THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

K. SUBRAMANI,
Grievant,

v. **DOCKET NO. 2011-1704-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, K. Subramani, a tenured Associate Professor at West Virginia University, filed a grievance against his employer, West Virginia University, on May 20, 2011. The statement of grievance reads:

> I write to file a Level I grievance against the departmental evaluations for my contributions in the year 2010. I include W. Va. Code §6C-2-2 claims for: discrimination; violation, misapplication and misinterpretation of statutes, rules and policies; discrimination and aggrieved application of unwritten policies and practices; harassment and reprisal. I request that I be permitted to explain the factual bases for each of these claims, at the grievance hearing.

As relief Grievant sought:

> (I) Modifying the descriptor of my teaching evaluations from "Satisfactory" to "Excellent" in the departmental committee letter and from "Good" to "Excellent" in Chair Woerner's letter, (ii) Modifying the descriptor of my service evaluations from "Good" to "Excellent" in both the departmental committee and Chair Woerner's letter. (iii) Permanently disbarring the faculty members of the 2010-2011 Promotion and Tenure committee from evaluating my contributions, if malice and discrimination are established.

A hearing was convened at level one on July 8, 2011, and the grievance was denied at that level on July 29, 2011. Grievant appealed to level two on August 3, 2011, and a

mediation session was held on November 16, 2011. Grievant appealed to level three on December 2, 2011. Two days of hearing were held before the undersigned Administrative Law Judge at level three on December 7 and 12, 2012, in the Grievance Board's Westover office. Grievant was represented by Joseph T. Hodges, III, Esquire, Hodges & Riffle, PLLC, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on February 4, 2013.

Synopsis

Grievant contends that he should have received a rating of excellent in teaching and in service on his 2010 faculty evaluation. Faculty evaluations of teaching, research and service are subjective, and the professional judgement of those at the institution who are charged with such evaluations is entitled to great deference. A Grievant seeking to have his evaluation overturned by the Grievance Board bears a substantial burden. Grievant failed to demonstrate that the ratings on his faculty evaluation were arbitrary and capricious, or the result of discrimination. Grievant also failed to prove his claims of reprisal and harassment.

The following Findings of Fact are made based on the evidence presented at levels one and three.

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia University ("WVU"), since August 2000. He was promoted from Assistant Professor to Associate Professor in 2006 in the Lane Department of Computer Science and Electrical Engineering

("LDCSEE"), of the College of Engineering and Mineral Resources ("the College")[1], and granted tenure. Grievant continues to be employed by WVU as an Associate Professor in that department.

2. WVU Board of Governors Policy 2 provides in Section 11 that all faculty at WVU shall receive written evaluations of performance annually. Policy 2 requires that evaluation procedures be developed at the university level, and by the college level, and by the department level, if appropriate. Policy 2 specifically states that "[s]uch procedures must be multidimensional; criteria *shall include* but not be limited to peer evaluations, *student evaluations*, and evaluations by immediate supervisors." (Emphasis added.)

3. The College has developed written Criteria for Promotion and Tenure which includes a section on faculty evaluation. This document states that the annual evaluation "forms the basis for any annual merit salary raises and other rewards. Cumulatively, annual evaluations establish a continuous written record of expectations and performance that will encourage professional growth and provide support for retention, promotion, tenure, and other recognition." It further provides that "[t]he primary purpose of these annual evaluations is to assist individual faculty members in developing their talents and expertise to the maximum extent possible, and in promoting continuing productivity over the course of their careers, consistent with the role and mission of the university." However, the annual evaluation also "should be a basis for those periodic recommendations forwarded to the Provost which relate to promotion . . .."

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[1] The College's name has changed to the Benjamin M. Statler College of Engineering and Mineral Resources.

4. The College's written Criteria for Promotion and Tenure provide that the annual evaluation is to be conducted at the department level by the department "chair and the faculty evaluation committee based on documentation in the personnel file." The review is "to be a review of annual evaluation statements from [previous] years, in order to assess whether suggestions for improvement have been addressed," in addition to a review of the "immediately-previous one-year period."

5. The record does not reflect what steps, if any, Grievant took to address suggestions for improvement made in previous years' evaluations.

6. The College's written Criteria for Promotion and Tenure provide that the faculty evaluation committee "will perform an evaluation of each faculty member by considering the quality and quantity of the faculty member's teaching, research, and service performance, and the work assignment given to that faculty member. Faculty should be classified as excellent, good, satisfactory, and unsatisfactory in each mission area according to the department's system." The Department Chair is to review the faculty member's performance independently in each area.

7. The College's written Criteria for Promotion and Tenure states that teaching "includes not only traditional modes of instruction such as the classroom lecture, but also modes such as laboratory, electronic classroom, and practicum instruction; thesis and dissertation direction; evaluation and critique of student performance; various forms of continuing education and non-traditional instruction; and advising, which is a special dimension of teaching, the success of which is essential to the educational process."

8. The College's written Criteria for Promotion and Tenure further provides with regard to teaching that "[t]he prime requisites of any effective teacher are intellectual

competence, integrity, a spirit of scholarly inquiry, a dedication to teaching quality, the ability to transfer knowledge, respect for differences and diversity, a respect for interest and enthusiasm 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 advisors, and of colleagues who have visited the faculty member's classes. It might also include analyses of course content, evaluation of products related to teaching such as textbooks and other instructional materials, 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."

9. The College's written Criteria for Promotion and Tenure provides with regard to service that it involves "the application of the benefits and products of teaching and research to address the needs of society and the profession. These activities include service to the university, state, region, and at national and international levels. Service to the university includes contributions to the efficiency and effectiveness of the faculty member's department and college. Service may also be to individual organizations who have technical challenges needing professional advice. . . . The evaluation of service should include assessments of the degree to which the service yields important benefits to the university, society, organizations, or the profession. Especially relevant is the extent to which the service meets the needs of clients, induces positive change, improves performance, or has a significant impact on societal problems or issues."

10. The College's written Criteria for Promotion and Tenure states that "[e]valuations and recommendations are to be based on both quantitative and qualitative

evidence. The primary evidence to be weighted must be contained in the faculty member's personnel file. To it are added professional judgments as to the quality of the faculty member's teaching, research, and service, as applicable. Aside from material submitted by the faculty member, the chairperson is responsible for determining what other material should be included in the personnel file."

11. The College's written Criteria for Promotion and Tenure states that the faculty member's file should contain certain enumerated items, and that the faculty member is responsible for assuring that some of these items are in the file and the Chair is responsible for assuring that the rest of these items are in the file. Item number 6 is "[o]ther information and records that the chairperson or dean may wish to include. Faculty members may include written responses to such material."

12. WVU 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.

13. A bank of questions is available to be placed in the Student Evaluation Forms (" SEIs") 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).

14. 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."

15. 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."

16. 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."

17. Grievant's work assignment agreement for 2010 allocated his time to 30% teaching, 60% research, and 10% service.

18. Grievant prepared and submitted a Faculty Productivity Report dated December 30, 2010, to be used in evaluating his teaching, research, and service for 2010. He placed supporting documents on a CD, arranged in directories for teaching, research and service, with sub-directories, and documents in the subdirectories. Each document bears a label and must be accessed individually, but many of the labels assigned to the documents are shorthand, and are not clearly spelled out, and there is no overall index indicating what documents are found on the CD, what directories are on the CD, or where any particular document can be found. The Faculty Productivity Report does state in the various sections the documents that can be found on the CD. Grievant also included on the CD documents which appear to represent Grievant's views on various issues and papers from outside sources on various topics, including the use of student evaluations.[2]

19. On February 28, 2011, the LDCSEE Promotion and Tenure Committee ("P&T Committee"), composed of nine department members, issued a written evaluation of Grievant's performance for 2010. The P&T Committee rated Grievant's teaching as satisfactory, his research as excellent, and his service as good.

20. The P&T Committee noted that in the section evaluating Grievant's teaching that Grievant's Faculty Productivity Report was "not well organized. It appears that some documents recorded on the CDs are not directly related to his annual performance. The committee encourages Dr. Subramani to re-organize his annual productivity report to

[2] The CD was provided as Level 1 Grievant's Exhibit Number 5. The information in the last three sentences was gleaned from the undersigned's review of the documents on the CD and the Faculty Productivity Report.

conform to the standardized forms used by LCSEE faculty, making the supporting documents easier to find and assess."

21. On May 10, 2011, LDCSEE Chair Brian Woerner issued a written evaluation of Grievant's performance for 2010. Chair Woerner rated Grievant's teaching as good, his research as excellent, and his service as good.

22. The first page of the Faculty Productivity Report prepared and submitted by Grievant for 2010 states Grievant's Academic Rank as, "Associate Professor (pending outcome of grievance hearing)." Grievant also stated on the first page of his Faculty Productivity Report:

> In my professional judgement and also in the professional judgement of several authorities in WVU (see attached letters in "support" directory), the evaluation process of the Lane Department has violated University guidelines and procedures. I am currently grieving this matter; depending on the outcome of the grievance hearing, the matter could be litigated in district court. As far as I am concerned, I should not be evaluated by the very people whose judgement I am questioning (see "conflict of interest" directory).

23. The Provost's office keeps a grievant's personnel file when a grievance is pending challenging a promotion or tenure decision, as is the case with Grievant. Because of this practice, Grievant's personnel file was in the Provost's office. Grievant had asked Chair Woerner what part of his personnel file would be available for review by the P&T Committee. Chair Woerner spoke with Associate Provost for Academic Personnel C. B. Wilson about whether Grievant's personnel file could be copied for the committee for its review during the evaluation process, and Associate Provost Wilson advised that the file was too large to be completely copied. On December 17, 2010, Chair Woerner sent Grievant an email informing him that Associate Provost Wilson had said that with regard

to creating a file for annual review, "the only material which is needed is for the past year, which could include reviews and responses from the past review cycle." The email indicates Chair Woerner and Grievant had discussed this issue the previous day. Grievant responded on December 17, 2010, by email, stating with regard to this issue, "I can live with it. However, I have to put in a letter to the effect that I am grieving both the decision and the methodology used to arrive at the same."

24. Chair Woerner wrote a memorandum to Grievant, dated December 29, 2010, which he placed in Grievant's file for the 2010 evaluation, stating:

> You have elected to challenge the decision of the university with respect to your request for promotion during the 2009-10 review cycle. As a result of this ongoing challenge, your complete personnel file is in the Provost's office and not available for the present review cycle. After consulting with the Provost's office, I have placed only items from the 2010 calendar year into your file. In completing its review for the current cycle, the committee should consider your accomplishments from the 2010 calendar year. The committee should not draw any conclusions on the outcome of ongoing proceedings until those proceedings have completed.
>
> You have the right to respond to this note and any other items in your file, and place the response into your personnel file.

Chair Woerner believed that some explanation needed to be provided to the P&T Committee as to why the personnel file was not available. Grievant did not see this letter until sometime after December 29, 2010.

25. Grievant responded to the placement of Chair Woerner's letter in his file by letter dated December 30, 2010.[3]

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[3] Grievant complained that he was not given sufficient time to respond, however, it is clear that he was able to do so.

26. Chair Woerner put together a temporary file to serve as Grievant's personnel file for evaluation purposes, and placed in it reviews and responses from the prior year, and materials from 2010.

27. Grievant sent a letter to Chair Woerner dated December 30, 2010, "requesting that my teaching file be re-reviewed at the earliest date (preferably January 2011) as part of my reapplication for promotion to the rank of Full Professor. I am also requesting an external evaluation of my teaching contributions." Chair Woerner believed that Grievant wanted this letter placed in the temporary personnel file, and he did so. He did not advise Grievant that he had placed this letter in the temporary personnel file. Grievant had not intended for this letter to be placed in the temporary personnel file.[4]

28. During 2010 Grievant taught two lecture course sections: CS 595 "Special Topics" in the spring with an enrollment of 3 students, and CS 220 in the fall with an enrollment of 53 students. Student comments on the SEIs for courses taught in the fall semester are not available until after the end of the year. Because of this, the student comments for CS 220 would not normally be included in Grievant's Faculty Productivity

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[4] Grievant pointed to a September 1, 2010 Memorandum from Michele G. Wheatly, Provost and Vice President for Academic Affairs, which contained that following statement: "Deans and chairs *should* notify faculty when they have added material to the personnel file, and should remind faculty of their right to respond to such material. . . . and the faculty member notified sufficiently in advance of the closing date so that the faculty member has a reasonable time to respond." (Emphasis added.) The memorandum did not say that the faculty member must be notified. In this instance, Chair Woerner mistakenly believed that Grievant wanted this document in his file. This was not a case where the Chair decided to place something in the file. Moreover, Grievant did not explain how he was harmed by this document being placed in his file.

Report for 2010. However, Grievant included the SEI Survey Results Analysis[5] for this course in his Faculty Productivity Report, but not the student comments.[6] Twenty-four students completed SEIs for the fall 2010 CS 220 course.

29. The students in the fall 2010 CS 220 course were to rate Grievant on 18 questions. The highest mean rating received by Grievant was a 4.75 for the question "the course material challenged the students intellectually." The lowest mean rating was a 2.96 on the question, "the instructor provided useful feedback regarding performance," with a standard deviation of 1.27. Grievant received a mean rating of over 4.0 (good) on only 5 of the 18 questions. The P&T Committee noted in its evaluation that the overall student rating for Question 5 of the SEIs, teaching effectiveness, was 3.04 out of a possible 5.0 for the fall 2009 CS 220 course, with a standard deviation of 1.33; the overall student rating for Question 6 of the SEIs, overall course rating, was 3.29, with a standard deviation of 1.04; and the overall student rating for Question 7, overall learning, was 3.38, with a standard deviation of 1.13. These are the three global questions which are the focus of the Provost's office.

30. The P&T Committee stated in its evaluation that it "expects relevant SEI summaries and student comments for the 2010 classes to be included in the file in time

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[5] This Analysis is a one page document that lists all the questions on the SEIs administered for the course, the number of students responding, the number of responses in each answer category (i.e., NA, rarely, seldom, usually, frequently, always, or poor, fair, satisfactory, good, excellent), and the mean, median, and standard deviation for each question answered.

[6] The undersigned has concluded from the evidence placed in the record that the student comments were not available to be placed in the 2010 report.

for the next evaluation cycle. While additional sources of teaching evaluation are valuable and welcome, they did not eliminate the need to report standardized SEI evaluations."

31. Chair Woerner noted in his evaluation that student responses on the SEIs for the fall 2010 CS 220 course for the questions of teaching effectiveness, overall ratings, and overall learning "were slightly below other classes of similar size and level within the department, but reasonable."

32. CS 220 is a required undergraduate course. Chair Woerner noted in his evaluation that Grievant had "documented extensive course materials for the class, including lecture notes and assignments, which are available on a web site."

33. The lecture course Grievant was originally assigned to teach for the spring of 2010 was CS 525, "Computational Complexity." Three students were enrolled in this course. This course was canceled in March 2010, because Grievant had determined that the students enrolled in the course did not have the necessary prerequisites, and the students were instead allowed to drop CS 525 and enroll in CS 595, "Special Topics." Grievant did not provide any SEIs to these students to complete because the computer program that generates the blank SEIs requires that the course number be entered from the list of courses on the computer, and the new course number was not listed in the database, nor did Grievant ask the students for comments on the course. Chair Woerner's evaluation noted that there were no SEI's provided for this course, but "I have not considered the lack of SEI data for this class as a factor in my evaluation." The P&T Committee noted in its evaluation the lack of student evaluations for either the original course or the replacement course.

34. During the fall of 2009, Grievant taught CS 220. As is the practice at WVU, Grievant included the SEI Survey Results Analysis in his Faculty Productivity Report. He did not include the student comments.

35. The P&T Committee noted that, in addition to the SEIs for the fall 2009 CS 220 course, a number of other documents not specifically identified by the P&T Committee, but related to this course, were included in Grievant's file. The P&T Committee did not consider these documents because they chose to follow the recommendation of Chair Woerner in his December 29, 2010 memorandum (See Finding of Fact Number 24), and because of "the absence of comprehensive documentation of 2009 teaching activities."

36. The SEI Survey Results Analysis for the fall 2009 CS 220 course show that 15 students participated. The mean response on the question of teaching effectiveness was 4.07; on overall rating of the course was 4.33; and on overall learning was 4.0. The lowest mean rating was 4.07, and the highest mean rating was 4.87 on two questions. Grievant received mean ratings above 4.0 on all 18 questions.

37. Grievant's SEI mean ratings were lower for the fall 2010 CS 220 course than they were for the fall 2009 CS 220 course on every question but one (the instructor showed mastery of the subject matter), and in some cases substantially lower.

38. Grievant had four post-doctoral researchers working with him during portions of 2010, two in the spring semester, and two different researchers in the fall semester, so that he was working with two post-doctoral researchers at a time.[7] He co-authored four

[7] Grievant continued to assert that Chair Woerner's evaluation was wrong when it stated that he worked with two post-doctoral researchers, even after Chair Woerner explained that Grievant was only working with two at a time, and he recognized that Grievant had four different researchers during the year.

papers with three of these researchers. Grievant advised one undergraduate student, one Master's student, and two Ph.D. students. One of the Ph.D. students left Grievant's program. Grievant mentored the other Ph.D. student in writing a grant proposal, which was successful, and that student is continuing his thesis with that grant. The undergraduate student has co-authored several papers with Grievant.

39. Post-doctoral researchers have usually already completed their doctoral research, and are working with a professor at WVU to conduct research with a more senior faculty member. They are not awarded a degree by WVU when they have completed their time at WVU.

40. Grievant has advised few Ph.D. students to graduation, as in his area of expertise, students attempt to find the solution to a problem, and often find that there is no solution, or that it will take many years to find the solution, causing the student to switch to another area of study.

41. Both the P&T Committee and Chair Woerner stated in their evaluations of Grievant that they encouraged him to increase the number of students advised and mentored to graduation, "given your high level of research activity."

42. Grievant served on a Ph.D. dissertation committee for a student, which is similar to reviewing a paper.

43. Grievant included in his Faculty Productivity Report exit interviews of two students prepared in the late summer and fall of 2010, who had taken CS 220 in the fall of 2009. Both offered generally positive comments about their experience. He also included a critique by Grievant of student performance for the fall 2010 CS 220 course, summaries prepared by Grievant of three student course surveys he had conducted in the

fall of 2010 in order to get student input on issues related to teaching, including his criticism of student attitudes, and lecture notes.[8]

44. Grievant offered a one credit hour directed study course for two graduate students in the Spring of 2010.

45. Grievant selected two individuals to observe his classroom instruction and he included the peer evaluations of his teaching completed by these individuals in his Faculty Productivity Report. The first individual, LDCSEE Associate Professor Daryl Reynolds, observed one class session. Professor Reynolds' evaluation found that Grievant was "extremely well prepared, he fully engaged the students in the learning process. His use of student and instructor worked examples, along with his efforts to connect the topic to his research, motivated the practical importance of recurrence relations." Professor Reynolds suggested that Grievant increase the font size of the slides in his presentation, and that he have more patience with students who provide incorrect answers to questions. Grievant views Professor Reynolds as a friend.

46. The other individual who observed Grievant's classroom instruction and completed an evaluation was Harry Gingold, a mathematics professor at WVU. Professor Gingold assisted Grievant at the level one hearing in this matter. Professor Gingold observed two class presentations by Grievant in September and October 2010. He found the presentations to be clear, and that Grievant had "an excellent command of the

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[8] The Faculty Productivity Report, however, lists all of this documentation under "Fall 2009 - Discrete Mathematics (CS 220) (Undergraduate, Core). Enrollment: 51." The introduction to this section of the Faculty Productivity Report states that Grievant taught two courses in 2010, and apparently erroneously lists the Fall 2009 CS 220 as the second course.

mathematics he presented." He found the class atmosphere and interaction to be excellent, and that students felt "at ease to interact." He concluded that the course syllabus clearly conveyed the desired outcome and goals, and that Grievant "is an engaging teacher, who cares about the learning of his students and makes significant contributions to the knowledge and skills of students at WVU."

47. Grievant listed in his Faculty Productivity Report under service to the profession for 2010, that he was a member of the editorial board of the "International Journal of Applied Intelligence, and served on the Program Committees of "FCS 2010 and PDPTA 2010," and he had reviewed four journal papers, one paper for each of the journals Sensors, IST Transactions on Transportation Systems - Theory and Applications, Computational Optimization and Applications, and Acta Informatica. He also listed under conference reviewing that he had reviewed one paper for Logic in Computer Science. Grievant noted that this "is the most prestigious conference among conference[s] which address logical aspects of computer science," and that being asked to review a paper for this conference "is an indication of the esteem in which my peer community holds me." Grievant pointed out that it took him four weeks to complete review of this paper. Finally, Grievant was on the Program Committee for two conferences.

48. In his Faculty Productivity Report for 2010, Grievant listed under service to the department that he hosted a visiting lecturer for three days in July, a visiting postdoctoral researcher for four days in April, and a visiting doctoral researcher for one day in January. Grievant listed that he served on the CS undergraduate curriculum committee, that he chaired the search committee for two postdoctoral associates, and that he spent

"significant amounts of time" collecting and presenting rules and policies on the WVU evaluation process to faculty.

49. Most faculty review many papers and host visitors.

50. Grievant has filed previous grievances, and Chair Woerner and the members of the P&T Committee were aware of the grievances.

51. Chair Woerner placed a draft of a Memorandum of Understanding for Promotion from Associate Professor to Full Professor, dated September 20, 2006, in Grievant's temporary file, together with a Memorandum dated December 16, 2009, from Chair Woerner to Grievant. Grievant disagrees with the Memorandum of Understanding and has not signed it. The December 16, 2009 Memorandum states that "the college and university have requested that candidates for promotion have a signed Memorandum of Understanding (MOU) in their personnel files. . . . For purposes of documenting our discussions, I am placing a copy of a draft MOU which we discussed into your Personnel file, along with this memo. The primary point of disagreement is that you do not feel that advising of graduate students to completion is an appropriate evaluation measure; on this matter, we must respectfully disagree."

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).

"[T]his Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse that would thwart the primary purpose of the evaluation process. *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999); *Kinder v. Berkeley County Bd. of Educ.,* Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.,* Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.,* Docket No. 54-86-262-1 (May 5, 1987), *aff'd* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff'd, in part*, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Rutherford v. W. Va. Univ. at Parkersburg*, Docket No. 05-HE-229 (Oct. 31, 2005).

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

Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). *See Siu, supra; Kauffman v. Shepherd College,* Docket No. BOR1-86-216-2 (Nov. 5, 1986).

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

"The standard for assessing an evaluation is the arbitrary and capricious standard." *Id.* "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 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)).

As an initial matter, Grievant repeatedly stated during his testimony at level three that either the P&T Committee or the Chair ignored information he had placed in his file. This statement was based entirely on the fact that the written evaluations did not reference particular items. As Chair Woerner pointed out, the faculty files are voluminous, and there is no requirement that every item be referenced. Grievant acknowledged that there is no such requirement. Chair Woerner testified that he reviewed all the documentation provided by Grievant. Grievant's conclusion that items were ignored because they were not referenced is not based on fact. The undersigned will not address every item pointed out by Grievant as "ignored," but will simply state that Grievant's conclusion on this point is not supported by the evidence. Further, just because Grievant would have stated things a different way does not make the statements of his colleagues erroneous.

Likewise, Grievant's assertions that various procedures were violated by the Chair and the P&T Committee when they failed to consider or address all the elements that make up teaching, are again based solely on the failure to specifically address these elements in the written evaluation. There is absolutely no requirement that either the Chair or the P&T Committee state in the written annual faculty evaluation how they have evaluated each and every factor set forth in the University and College procedure, nor is there any requirement that either the Chair or the P&T Committee fully justify their decisions. The purpose of the evaluation is to assist the faculty member in improving, as well as forming the basis for merit increases, and use in promotion and tenure decisions. It would

accordingly be a reasonable approach to highlight the areas where improvement is needed, and highlight areas of outstanding performance, if they choose to do so. Grievant's argument in this regard is without merit.

Grievant also argued that the Chair and the members of the P&T Committee did not have the expertise in his field to properly evaluate him. The only testimony presented in support of this assertion was Grievant's opinion. Grievant pointed out on many occasions during the level three hearing that the P&T Committee and the Chair must follow the written procedures adopted by the Department, College, and WVU. Grievant is also subject to these same procedures, which set forth who is to conduct his evaluation. The undersigned has no authority to change this procedure. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Grievant took issue with many of the statements made by the P&T Committee and Chair Woerner, as well as their evaluation rating of his teaching and service. The undersigned, however, declines to address every single area in which Grievant disagreed with those evaluating him, and it would behoove Grievant to do the same. The issue in this grievance is whether the professional judgement of Grievant's evaluators was unreasonable and in disregard of the facts. The undersigned will, however, as an example, address Grievant's objection to the P&T Committee's statement that the CD he compiled was not well organized, stating that he followed the proper format, pointing to Level Three Grievant's Exhibit 11. That exhibit does not address how the CD is to be set up. Grievant also testified that he was told that the problem was that he did not use MS Word 7, but he did not identify who had told him this. Finally, he testified that the CD was well-organized in a tree-like fashion in main directories with various sub-directories for each area, class,

student, and so on. Chair Woerner testified that he found the CD difficult to follow in some instances, and that he believed some members of the P&T Committee had found the directories for each class to be confusing.[9] He stated that the documents are usually numbered in each category. Moreover, Chair Woerner stated that it is the responsibility of the faculty member to make sure his file is easy to read. The CD clearly was not as well-organized as it could have been, and the P&T Committee may well have been put out by this, otherwise, they would not have pointed it out. Grievant, however, apparently believes that there is no room for improvement, and rather than accept that he should see if there were some way to do an even better job of organizing the supporting documents in the future for those reviewing the documents, simply decided that the P&T Committee was wrong and he was going to prove it, and there was no requirement that he do things their way. In fact, Grievant stated in his response to the P&T Committee evaluation that he rejected "the notion that my file is not well-organized. Additionally, I do not plan to reorganize the format of my productivity report, unless the Committee can point to a specific guideline that mandates such a reorganization." This attitude was prevalent throughout the level three hearing.

In the area of teaching, Grievant demonstrated that he has put significant effort into improving his teaching and preparation of course materials, and that those he chose to observe his instruction found his teaching to be of good quality. He also demonstrated that his work with the students assigned to him has been good enough to produce results in terms of grant money and papers presented for publication, for which he should be

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[9] No members of the P&T Committee were called as witnesses.

commended. The areas in which Grievant has not excelled are taking students to completion of their degrees, and the most recent student evaluations of his instruction, on which Grievant received much poorer ratings than he did in 2009. Grievant argued that he should not be penalized for his students not completing their degrees because the challenges to degree completion in his field are such that very few students are successful. While there may well be some merit to this, it is not up to the undersigned to make this decision. Associate Provost Wilson testified that it is the expectation of the Dean of the College that faculty bring graduate students to degree completion, and Grievant has been aware of this expectation for many years. He also opined that it was not unreasonable to expect Grievant to bring some students to degree completion, even if was difficult to do so. Grievant did not demonstrate that it is unreasonable to expect that he will guide more students to successful completion of their degree.

As to the SEIs, Grievant takes issue with the emphasis on the three global questions. First, while Grievant continually asserted that Respondent had "violated" the SEI Guide, something which would seem to be impossible since it is merely a guide, in this instance he ignored the SEI Guide's statements regarding the usefulness of more global questions. Second, even if the P&T Committee and the Chair reviewed all the questions on the SEIs, it is quite clear that Grievant's scores for the fall of 2010 were much worse on all questions than they were for the fall of 2009. Finally, this Grievance Board has already addressed the validity of focusing on the three global questions, and the undersigned is not going to revisit that issue. *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).

Grievant also took issue with the P&T Committee's disregard of the materials in his Faculty Productivity Report from 2009. The year at issue here was 2010. The undersigned finds nothing in any policy, procedure, or rule that would require the Committee to review anything from previous years, except the statement in the College's written Criteria for Promotion and Tenure, where it stated that the review is "to be a review of annual evaluation statements from [previous] years, in order to assess whether suggestions for improvement have been addressed." The undersigned would note in this regard that Grievant did not indicate whether he had, in fact, addressed suggestions for improvement. This document goes on to state that the review is of the "immediately-previous one-year period." Further, had the P&T Committee compared Grievant's SEIs for the fall of 2009 to the fall of 2010 it would have noted that instead of showing improvement, the scores were much worse. The undersigned cannot find any error in the Committee's action in this regard.

Having reviewed the entire record in this proceeding, and Grievant's many arguments and assertions, the undersigned cannot conclude that Grievant has demonstrated that Grievant's evaluators exercised their professional judgement in the evaluation of his teaching in an arbitrary and capricious manner.

In the area of service, Grievant demonstrated that he put in a lot of time, and that he performed quality work. Chair Woerner testified that it is hard to evaluate service because the faculty engage in such a broad range of activities which fit within this category. He testified that it ultimately comes down to a professional judgement of the value of the entire body of service contributions, and he generally reserves a rating of excellent in this area for someone who is extremely active in a leadership role, for example, in a

professional society or a conference, coordination of a conference or major activity, or coordination of reviews for a journal. Grievant disagreed with Chair Woerner's approach and asserted that his colleagues were not qualified to evaluate the effort he put forth in review of the paper for Logic in Computer Science. Chair Woerner pointed out that nearly every faculty member reviews many papers, and hosts visitors, which is part of the job. While Grievant demonstrated that he put forth a significant effort on a difficult, prestigious project, as well as participating in several other service activities, he did not demonstrate that the professional judgement of the Committee or Chair Woerner was without foundation or clearly incorrect.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the

evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

The first area which will be addressed is Grievant's complaint that Chair Woerner did not maintain the confidentiality of the grievance procedure when he placed the December 29, 2010 letter in his temporary personnel file, which began by stating that Grievant had "elected to challenge the decision of the university with respect to your request for promotion during the 2009-2010 review cycle." Chair Woerner explained that he thought it was best to offer some explanation as to why Grievant's complete personnel file was not available for review. While Chair Woerner could have certainly come up with some more generic language, the undersigned finds Grievant's purported outrage on this

point to be disingenuous. Grievant himself told the reviewers that he had one or more grievances pending, and had told Chair Woerner in the email of December 17, 2010, that Grievant needed to include a letter in the file that he was grieving the decision and the methodology. The very first page of the Faculty Productivity Report prepared and submitted by Grievant for 2010 states Grievant's Academic Rank as, "Associate Professor (pending outcome of grievance hearing)," and then he goes on to explain at another point on the first page that he is grieving the evaluation process. The undersigned declines to address this issue further.

While Chair Woerner and the P&T Committee were aware of grievances being filed, Grievant failed to demonstrate that the filing of prior grievances was a factor at all in the ratings he received on his evaluation. It is clear that the evaluations of the Committee and the Chair were based on their review of the file before them, and their professional judgement.

Grievant asserted in his statement of grievance that he had been subjected to harassment. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495

(Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

Grievant argued that Chair Woerner's placement of the two memos in the file at the end of the year, one of which told the P&T Committee why Grievant's entire personnel file was not available, and the other in which Grievant asked for a re-evaluation of his teaching file, constituted harassment. He further argued that the placement of the unsigned Memorandum of Understanding in his file constituted harassment. The undersigned cannot find that these actions are contrary to the behavior expected by law, policy, or profession. Grievant failed to demonstrate that he has been the victim of harassment.

Finally, Grievant argued he had been discriminated against. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant argued that he was held to a different standard from another faculty member with regard to poor SEIs and advising students to degree completion, pointing to Grievant's Level 3 Exhibit Number 26, which was the 2010 evaluation of another faculty member in the department by the P&T Committee. Grievant focused on various statements made by the Committee in the evaluation summary. As to the SEIs, this unidentified professor had presented SEIs for two courses in the spring of 2010, and two courses for the fall of 2010. The mean scores on all three global questions for three of the four courses were above 4.0, with the mean score for two of the questions at 4.60 for one of the fall course, well above Grievant's mean scores. Grievant has ignored that the Committee also referred to favorable students comments, and that "average SEI scores have gone up each time...has taught it." Grievant's mean scores actually went down from 2009 to 2010 for the one course taught both years. As to student advising, the undersigned cannot clearly discern how Grievant believes he has been treated differently. The Committee specifically mentioned advising undergraduate students in the evaluation of this professor, but that does not mean it was required to mention this in Grievant's evaluation or that it ignored this, as was noted by the undersigned previously. The Committee stated that this unidentified professor had chaired the committee for a number of M.S. and Ph.D. students, and that at least three had graduated. The specific number of students in each category was redacted, making it difficult to compare to Grievant's student advising. The undersigned cannot conclude from the statements made in the evaluation of this unidentified professor that Grievant was treated differently by the P&T Committee.

Grievant also argued he was discriminated against "when he was required by the Committee to include fall 2010 student evaluations which would not be available until Spring 2011, a matter known by the chair and all evaluators . . .." The undersigned cannot draw the same conclusion as Grievant from the evaluation. The P&T Committee simply stated in its evaluation that it "expects relevant SEI summaries and student comments for the 2010 classes to be included in the file in time for the next evaluation cycle. While additional sources of teaching evaluation are valuable and welcome, they did not eliminate the need to report standardized SEI evaluations." In this case, there were no student comments in Grievant's Faculty Productivity Report for any courses Grievant taught, including the course he taught in the fall of 2009. The Committee merely noted this void, and that it wanted to see student comments in the future.

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. "[T]his Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse that would thwart the primary purpose of the evaluation process. *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999); *Kinder v. Berkeley County Bd. of Educ.,* Docket No. 02-87-199 (June 16, 1988). *See Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682

(1981); *Thomas v. Greenbrier Bd. of Educ.,* Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.,* Docket No. 54-86-262-1 (May 5, 1987), *aff'd* Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), *aff'd, in part*, 184 W. Va. 205, 400 S.E.2d 213 (1990)." *Rutherford v. W. Va. Univ. at Parkersburg*, Docket No. 05-HE-229 (Oct. 31, 2005).

3. "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." *Kunda, supra*, at 548. *See also Bina v. Providence College,* 39 F.3d 21 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1406 (1995); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980). "This same discretion should be applied to the evaluation of faculty members." *Rutherford, supra.*

4. "The standard for assessing an evaluation is the arbitrary and capricious standard." *Id.* "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable.

State ex rel. Eads v. Duncil, 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)).

5. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

6. Grievant did not demonstrate that he was subjected to reprisal for filing a grievance.

7. What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln*

County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

8. Grievant did not demonstrate he had been subjected to harassment.

9. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

10. Grievant did not demonstrate that he was the victim of discrimination.

11. Grievant did not demonstrate that Grievant's evaluators exercised their professional judgement in the evaluation of his teaching or service in an arbitrary and capricious manner.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: March 15, 2013