STATE OF MICHIGAN

COURT OF APPEALS

CENTRAL MICHIGAN UNIVERSITY FACULTY ASSOCIATION and TANYA MARCUM, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED February 10, 2011
v	No. 293003 Court of Claims
CENTRAL MICHIGAN UNIVERSITY, Defendant-Appellant/Cross-Appellee.	LC No. 07-000009-MK

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant Central Michigan University appeals as of right the trial court's order that vacated an arbitrator's decision denying plaintiff Tanya Marcum's[1] grievance regarding her application for promotion and remanded the matter for the arbitrator to consider plaintiff's application for promotion without consideration of the quality of the works plaintiff submitted for publication. Plaintiffs' cross-appeal the portion of the same trial court order confirming the arbitrator's denial of plaintiff's grievance regarding her application for tenure.[2] For the reasons set forth in this opinion, we affirm the portion of the trial court's order confirming the arbitrator's decision denying plaintiff's tenure grievance; however, we reverse the portion of the

[1] References to the singular "plaintiff" are to Tanya Marcum.

[2] Plaintiffs filed a claim of cross-appeal on July 29, 2009, claiming that the trial court erred in confirming the arbitrator's denial of plaintiff's application for tenure. However, plaintiffs have not filed a brief on cross-appeal, and they do not adequately address the tenure issue in their brief on appeal. When a party fails to sufficiently brief the merits of an allegation of error, the issue is deemed abandoned on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). Plaintiffs have abandoned their appeal of this issue.

trial court's order vacating and remanding the arbitrator's decision denying plaintiff's promotion grievance and reinstate the arbitrator's decision in this regard.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is an attorney and former faculty member of the Department of Finance and Law at defendant Central Michigan University. In 2004, she applied for and was denied tenure with defendant. Plaintiff was a member of plaintiff Central Michigan University Faculty Association (plaintiff union). The collective bargaining agreement (CBA) between plaintiff union and defendant contained provisions regarding the filing of grievances relating to decisions regarding tenure or promotions. CBA, Art 8, ¶ ¶ 15-21. Pursuant to these provisions, plaintiff filed a grievance. The grievance was resolved when the parties agreed to allow plaintiff to re-apply for tenure in the spring of 2005. The Resolution of Grievance further provided that plaintiff's re-application for tenure could be combined with an application for promotion to associate professor.

In spring 2005, plaintiff re-applied for tenure and also applied for promotion to associate professor. In a letter dated April 26, 2005, defendant denied plaintiff's application for tenure. The department, department chair, dean and provost all recommended that plaintiff's application for tenure be denied. The letter from defendant stated that the major question regarding plaintiff's previous application for tenure was whether she "had satisfied the criterion of competence in regard to scholarly/creative activity and whether or not [she] had satisfied the criterion of promise." Defendant concluded that plaintiff had not demonstrated the preceding criterion, stating:

> You have presented three co-authored law journal articles. Some have represented these works as "studies" rather than "articles." This may be a distinction without a difference. You also presented your forthcoming article on the "Burden of Proof Laws." The telling point about each of these achievements is that your fellow faculty members at the department level, but also at the college level and your dean, do not judge them to be of very high quality.
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> The collective bargaining Agreement says, "Departmental colleagues are best informed and are in the best position to arrive at specific criteria and standards to evaluate a bargaining unit member's work." My own review of the three law review journal articles and of the "Burden of Proof Laws" article supports the assessments of your department as to their quality. I do not judge any of these four works to be of a quality to recommend the award of tenure. Thus, I cannot say that you have demonstrated a sufficient competency in scholarly/creative activity to warrant tenure; nor do I judge you to have demonstrated sufficient promise for tenure. I am not recommending you for tenure as a member of the faculty of Central Michigan University.

In a letter dated May 25, 2005, defendant denied plaintiff's application for promotion. The letter denying plaintiff's application for promotion explained that "[t]he issue is whether or not you have met the department and University standards in scholarly/creative activity." Under the CBA, the basis for judgment for promotion is the competence of the bargaining unit member,

which includes demonstrated achievements in scholarly and creative activity. CBA, Article 14, ¶ ¶ 2.a.(1)(b); 2.b. The bylaws for defendant's Department of Finance and Law similarly require a candidate seeking a promotion to demonstrate, among other criteria, scholarly and creative activity. Bylaws, Department of Finance and Law, Departmental Procedures, XI, B.2.d. The bylaws also require a candidate seeking promotion to the rank of associate professor to "have published three (3) or more articles (the articles must list CMU as the author's affiliation) in refereed scholarly journals (a published textbook may be counted as a refereed scholarly journal article and only one (1) textbook publication may be used for this purpose) or law review journals from an ABA accredited law school . . . ." Bylaws, Department of Finance and Law, XI, E.1.

In denying plaintiff's application for promotion, defendant stated that plaintiff's claim that she had clearly exceeded the number of articles required was inaccurate and that even if defendant agreed that plaintiff had satisfied "the quantity standard set forth by the department for promotion, there is another standard to assess; and that is your responsibility 'to document both the quantity **and quality** of (your) activities and achievements.'" (Emphasis in letter.) Defendant concluded that plaintiff failed to establish the adequacy of the quality of her activities and achievements:

> You have provided a brief description of the content of each of your articles, but you did not in my view satisfactorily document the quality of that content. I understand there might be a view that publication itself in a journal with some kind of referee process necessarily means the article is of sufficient quality to have satisfied the University standard cited in Article 14. If there is such a view, I do not agree with it. One finds many very fine quality articles published regularly in each academic discipline. One also can find many very poor quality articles similarly published. Publication alone is not a measure of quality. And I do not believe you have fulfilled the responsibility to document the quality of your activities and achievements in this area of scholarly/creative activity. Dean Vetter's judgment is that two of the three law review articles are "at best descriptive in nature and provide no constructive analysis of the data." My review has found nothing to dispel his assessment.
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> I am sorry to conclude, as did your department and dean, but on a separate and independent basis, that you should not be promoted at this time.

Plaintiff grieved defendant's decisions to deny her tenure and a promotion. The CBA provides that an unresolved grievance concerning the denial of reappointment, tenure or promotion may be referred to binding arbitration. CBA, Art 8, ¶ 18. The case went to arbitration before arbitrator Mark J. Glazer. There were two issues for the arbitrator to decide: 1) whether defendant violated the CBA when it refused to promote plaintiff from assistant professor to associate professor, and 2) whether defendant violated the CBA when it denied plaintiff tenure. In an opinion and award dated June 16, 2006, the arbitrator denied plaintiff's grievances regarding tenure and promotion. In so doing, the arbitrator observed that defendant denied plaintiff's application for tenure and a promotion based on her submissions to the University of Detroit Mercy (UDM) Law Journal, which failed to satisfy the scholarship (scholarly and creative activity) criterion. According to the arbitrator, plaintiff made three submissions; two

were co-authored with tenured Department of Finance and Law professor Elizabeth Campbell, and the third was co-authored with Professor Campbell and Patricia Morris.

The arbitrator denied plaintiff's grievance regarding the denial of tenure, ruling that plaintiff failed to carry her burden of proving that she had promise in the area of scholarly and creative activity. The arbitrator also denied plaintiff's promotion grievance, concluding that plaintiff did not publish three or more articles in a law review from an ABA accredited law school and that even if plaintiff's submissions to the UDM Law Journal constituted articles, "[t]he evidence suggests that the Grievant did not meet the threshold requirements for quality of scholarship within the Department."

In October 2006, plaintiff filed a complaint in the Court of Claims (Ingham County Circuit Court, Judge James R. Giddings), seeking to vacate the Arbitration Award and Order. According to plaintiff, the arbitrator's award failed to draw its essence from the CBA because the arbitrator assumed that the CBA required a threshold analysis of the quality of the scholarship of an article when "[t]here is nothing in the Contract requiring the Department to rely solely on the quality of the scholarship before even determining if a valid article has been submitted." Thus, plaintiff asserted, the arbitration award improperly adds to and alters the CBA. The parties filed cross-motions for summary disposition. On June 25, 2009, the trial court entered an order confirming the arbitrator's denial of plaintiff's request for tenure and vacating the arbitrator's denial of plaintiff's request for promotion to associate professor. In addition, the trial court remanded for the arbitrator to consider plaintiff's application for promotion without considering the quality of the articles submitted by plaintiff in connection with her application for promotion. The trial court explained its reasoning for vacating the arbitrator's denial of plaintiff's request for promotion on the record on June 1, 2009. According to the trial court, the arbitrator erred in finding that because the UDM Law Journal characterized plaintiff's submissions as "studies" rather than "articles," plaintiff did not publish three or more articles as required by the bylaws. The trial court further found that the UDM Law Journal's characterization of plaintiff's submissions as "studies" was merely editorial choice or editorial designation and that there was no distinction of legal significance between an "article" and a "study." The trial court also addressed the issue of the quality of plaintiff's written submissions. According to the trial court, nothing in the CBA or the bylaws permits defendant to evaluate the quality of plaintiff's submissions. The trial court vacated the arbitrator's decision regarding plaintiff's application for promotion and remanded for the arbitrator to decide the promotion issue without considering or evaluating the quality of plaintiff's written submissions.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004). Thus, legal issues are considered without any deference to the trial court's decision. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). Arbitration is a favored means of resolving labor disputes, and courts refrain from reviewing the merits of an arbitration award when considering its enforcement. *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 149; 393 NW2d 811 (1986). Therefore, "judicial review of an arbitrator's decision is very limited; a court may not review an arbitrator's factual findings or decision on the merits." *Id.* The inquiry for the reviewing court "'is whether the award was beyond the

contractual authority of the arbitrator.'" *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002), quoting *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). If, in granting the award, the arbitrator did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases. *Police Officers Ass'n of Michigan (POAM)*, 250 Mich App at 343. "'[W]hile the powers of an arbitrator are not unlimited, [such] awards should be upheld so long as [t]he[y] do[] not disregard or modify plain and unambiguous provisions of a collective bargaining agreement.'" *Id.*, quoting *General Telephone Co of Ohio v Communications Workers of America, AFL-CIO*, 648 F2d 452, 457 (CA 6, 1981).

III. ANALYSIS

Defendant argues that the trial court erred in vacating the arbitrator's decision denying plaintiff's grievance regarding her request for promotion and remanding the matter for the arbitrator to consider plaintiff's application for promotion without consideration of the quality of plaintiff's submissions for publication.

"Parties consenting to arbitration pursuant to written agreements consent to arbitrate within the framework of the terms and conditions of such agreements." *Port Huron Area Sch Dist*, 426 Mich at 151. Thus, judicial review of an arbitration award is limited to the determination whether the arbitrator exceeded the contractual authority granted to the arbitrator in the CBA and does not extend to evaluation or fact-finding on the merits of the dispute. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999). In addition to arguing that the trial court erred in concluding that the arbitrator exceeded his contractual authority under the CBA, defendant presents numerous other arguments on appeal regarding the trial court's failings in vacating and remanding the arbitrator's decision on the promotion issue. The only relevant inquiry for this Court, however, is whether the arbitrator's award was beyond the contractual authority of the arbitrator in the CBA. *POAM*, 250 Mich App at 343. We therefore address whether the arbitrator's award relating to plaintiff's application for promotion was beyond its contractual authority as that authority was articulated in the CBA.

Under Article 8, ¶ 18 of the CBA, unresolved grievances concerning the denial of promotion may be referred to binding arbitration under the provisions of Article 9 of the CBA. Article 9, ¶ 6 of the CBA defines and limits the arbitrator's authority in arbitrating a dispute under the CBA:

> Matters under this Article shall consist only of disputes about alleged violations of this Agreement, of department procedures developed under Article 10 (Department Procedures, Criteria, Standards, and Bylaws), or of matters under Paragraph 18 of Article 8 (Grievance Procedure). *The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement; nor shall the arbitrator exercise any responsibility or function of CMU or the ASSOCIATION, except as provided for under the provisions of this Agreement; nor shall the arbitrator turn to laws or regulations outside of this Agreement as a*

> *basis for decision except that the arbitrator may take note of the legal status and power of the parties of this Agreement.* [Emphasis added.]

Article 8, ¶ 18 of the CBA provides:

> If a grievance concerning the denial of reappointment, tenure, or promotion remains unresolved at Step Two (2), the grievance may be referred by the ASSOCIATION to binding arbitration under the provisions of Article 9. The arbitrator's award in such case may include the grant of reappointment, tenure, or promotion to the bargaining unit member.

Thus, the CBA specifically grants the arbitrator the authority to decide disputes concerning the denial of promotion and disputes concerning violations of the CBA.

Regarding plaintiff's application for promotion, the issue before the arbitrator was whether defendant violated the CBA when it refused to promote plaintiff from assistant professor to associate professor. In deciding whether defendant violated the CBA in denying plaintiff's application for promotion, the arbitrator focused on whether plaintiff's three submissions to the UDM Law Journal satisfied the CBA's and bylaws' scholarly and creative activity requirement for promotion. In so doing, the arbitrator noted that the bylaws require publication of three or more "articles" and the UDM Law Journal lists each of plaintiff's submissions as a "study." Because the UDM Law Journal also included works that it listed as "articles," the arbitrator concluded that the UDM Law Journal considers a "study" to be different from an "article." Thus, the arbitrator concluded: "Pursuant to the literal language of the bylaws, the Grievant did not publish **three or more articles** in a law review from an ABA accredited law school. Consequently, if only the literal language is considered, the promotion grievance must fail insofar as the Grievant did not publish the three articles required by the bylaws, as opposed to studies." Furthermore, the arbitrator found that even if plaintiff's studies constituted articles, "[t]he evidence suggests that the Grievant did not meet the threshold requirements for quality of scholarship within the Department." According to the Arbitrator:

> Pursuant to the contract, it is for the Department to make the decision on quality, and the Grievant has the burden of proving that the decision was not properly made. An arbitrator, under the contract, does not make an independent judgment of the quality of scholarship; rather, the arbitrator simply determines if a Grievant has met her burden of proving that the criteria had been misapplied. Based upon the evidence, it cannot be concluded that the Department, the Dean, or the Provost made an improper evaluation that the threshold requirement for scholarship was lacking in the Grievant's submissions.
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> Whether the promotion issue is viewed as a matter of literal construction of the Departmental bylaws requiring an article, or an examination of whether the submission meets the standards of an article, or whether there is a threshold examination of quality of the articles, the Grievant did not meet her burden of proof to show a violation of the contract and the bylaws. Accordingly, the promotion grievance should be denied.

In reversing the arbitrator's decision in this regard, the trial court disagreed with the arbitrator's conclusion that a "study" did not constitute an "article" under the CBA or the bylaws:

> But again, I'm not aware of any definitional significant difference between, as I say, article, comment, essay, quote "study." But, certainly to the extent that the Arbitrator found that she was disqualified from promotion, because in his opinion he created this new standard for study, which falls below the article standard, that's unsupported in the law, unsupported in the record. There's nothing there which would allow him to do that. There's nothing specifically in the collective bargaining agreement, and nothing in the bylaws.
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> And given that, he exceeded his authority, so to that extent the determination of denial of promotion is set aside. It's remanded back with the direction to reconsider her request without any consideration of the quality of the article, or his—or the Department's, frankly, peculiar definition of the word article. . . .

The trial court also concluded that the arbitrator exceeded his authority by considering the quality of plaintiff's written works. According to the trial court, the CBA and the bylaws require only that an applicant submit three articles to a law review, and nothing in the CBA or bylaws permits defendant to evaluate the quality of the submissions.

The trial court erred in concluding that the arbitrator acted outside his authority in concluding that a "study" did not constitute an "article."

The arbitrator did not act outside the scope of the authority granted to it in the CBA by concluding that plaintiff's submissions to the UDM Law Journal were not "articles" as required under the department's bylaws.[3] As noted above, the CBA specifically grants the arbitrator the authority to decide disputes concerning the denial of promotion and disputes concerning violations of the CBA. The bylaws specifically require an applicant for promotion to have published three or more "articles" in a law review journal from an ABA accredited law school (or in a refereed scholarly journal). Plaintiff submitted three works to the UDM Law Journal, and the Law Journal published each submission as a "study" rather than an "article." Whether the arbitrator's conclusion that plaintiff did not publish three or more articles "[p]ursuant to the literal language of the bylaws" is correct, it is irrelevant because the CBA gave the arbitrator the

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[3] The department's bylaws are incorporated by reference in the CBA. Article 10, ¶ 1 of the CBA provides: "The department procedures, criteria, standards, and bylaws of each department shall remain in effect, except when changes are made in compliance with the provisions of this Article." Furthermore, Article 9, ¶ 6 of the CBA provides: "Matters under this Article shall consist only of disputes about alleged violations of this Agreement, of department procedures developed under Article 10 (Department Procedures, Criteria, Standards, and Bylaws), or of matters under Paragraph 18 of Article 8 (Grievance Procedure). . . ."

authority to decide promotion grievances and disputes concerning violations of the CBA, and the parties agreed to be bound by the CBA. Judicial review of an arbitration award in a labor dispute is limited to whether the award draws its essence from the CBA; "'[t]he fact that an arbitrator's interpretation of a contract is wrong is irrelevant.'" *Roseville Community Sch Dist v Roseville Federation of Teachers*, 137 Mich App 118, 126; 357 NW2d 829 (1984), quoting *Ferndale Ed Ass'n v School Dist for City of Ferndale #1*, 67 Mich App 637, 643; 242 NW2d 478 (1976). Thus, even if the trial court believed that the arbitrator incorrectly interpreted the term "article" in the bylaws, it improperly rejected the arbitrator's conclusion that plaintiff's submissions were "studies" rather than "articles." It was improper for the trial court to overturn the arbitrator's decision on the merits of the grievance. *Roseville*, 137 Mich App at 126. Moreover, in concluding that neither the CBA nor the department's bylaws permitted the arbitrator's conclusion that a "study" did not constitute an "article," the trial court was essentially balancing the competing arguments of the parties. "Where a court finds itself weighing the pros and cons of each party's interpretation of substantive provisions of the contract, it is likely that the court has gone astray. The question for the court is not whether one interpretation or another is correct, but whether the parties have agreed that an arbitrator shall decide which of the competing interpretations is correct." *Kaleva-Norman-Dickson Sch Dist No. 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583, 595; 227 NW2d 500 (1975).

In sum, because the arbitrator's decision regarding plaintiff's application for promotion drew its essence from the CBA and the bylaws, the trial court's review of the arbitrator's decision effectively ceased. *POAM*, 250 Mich App at 343. Thus, the trial court erred in vacating and remanding the arbitrator's decision regarding plaintiff's promotion grievance.

The trial court also erred in concluding that the arbitrator acted outside his authority by considering the quality of plaintiff's written submissions for publication. Several provisions in the CBA grant defendant the authority to make such quality determinations when reviewing the submissions of an applicant seeking a promotion. Under the CBA, an applicant for promotion to associate professor must demonstrate "both the quantity and *quality* of her/his activities and achievements." CBA, Art 14, ¶ 32 (emphasis added). As noted above, scholarly activity is one of the bases for judgment regarding promotion under the CBA, and Article 14 of the CBA grants defendant the authority to *evaluate* an applicant's work in this regard:

> Departmental colleagues are best informed and are in the best position to arrive at specific criteria and standards to evaluate a bargaining unit member's work. Criteria refer to the areas of evaluation (e.g., teaching, scholarly and creative activity, professional growth, and university service). Standards refer to the written performance requirements in each evaluation area developed in compliance with this Agreement. . . . Departments develop and systemize these criteria and standards so that they may serve as guidelines for departmental recommendations regarding reappointment, tenure, and promotion. After approval by the Provost, these written standards form the basis not only for departmental evaluations but also for subsequent evaluations at higher levels. [CBA, Art 14, ¶ 1.]

In addition, the CBA provides:

> Reappointment, tenure, and promotion decisions result from deliberations and judgments occurring at various levels within the institution and begin with recommendations by departments to the college level where recommendations are made to the university level for decision. At each level, the criteria and standards applied shall be those developed in compliance with this Agreement. Both parties recognize that greater scrutiny may be given to judgments as their relative importance increases. [CBA, Art 14, ¶ 2.]

The CBA also provides that

> Promotion in rank results from a deliberative process involving departments, colleges, and the Provost, resulting in a decision by the Board of Trustees. *Promotion is not automatic nor based on seniority but rather on a judgment of the extent to which the applicant has met the criteria and standards developed in compliance with this Agreement.* [CBA, Art 14, ¶ 19 (emphasis added).]

In addition, the CBA provides that "[t]he primary responsibility for judging the extent to which departmental members have fulfilled the criteria and standards established in compliance with this Agreement rests with the department." CBA, Art 14, ¶ 34.

The trial court ruled that there was nothing in the CBA that permitted defendant to evaluate the quality of plaintiff's submissions. However, the trial court then explained that it read each of plaintiff's submissions, and the trial court concluded that plaintiff's submissions "were serious articles" with "a substantial amount of discussion, and certainly, some degree of analysis." Essentially, then, the trial court evaluated the quality of plaintiff's submissions itself, even though it concluded that it was improper for defendant and the arbitrator to do so. The trial court may "not substitute its opinion on the merits of the grievance for that of the arbitrator." *Port Huron Area Sch Dist*, 426 Mich at 160. Furthermore, contrary to the trial court's conclusion, the CBA provisions cited above permit defendant to evaluate the quality of plaintiff's publication submissions when making a determination regarding whether the applicant should be promoted. Most importantly, the CBA granted the arbitrator the authority to decide disputes regarding alleged violations of the CBA and grievances concerning the denial of promotion. Whether defendant was permitted to evaluate the quality of plaintiff's written submissions impacted both of these matters within the arbitrator's authority. Thus, the trial court erred in concluding that the arbitrator exceeded his authority by considering the quality of plaintiff's written works.

In sum, the trial court erred in rejecting the arbitrator's conclusion that plaintiff's written submissions did not constitute "articles" under the bylaws and in concluding that the arbitrator exceeded his authority by considering the quality of plaintiff's written works. A reviewing "court must be careful to appropriately limit its review to whether the arbitrator exceeded his contractual jurisdiction and authority." *Michigan State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 583; 444 NW2d 207 (1989). It is noteworthy that in explaining its ruling on the record, the trial court did not articulate the scope of judicial review of an arbitration award and did not make any statements indicating that it understood its limited role in reviewing the arbitrator's decision. The trial court clearly did not grasp the concept of judicial deference in the context of labor arbitration. "The legal basis underlying this policy of judicial deference is

grounded in contract: the contractual agreement to arbitrate and to accept the arbitral decision as 'final and binding.'" *Port Huron Area Sch Dist*, 426 Mich at 150. As stated above, "'If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases.'" *POAM*, 250 Mich App at 343, quoting *Lincoln Park*, 176 Mich App at 4. For the reasons explained above, the arbitrator did not disregard the scope of his authority as outlined in the CBA. The trial court therefore erred in vacating the arbitrator's decision denying plaintiff's grievance regarding her request for promotion and remanding the matter for the arbitrator to consider plaintiff's application for promotion without consideration of the quality of plaintiff's submissions for publication.

Affirmed, in part, and reversed, in part. The arbitrator's decision regarding the denial of plaintiff's promotion grievance is reinstated.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood