVU Faculty Senate has developed a WVU Student Evaluation of Instruction Report of Results Interpretive Guide ("the SEI Guide"), which states that it "is intended to assist instructors in reading and understanding the Student Evaluation of Instruction Report of Results." This Guide provides guidance only. It is not a rule or policy.

27. The WVU Faculty Senate has approved the use of Student Evaluation of Instruction Forms (" SEIs") in the evaluation of faculty by students. A bank of questions is available to be placed in the SEI to be used for any individual course at WVU, although certain questions are to be used in all SEIs. Some questions are chosen by the instructor and some are chosen by the Dean of the College. The students may respond to each of these questions with a rating of NA, poor (1), fair (2), satisfactory (3), good (4), or excellent (5).

28. The SEI Guide states that "[o]ver the past decade there is some indication that 'global' item ratings of teacher effectiveness and course value correlate more highly with student learning than do specific instructional style items (*e.g.* student-teacher interaction). Therefore, inclusion of more global item ratings could be more suitable for evaluative review than specific style item ratings."

29. The Provost's Office focuses on the student responses to three questions that are on all SEIs, because these three questions are more global. The three questions which are the focus of review by the Provost's Office are: "The instructor's teaching effectiveness was," "Considering the course objects, organization, quality of materials, class presentations, tests, course policies, etc., my overall rating of the course is," and "Overall, my learning in this course was."

30. The SEI Guide sets forth several limitations observed in the use of SEIs, but concludes that, despite the limitations, "student ratings have been shown to be a useful feedback tool to instructors and administrators if designed in such a way to be flexible enough to elicit appropriate and valid information." One of the limitations stated in the SEI Guide is "*some researchers recommend* that ratings from at least five representative

classes taught over the past one or two years be presented in faculty evaluation. At least two-thirds of the students in each class *should* participate in the evaluation, and the number of participating students *should* be at least 15." (Emphasis added.) The SEI Guide states, "it is usually cause for concern when a third of the responses give relatively low ratings to some aspect of the course or instruction." It further states, "[i]f the standard deviation is greater than 1.20, be cautious in interpreting an item mean. A spread this large may indicate either a heterogeneity of student backgrounds and interests, or that the instructor only attended to a proportionally small group of students within a class."

31. The SEIs for Grievant's Physics 111 course in the Fall of 2011, were completed by 56 students. The mean scores on the 21 questions ranged from a low of 3.07 on the question regarding useful feedback provided by the instructor, to a high of 4.21 on the question regarding the return of tests in a timely manner.

32. The SEIs for one of Grievant's Physics 112 courses in the Spring of 2011, were completed by 52 students. The mean scores on the 18 questions ranged from a low of 2.53 on the question regarding teaching effectiveness, to a high of 4.18 on the question regarding the instructor's mastery of the subject matter. The mean ratings on five of the questions were below 3.0, with the mean rating for only one question at or above 4.0.

33. The SEIs for the other Physics 112 course taught by Grievant in the Spring of 2011, were completed by 66 students. The mean scores on the 18 questions ranged from a low of 2.47 on the question regarding overall learning in the course, to a high of 4.12 on the question regarding the instructor's mastery of the subject. The mean ratings on six of the questions were below 3.0, with the mean rating for only one question at or above 4.0.

34. The SEIs for the Physics 111 course taught by Grievant in the Fall of 2010, were completed by 72 students. The mean scores on the 23 questions ranged from a low of 2.42 on the question regarding whether the student would recommend the instructor, to a high of 4.15 on the question regarding the instructor's mastery of the subject. The mean ratings on seven of the questions were below 3.0, with the mean rating for only one question at or above 4.0.

35. The SEIs for the Physics 774 course taught by Grievant in the Spring of 2010, were completed by seven students. The mean scores on the 22 questions ranged from a low of 2.43 on two questions, regarding teaching effectiveness and course organization, to a high of 4.0 on two questions regarding fairness of tests and assignments and relation of course to practical situations. The mean ratings on eight of the questions were below 3.0, with the mean rating for only two questions at or above 4.0.

36. The SEIs for Grievant's Physics 341 lab in the Spring of 2010, were completed by eight students, and the mean ratings ranged from 3.75 to 4.60, with most of the mean ratings above 4.0. The mean ratings for this same lab in the Fall of 2009, were much lower from the six students completing the SEIs, ranging from 1.2 to 4.33, with six ratings below 2.0. Only two students completed SEIs for this lab in the Spring of 2009, one of whom assigned mostly good ratings, and the other assigned mostly poor ratings.

37. The SEIs for the Physics 111 course taught by Grievant in the Spring of 2008, were completed by 66 students. The mean scores on the 23 questions ranged from a low of 1.63 on the question regarding recommending the instructor, to a high of 3.64 on the question regarding the instructor's availability outside class. The mean ratings on 17of the questions were below 3.0.

38. The SEIs for the Physics 791 course taught by Grievant in the Spring of 2007, were completed by seven students. The mean scores on the 23 questions ranged from a low of 2.14 on the question regarding returning tests in a timely manner, to a high of 4.57 on the question regarding the instructor's mastery of the subject. The mean ratings on nine of the questions were below 3.0, with the mean rating for five questions at or above 4.0.

39. Grievant's aggregate mean scores on the SEIs were substantially lower than those of other faculty in the Physics Department recently considered for promotion during the period 2008 through 2011.

40. The Provost acknowledged that Grievant's SEI scores "show general improvement over time, but the best are not strong."

41. Grievant applied for the National Science Foundation Career Award, which is a prestigious grant, and received this Award in 2010. This grant is awarded "in support of junior faculty who exemplify the role of teacher-scholars through outstanding research, excellent education and the integration of education and research within the context of the mission of their organizations."

42. Grievant has had 11 graduate student advisees since 2006, 4 of whom are Physics graduate students, and 1 postdoctoral student. Two of these students switched to other Physics professors, and one left WVU with a non-thesis Masters of Science. One of the Physics students co-authored two publications, and two co-authored one publication each. Non-Physics graduate advisees co-authored publications. In total six students have appeared as co-authors on five publications. These students work closely with Grievant in the lab setting.

43. Two undergraduate students “were involved in experimental studies of collagen arrays investigated by nonlinear optical microscopy,” and their contribution will be acknowledged in a manuscript to be submitted for publication.

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).

The parties agreed that neither Grievant's research efforts or his contributions in the area of service were at issue. Only his teaching effectiveness is at issue in this grievance.

Grievant argued that the Provost's office places a disproportionate emphasis on SEIs. Grievant argued that his favorable peer reviews, the award of the Career Award grant, and his supervision of graduate and post-graduate students supported the award of tenure and promotion. While the Career Award is certainly a commendable achievement, it represents proposed instruction. Grievant discounted his unfavorable annual evaluations by pointing to the emphasis of those evaluations on SEIs; however, Grievant did not contest the evaluations at any time, and the annual evaluations of his teaching, as Associate Provost Wilson pointed out, do not show a preponderance of meritorious ratings in teaching effectiveness. The undersigned reviewed these annual evaluations, and it is clear that they were based on more than the SEIs, as is set forth in the Findings of Fact.

Grievant pointed to the limitations set forth in the SEI Interpretive Guide. Respondent pointed out that if Grievant had issues with the use of SEIs, he should have taken these issues to the Faculty Senate, which has approved the use of the SEIs. This Grievance Board has previously addressed this very issue:

> The WVU Faculty Senate has determined that the SEIs are appropriate for the evaluation of faculty teaching performance. To the extent Grievant takes issue with the evaluative process promulgated by the WVU Faculty Senate, Grievant should direct his concerns to the WVU Faculty Senate. It is beyond the scope of this Board's authority to change WVU policies. "The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001).

See, Subramani v. W. Va. Univ., Docket No. 2010-1473-WVU (July 22, 2011); *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 11-AA-114 (Mar. 7, 2013). That Decision went on to further discuss the use of SEIs at WVU as follows:

> The record of this grievance demonstrates that the Provost Office consistently uses the three global SEI questions to rate a faculty member's teaching performance. The calculations of these three global SEI questions by the various levels of review appear to be easily understood, straightforward, and not easily subject to misinterpretation. It should be noted that this Board addressed a similar argument in *Shackleford v. W. Va. Bd. of Directors/Concord College*, Docket No. 96-BOD-414 (Oct. 9, 1997). Grievant argued that the use of student evaluations was not statistically valid because they are subject to emotional bias, are impacted by factors beyond the professor's control, are not consistent, and are not reliable. Notwithstanding an element of subjectivity, the administrative law judge determined that the use of these instruments could not be viewed as arbitrary and capricious in evaluating the application for promotion. The same can be said in the instant case.

Id. The undersigned finds no evidence in the record to suggest that a different conclusion should be reached in this case.

Further, 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).

Finally, student evaluation of the instructor is clearly one factor to be considered, and the record does not reflect any form of student evaluation in Grievant's applications or file other than the SEIs and student comments, which were not made a part of the record. It is understandable that Grievant would want to discount the SEIs, given that he received such poor ratings on them over the years. It was appropriate for the SEIs to be considered in the promotion and tenure decisions.

Grievant cited to the fact that his laboratory duties at two labs on separate campuses were time consuming, and to the fact that he taught several courses only one time, which required him to prepare course materials anew with each new course, while other faculty members taught the same course repeatedly. He opined in his testimony that this was not fair. The issue in this grievance is not whether Grievant's workload was unfair, but whether he had made significant contributions in teaching as of the time he submitted his applications for promotion and tenure. As Associate Provost Wilson pointed out, Grievant's research efforts do not change the requirement that his teaching be good or excellent.

Finally, Grievant argued that it was contrary to the policies and procedures for him to be compared to peers in the department over a four-year period rather than a two-year

period. First, the procedures set forth in the Findings of Fact do not require that the comparison be limited to the preceding two year period. The procedures state that the faculty member is compared to those recently achieving similar promotion, *normally* the last two years. This language does not limit the comparison to a two-year period. Even were the undersigned to agree with Grievant, it would not make any difference to the outcome. It was made clear to Grievant when he was hired, and in his annual evaluations what would be required of him to achieve promotion and tenure. Grievant's initial appointment letter stated, "[c]lassroom teaching will be evaluated by the Department of Physics faculty and Student Evaluations of Instruction. Sustained evaluations of 'good' or 'excellent' combined with documented achievement in supervising and mentoring graduate and undergraduate students in your laboratory will constitute significant contribution[s] in teaching." The University Guidelines state that "a faculty member with a preponderance of 'satisfactory' or 'unsatisfactory' ratings, particularly in an area in which a significant contribution is required, *would not qualify for promotion and tenure*." (Emphasis added.) As Associate Provost Wilson pointed out, Grievant did not achieve a preponderance of meritorious ratings.

Further, Grievant's annual evaluations pointed out his shortcomings. While Grievant has improved his teaching and received mostly good peer reviews of his teaching, one recent peer review was not good. Grievant has made a good effort to involve students in his research, from which they have benefitted, but his SEI scores were not good. Grievant's evaluations of his teaching over the years were clear in detailing that substantial improvement was needed in order to achieve the level necessary for promotion and tenure.

Grievant did not demonstrate that his teaching had improved to the point that he had achieved the goal of significant contributions.

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 did not demonstrate that the conclusion by the Provost that he had not made significant contributions in teaching was arbitrary and capricious. Grievant did not demonstrate that the decision not to award him tenure or promotion should be overturned.

Accordingly, this grievance 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).

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BRENDA L. GOULD
Administrative Law Judge

Date: May 22, 2013