STANLEY J. KLOC,

Grievant,

v. **DOCKET NO. 96-BOT-507**

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Stanley Kloc, has filed this grievance pursuant to the provisions of W. Va. Code §§ 18-29-1, et seq., alleging that his "employment was terminated in violation of West Virginia University policies and procedures." He seeks reinstatement with back pay and benefits.

Grievant instituted this grievance at level one on August 20, 1996. After denials at the lower levels, he appealed to level four on December 2, 1996. After continuances for good cause shown on January 23, 1997, February 28, 1997, and April 4, 1997, and after the parties were given a scheduling order for the exchange of documents and other pertinent information, a level four hearing was held on May 1, 1997, in this Grievance Board's office in Morgantown, West Virginia. Due to the illness of counsel for the grievant, this matter did not become mature for decision until June 26, 1997, upon receipt of Grievant's proposed findings of fact and conclusions of law. (See footnote 1)

The following findings of fact are made from the record developed at levels two and four. (See footnote 2)

Findings of Fact

1. Grievant was employed by West Virginia University ("WVU") for thirty years in a professional, administrative capacity in the College of Business and Economics. His last position was as Director of the Small Business Development Center ("SBDC") from 1985 through September 30, 1995.

2. The purpose of the SBDC was to provide counseling, consultation services, and training to

West Virginia residents interested in opening their own businesses, and also to assist small businesses in trouble. The SBDC's services were provided to the public for free, and its funding came chiefly from federal and state sources, including grants, combined with money provided by WVU.

3. As Director of the SBDC, Grievant was responsible for general management of the Center, development of proposals and strategic planning, conducting research, writing grants and preparing reports.

4. Beginning in early 1995, continued federal funding for the SBDC became very uncertain, prompting discussions regarding finding alternative funds, which would be necessary to continue operation of the SBDC. Grievant was involved in some of these discussions with Tom Witt, Associate Dean for Research and Outreach in the College of Business and Economics (and Grievant's direct supervisor), and Sydney Stern, Dean of the College of Business and Economics. Grievant also made some proposals of his own regarding funding.

5. Sometime during the summer of 1995 (probably early August), Dean Stern initiated discussions with Fairmont State College regarding the “merger” of WVU's SBDC with Fairmont's. He believed that continued operation of the SBDC at WVU could not be accomplished, because of a “continuing budget crisis” within the College of Business and Economics. Having Fairmont State's SBDC take over the services provided by WVU seemed to be an economical and sensible solution, which would also ensure that services would continue to be provided to area residents.

6. Dean Stern did not include Grievant in the discussions concerning the merger with Fairmont State, because he knew that WVU positions would likely be eliminated, including Grievant's.

7. Grievant was notified by letter dated September 14, 1995, that his employment was terminated effective September 30, 1995, because Fairmont State would take over operations of the SBDC as of October 1, 1995. Prior to receiving this letter, Grievant had no knowledge of the Fairmont State merger.

8. Two classified employees of the WVU SBDC were hired to work for the expanded program at Fairmont State.

9. Grievant signed a yearly “Notice of Appointment” while serving as Director of the SBDC, which designated his employment as non-classified, administrative and temporary.

10. Grievant's last Notice of Appointment was from July 1, 1995, through June 30, 1996. Because of this contract, WVU retained Grievant as an employee until June 30, 1996, in spite of the

notice of termination previously sent to him.

11. During the duration of his 1995-1996 contract, Grievant worked on various projectsassigned by Mr. Witt. He also actively sought other positions at WVU, with the assistance of the Provost for Academic Affairs, who is responsible for placement of non-classified employees.

12. Grievant was unsuccessful in finding other employment at WVU, and his employment there ceased on June 30, 1996, at the end of his contract term.

13. Grievant initiated this grievance after his employment ceased on June 30, 1996.

Discussion

In non-disciplinary grievances, the grievant bears the burden of proving his case by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995). Although it appears that, at the lower level hearing, the burden of proof was placed upon Respondent, it does not bear the burden in this case. W. Va. Code § 18-29-7 states that the employer bears the burden of proof in cases involving discipline or discharge. However, the parties in this case do not dispute that Grievant's yearly contract was designated as a temporary contract for the specified term, and that Grievant was allowed to finish out his 1995-1996 contract. At that time, the action taken by WVU was a decision not to renew the contract for the next year, because Grievant's position no longer existed. This situation does not involve any disciplinary action or a discharge from employment; it is analogous to the non-retention of a probationary faculty member or displacement of a classified employee due to lack of need, in which cases it has been held that the burden rests with the grievant. See Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (March 6, 1997); Thacker v. Bd. of Directors, Docket No. 96-BOD-068 (Aug. 27, 1996).

Grievant has made two chief contentions in this case. First, he claims that he is entitled to the employment protections offered by statute to classified employees. Code § 18B-9-2 defines classified and non-classified employees of Respondent, and provides, in pertinent part, as follows:

> (a) “Classified employee or employee” means any regular full-time or regular part-time employee . . . who holds a position that is assigned a particular job title and pay grade . . .
>
> (b) “Nonclassified employee” means an individual who is responsible for policy formation at the department or institutional level or reports directly to the president[.]

Grievant alleges that he “should be considered as a classified employee at West Virginia University because he was not responsible for policy formation at the department or institutional level and he did not report directly to the president.” Grievant's L IV Proposed Findings, COL # 5. He has obviously made this claim because of the legal entitlements of classified employees, which include consideration of seniority in downsizing situations. See Code § 18B-7-1 and Thacker, supra. The evidence directly contradicts Grievant's contention. In the same Proposed Findings, Grievant's counsel stated in Finding of Fact # 12 that “Stanley J. Kloc was the only nonclassified employee at the SBDC . . . He was never offered an opportunity to sign a contract for employment as a classified employee.” Not only has Grievant admitted, through this proposed finding of fact, that he was not a classified employee, but he did not contradict the level four testimony of Dean Stern, which also supports his non-classified status. Dean Stern testified that Grievant had policy- making authority within the SBDC. Most importantly, Grievant's own testimony at level two was “I had the . . . responsibility for the general management of the Center, . . . for any strategic planning, . . . putting together proposals.” Certainly, these duties involve “policy formation.” Grievant is not entitled to any of the benefits given to classified employees. (See footnote 3)

Grievant's second claim is a specific policy violation on the part of WVU with regard to its document entitled “Policies and Procedures for Program Change” (hereinafter “program changepolicy”). L II, Kloc Exhibit 6. He contends that WVU did not follow the specific procedures outlined in this document, which specifies that employees are to be informed and involved when significant changes are made in existing programs, including their elimination. Respondent does not dispute that Grievant was not consulted or otherwise informed of the plan to merge the SBDC into Fairmont State's program until after the decision had been finalized. However, through the testimony of Dean Stern, Respondent asserted that the intent of the program change policy is to have “appropriate” employee involvement in such decisions, which is within the discretion of management.

Grievant and two other employees testified at level four that they knew nothing of the Fairmont State merger until September of 1995, when informed the SBDC was closing at the end of that month. One of these other employees, Sharon Stratton, was a business analyst who was offered a position at Fairmont State's SBDC after the merger, which she accepted. It is undisputed that the only WVU employees involved in the discussions with Fairmont State regarding the proposed plan

were Tom Witt and Dean Stern, with the Provost's approval. Respondent contends that, because Grievant had been involved in discussions regarding the trouble with the SBDC's funding as early as a year before it was actually eliminated, the decision should not have been a surprise to him. Because Grievant was involved in discussions regarding how to solve the SBDC's problems earlier in 1995, he was appropriately involved. At the point that the proposal to eliminate the program and have Fairmont State absorb it was initiated, Dean Stern stated that it was no longer appropriate to include the SBDC employees in the discussions.

In its "Preamble," the program change policy states that its purpose is " . . . to offer guidelines that facilitate change while, at the same time, protect the rights of [WVU's] faculty, staff,students, and administrators[.]" L II, Kloc Exhibit 6. This section further states that it is WVU's intent "to effect change through a participatory process of systematic planning and program evaluation." Id. at 2. The program change policy states clearly that both academic and non- academic programs are subject to its provisions, and it certainly applies to the SBDC. "Significant Program Change" includes "[a]ny modification . . . of a program which involves the anticipated release of a . . . non-tenured faculty or staff member during the term of an appointment." Id. at 3. Based upon the evidence presented in this case, the proposal to eliminate the SBDC by having Fairmont State take over its operations, with the possibility of eliminating positions, would constitute a "Significant Program Change."

Dean Stern testified that the proposal to eliminate the SBDC by having Fairmont State take over its operations was his idea. The program change policy, under "Recommendation for Program Change Initiated at the Dean's/Director's Level," states that "[a]ffected personnel will be informed of the recommendation and be given an opportunity to offer further information which might influence the outcome. . . . [and] [t]he President or a designated Vice President will meet with the personnel of the affected program before the final decision is made." In cases of "Significant Program Change" the policy provides that the institution must assist employees whose positions are eliminated by attempting to place them in other positions.

Unquestionably, the program change policy was not followed as it pertains to the elimination of Grievant's position at the SBDC. If it had been followed, the provision set forth above would have required Dean Stern to inform the SBDC employees of the recommendation to close the Center and merge it with Fairmont State prior to that decision having been finalized. This was not done, and Grievant and the other employees were not afforded the opportunity to provide input into thedecision-

making process. Grievant argues that he should have been allowed to participate in this process, and that, by not following the policy, WVU improperly deprived him of his “property rights” in continued employment. Accordingly, he believes Respondent's failure to follow its policy entitles him to reinstatement.

It is well-settled that an administrative body such as Respondent must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, although WVU did not follow its program change policy in this case, this does not necessarily entitle Grievant to reinstatement. There is nothing in the policy which guarantees any type of job security even when it is followed. As discussed above, the policy's stated purpose is “to effect change through a participatory process of systematic planning and program evaluation.” It does not, however, state in any respect that employees' jobs will be protected, only that they will be allowed to participate in the process which may eliminate them. Thus, the policy itself does not provide the remedy Grievant is seeking.

In a previous case before this Grievance Board involving the same program change policy, it was determined that relief could not be granted. Because the change had already been implemented, allowing the grievants participation in the process was a moot issue. The Administrative Law Judge determined “there is no reason to believe that the outcome would differ in any respect, and to order such would be an exercise in futility.” Fekete v. Bd. of Trustees, Docket No. 95-BOT-484 (Aug. 20, 1996). The same logic applies here. The only “right or remedy” granted to Grievant through the program change policy is that of participation, which is not practical or possible now that the SBDC has been closed. The portion of the policy which requires Respondent to attempt to place employees in other positions for which they may be qualified at the institutionwas complied with in Grievant's case. L II, University Exhibits 3 and 4. Attempts to place him in another position were unsuccessful.

Even if an agency has not followed its own policies or procedures, its actions need not always be reversed. The grievant must prove that the error was harmful, in that “a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.” McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10. The testimony at all levels of this grievance shows unequivocally that, with or without Grievant's input, the SBDC was going to be closed. Therefore, Grievant has not proven harmful error occurred by

Respondent's failure to follow the program change policy in this case.

Grievant has also raised the issue of a “property interest” in continued employment, which he alleges Respondent has violated. However, this argument is inapplicable to the instant situation. It has been held by this state's Supreme Court of Appeals that a firing or discharge which is simply unexplained does not trigger a property or liberty interest. Wilhelm v. W. Va. Lottery, 479 S.E.2d 602 (W. Va. 1996). Furthermore, in order to establish a property interest, an employee must provide evidence of some claim of entitlement to continued employment, based upon some existing rule or understanding. Once established, such property interest entitles the employee to the protections of due process of law. McLendon v. Morton, 162 W.Va. 431, 249 S.E.2d 919 (1978). A mere unilateral expectation does not rise to the level of a property interest. Id. (Citation omitted). As previously discussed, the program change policy merely allows employees to participate in the process whereby programs are altered or eliminated. It does not state that employees are afforded any job protections or expectation of continued employment. Accordingly, it did not create aproperty interest on the part of Grievant. Likewise, Grievant's yearly employment contract designated him as a temporary employee for the term of each contract, which would also negate any expectation of permanent employment.

The line of cases discussed in McLendon, supra, mostly involved claims of college professors who alleged they were denied tenure without procedural due process. However, in many of those cases, it was determined that the employee was not eligible for tenure under the institution's rules, so no property interest was established. See Bd. of Regents v. Roth, 408 U.S. 564 (1972). The McLendon Court acknowledged that distinguishing between unilateral expectations and real entitlements can be difficult. However, it did determine that, when an employee establishes that he or she has met all eligibility requirements for a particular entitlement, such as tenure, a property interest is involved. The only “entitlement” created by the program change policy was participation in the process, which is now a moot issue. Grievant has failed to prove by a preponderance of the evidence that any rule or policy of WVU entitled him to employment beyond June 30, 1996.

Both parties have spent extensive time and energy in this grievance arguing various aspects of at will employment law. Respondent argues that Grievant's alleged at will status provided him no protections against discharge, and Grievant has argued the protections associated with a liberty or property interest as set forth above, which are only applicable in at will employment situations.

Employment which is for no fixed term is terminable at the will of either party, with or without cause. Harless v. First National Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). Grievant signed a yearly "Notice of Appointment"; for 1995, the term of his appointment was July 1, 1995, through June 30, 1996. Undoubtedly, this constitutes a terminal employment contract, so the principles governing discharge of at will employees are inapplicable to Grievant. It is perplexing that the parties have argued this case from an at will employment stance, in view of Grievant's unambiguous contract of employment. If WVU had carried out its original intention of completely eliminating Grievant as of September 30, 1995, there would potentially have been a claim on his part regarding his discharge from employment prior to the end of the term of his current contract. However, WVU reconsidered that decision and kept Grievant as an employee of the College of Business and Economics until his contract expired on June 30, 1996. At that time, it did not renew the contract or offer him a new one, so no discharge or violation of his contract was involved. It was then that Grievant instituted this claim, which arose from the decision not to renew the contract.

Grievant has not disputed that his contract was specifically designated as "Temporary," defined on the face of the Notice of Appointment as "[a]n appointment for the period and purposes specified, with no interest or right obtaining by virtue of the appointment." L II, University Ex. 2. He has identified no statute, rule, policy, regulation or written agreement which granted him any right to continued employment once the contract expired on June 30, 1996. As discussed above, although the program change policy may have been violated, it did not guarantee Grievant continued employment beyond his contract term. He has not proven by a preponderance of the evidence that he is entitled to reinstatement to his position.

Finally, Respondent asserted that Grievant did not initiate this grievance within the timelines set forth in W. Va. Code § 18-29-4. However, level four was the first time this issue was raised, and the statute specifically requires that the affirmative defense of timeliness be raised at or before the level two hearing. Code § 18-29-3(a). Because Respondent did not assert the timeliness issue until level four, it is estopped from raising that defense. See Payne v. Mason County Bd. of Educ., DocketNo. 96-26-047 (Nov. 27, 1996).

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary grievances, the grievant bears the burden of proving his case by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995).

2. The instant case did not involve a discharge or disciplinary matter.

3. Employment which is for no fixed term is terminable at the will of either party, with or without cause. Harless v. First National Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978).

4. Grievant had a terminal contract of employment with WVU, and he was not an at will employee.

5. Grievant proved by a preponderance of the evidence that Respondent violated the "Policies and Procedures for Program Change."

6. The only remedy provided to Grievant by the above-mentioned policy would be participation in the process whereby the SBDC was eliminated, which is a moot issue. See Fekete v. Bd. of Trustees, Docket No. 95-BOT-484 (Aug. 20, 1996).

7. Grievant did not prove by a preponderance of the evidence that, had the program change policy been followed, his contract of employment would have continued beyond June 30, 1996; therefore, Respondent's failure to follow the policy was harmless error. McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995).

8. A property interest in employment is established when the employee proves alegitimate claim of entitlement under existing rules or understandings, rather than just a unilateral expectation. Syl. Pt. 2, McLendon v. Morton, 162 W.Va. 431, 249 S.E.2d 919 (1978).

9. Grievant has failed to prove Respondent violated any statute, rule, policy, regulation or written agreement when it decided not to renew his contract as a temporary, administrative employee after June 30, 1996.

10. An employer is estopped from raising the affirmative defense of timeliness if not asserted at or before the level two hearing. W. Va. Code § 18-29-3(a); Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of

the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: August 20, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

For unknown reasons, in lieu of proposed findings of fact and conclusions of law, counsel for Respondent filed a document entitled "Employer's Brief" which is stated to be "in support of it's [sic] Motion to Dismiss or, in the alternative, Motion in Limine." This "brief" contains an extensive discussion and argument regarding at-will employment law, which, as the remainder of this Decision will show, is irrelevant to this grievance, because Grievant had a yearly employment contract.

Footnote: 2

The factual findings contained in this Decision will not encompass all of the facts developed in this grievance, for the simple reason that there has been extremely extensive factual developmentby Grievant regarding irrelevant issues. Much of this evidence concerns the closure of the Small Business Development Center and the administration's failure to consult Grievant during that process. Respondent admits that Grievant was not consulted, so there is no factual dispute regarding that issue. In addition, evidence regarding Grievant's job duties and the funding arrangements for the Center do not appear to have much bearing upon issues relating to the termination of Grievant's employment.

Footnote: 3

It is also interesting that Grievant signed a yearly contract for numerous years which designated him as an administrative, non-classified employee, which he did not contest until now.