JUANITA LOUNDMON-CLAY

Grievant,

v. **Docket No. 02-HEPC-013**

HIGHER EDUCATION POLICY COMMISSION/

BLUEFIELD STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Juanita Loundmon-Clay was employed by Bluefield State College ("BSC" or "College") as the Vice-President of Student Affairs. She filed a lengthy grievance June 20, 2001, alleging she had been wrongfully relieved of her duties, and had been treated in a retaliatory manner for filing prior grievances, and had been treated in a prejudicial and harassing manner because she was an African-American female. The relief she sought was also lengthy, but, in essence, Grievant wanted reinstatement to her prior position, a salary equal to Caucasian Vice Presidents, full support from administration, investigation of racial problems at BSC, mandatory diversity training for top administrators and deans, cessation of disrespectful behavior, and payment of all legal and medical bills. (See footnote 1)

There was no filing at Level I. A Level II hearing was held on October 4, 2001, and a Level II decision denying the grievance was issued on January 17, 2002. Level III was bypassed, and Grievant appealed to Level IV on January 23, 2002. A Level IV hearing was held on April 11, 2002, at BSC by the agreement of the parties. The deadline for the parties' proposed findings of fact and conclusions of law was May 13, 2002, but thisdeadline was extended by Grievant's attorney's request until June 3, 2002, at which time this grievance became mature for decision. (See footnote 2)

Issues and Arguments

The first issue raised by Grievant is that Respondent should have the burden of proof as this action was a termination, not a failure to renew her contract. Respondent asserted Grievant was an

at-will employee, BSC decided not to renew Grievant's contract, and therefore, this action is not a termination.

Grievant also asserted she has been subjected to a pattern of harassment, discrimination, and retaliation because she is an African-American female. She traced this treatment to the start of her employment, and alleged this treatment increased after she filed her first grievance. Grievant maintains BSC's administration has interfered with the performance of her duties, demeaned her, undercut her authority, ridiculed her for her religion, (See footnote 3) and has erroneously labeled her as a trouble maker.

Respondent noted Grievant filled a top level administrative position, and BSC's President, Robert Moore, who has been president of BSC since 1992, lost confidence that Grievant could perform her assigned duties in an efficient and productive manner. President Moore found Grievant was ineffective in her communication with faculty, staff, and students. Additionally, President Moore saw Grievant's behavior to be "contentious," and he concluded she had demonstrated an inability to follow established administrativeprocedures. Respondent maintained the non-renewal of the at will contract was in the best interest of BSC and not arbitrary and capricious.

Brief Procedural History

Grievant filed her first grievance, on similar issues of harassment and discrimination, on November 20, 2000. This grievance was at Level IV for hearing at the time her contract was not renewed. Grievant also filed another grievance on similar issues on April 20, 2001, but before this second grievance was heard at Level I, Grievant filed at Level IV, stating Respondent was in default. This default grievance was also at Level IV for hearing at the time her contract was not renewed. The parties agreed to go forward with this grievance on the non-renewal issue, as a ruling in this case would render the other grievances moot. Many of the issues raised in the other grievances will be discussed in this grievance as Grievant sees the non-renewal as a part of a continuing pattern of discrimination, retaliation, and harassment.

After a detailed review of the entire record, including the exhibits and transcripts of the two prior Level II grievance hearings, on December 14, 2000, and October 4, 2001, the undersigned Administrative Law Judge makes the following Findings of Fact. The majority of the testimony to be considered is the repeated statements of Grievant and President Moore on the same issues in each

of the grievances and at each of the levels of these grievances. Few other witnesses were called, and their testimony was limited. The multiple issues raised by the parties will be addressed separately and as closely as possible in chronological order. (See footnote 4)

Findings of Fact

Brief History of BSC

1. BSC was originally an African-American college. Over time the number of African-American students and faculty decreased drastically.

2. In 1998, BSC, after discussions with the federal Office for Civil Rights, voluntarily agreed to comply with a five-year program which would examine minority recruiting and hiring. This agreement included reporting on these issues. BSC has been in compliance with these guidelines and reporting requirements for several years. There have been no further actions or suggestions by the Office of Civil Rights. (See footnote 5)

3. As of 2001, the number of African-American faculty and students had increased. BSC has the second highest number of African-American faculty in the state system, ten percent of the student population is African-American, and approximately thirty percent of the staff is African-American.

General Facts

4. In 1997, BSC advertised for the position of Vice President of Student Affairs. (See footnote 6) The duties of the position were to "provide leadership to admission and retention, counseling and career placement, financial aid, student activities, registrar, athletics, intramural, three TRIO programs and security. The Vice President is a member of the senior administrative staff who reports to the President." Grt. Ex. No. 2, at Level II, Dec. 14, 2000 hearing.

5. Because the search committee did not find an applicant they believed met the needs of the position, the position was not filled. President Moore placed John Cardwell, a long-term employee, into this position for the interim.

6. In 1999, BSC advertised for the position of Vice President of Student Affairs again. The duties of the position had changed with the focus now being on students after they arrived on campus. The position was described as the "chief student affairs officer," who would serve on the

President's Cabinet and provide leadership and direction to a comprehensive student development program. The areas listed in the advertisement were: "Campus Life, Residence Life, Health Services, Financial Aid, Public Safety, Career Planning and Placement, Athletics, Recreational Activities, Judicial Affairs and (TRIO) student support services, ADA Regulations, and Special Student Needs." Additionally, the position would assume the responsibility for adding residence halls to a commuter campus. Grt. Ex. No. 3, at Level II, Dec. 14, 2000 hearing. 7. The duties of the position relating to students before they arrived on campus had been split off and were now assigned to a newly created position of Director of Enrollment Management. Mr. Cardwell received the Enrollment Management position.

8. Grievant came to campus and interviewed for the position. She became upset because the process was taking so long and withdrew her name from consideration. After several alumni, who strongly supported her for the position, heard about her withdrawal, they encouraged Grievant to reconsider her decision. Grievant did so and resubmitted her name for consideration.

9. The selection process did take some time to complete. Grievant was selected for the position in April or May 2000, and she was informed of this decision at that time. The paperwork for Grievant's selection also took some time to complete.

10. Contrary to Grievant's testimony, Grievant was aware when she applied for and accepted the Student Affairs position that the duties had changed, as this information was included in the advertisement and discussed during her interviews.

11. Grievant wanted to start her duties a month early, and President Moore thought this was a good idea. Instead of starting on July 1, 2000, she arrived in Bluefield the end of May, and she started her duties the first of June 2000.

Contract and Status

12. Because the paperwork for Grievant's position took some time to complete, and Grievant began her duties a month early, she did not see her official contract until she arrived on campus.

13. Both Grievant's contract for the one additional month and the one for 2000- 2001, identified her appointment as Vice President Student Affairs, and stated her salary for the period in question. The appointment term for her regular contract was from July 1,2000, to June 30, 2001, with a salary of $72,312. The contract Grievant received is the same contract signed by all of President Moore's

administrative staff. All Vice Presidents have at will contracts. Grievant's contract stated the following:

> This is an *administrative appointment* to serve at the will and pleasure of the President and the appointment can be terminated by either party on thirty (30) days written notice. . . . Your employment is subject to the fulfillment of your position responsibilities during the life of the agreement. . . . Your specific assignments will be prescribed by the President of the Institution. . . . ACCEPTANCE OF THIS EMPLOYEE AGREEMENT IS SIGNIFIED BY SIGNING AND DATING BELOW.

(Emphasis in the original).

14. Grievant signed her contract for the one month on June 6, 2001, and the contract for the 2001 - 2002 year on June 10, 2000. She talked to President Moore about the one year contract before she signed both contracts, as she believed she had been asked to make a longer commitment. President Moore explained all top level administrators, approximately ten employees, signed the same contract; and all of them were always for one year.

15. Grievant was aware that as long as an employee is completing his or her job duties successfully, these contracts are usually renewed the following year.

16. Grievant was a classified-exempt employee at BSC, and she served at the will and pleasure of her employer.

Moving Expenses

17. Prior to her moving to BSC, BSC agreed to assist Grievant with a portion of her moving expenses. 18. Grievant was upset because BSC did not pay all of her expenses, and President Moore was displeased because Grievant expected BSC to pay all of the expenses, even when the amount increased over the sum he had agreed to pay.

19. Grievant saw BSC's failure to pay all her moving expenses as harassment.

Housing

20. When Grievant came to Bluefield in May to look for housing, she did not find any satisfactory accommodations. She asked BSC if they had any housing she could use on a temporary basis until she found a house.

21. BSC had an efficiency apartment on campus, and it had been used for similar situations in

the past. President Moore told Grievant she could use this living space free of charge.

22. Unknown to President Moore, the apartment had already been promised to an athletic trainer. As soon as President Moore became aware of the problem, he directed maintenance to create a new, smaller, efficiency apartment and the trainer moved into this new place. (See footnote 7)

23. For the five or so days it took to create the new apartment, Grievant was put up at the Holiday Inn at BSC's expense.

24. Grievant viewed this incident as discrimination against her, and thought Mr. Cardwell had created this difficulty to cause her problems because he wanted her position.

25. Mr. Cardwell does not have a doctorate degree, and he did not apply for the position. 26. Grievant's use of this apartment was expected to last for the time it took her to find suitable housing.

27. Grievant bought a home and moved the majority of her belongings to this house, but did not vacate the apartment.

28. Finally, because Grievant had taken no action, President Moore wrote Grievant on February 1, 2001, noting it had been eight months, she had purchased a house, and it was time for her to vacate the apartment. He directed her to complete this move by February 14, 2002.

29. Grievant viewed this directive as rude and insulting.

Job Duties

30. Even before Grievant assumed her position as Vice President, she was displeased with the assignment of certain duties. She wanted to be in charge of the enrollment management duties, and these responsibilities were removed prior to the 1999 advertisement and were no longer present in her Job Description.

31. She asked President Moore about this change, and he explained why the duties had been separated. The trend in many colleges was to separate these duties and have an enrollment management focus on recruiting students, and have student affairs work with students' needs once they were on campus. This division of duties is what BSC and President Moore wanted.

32. Grievant was well aware that the enrollment management duties were no longer included when she agreed to accept the Vice President position. President Moore did tell her they could

continue to discuss it, but gave no assurances that this decision would be changed 33. Grievant also wanted the counseling duties to be within her area of responsibility, and she wanted BSC to do psychological counseling on campus.

34. The counseling BSC offered was career counseling, and BSC did not have the expertise, manpower, or money to perform psychological counseling on campus. Students were referred to professionals in the community for this type of service.

35. On July 20, 2000, Grievant wrote a letter to President Moore expressing her concerns, and again insisting he return the enrollment management duties to her position. (See footnote 8) This letter followed a meeting where the issue was again discussed, and President Moore informed Grievant there would be no change in the assignments.

36. This July 20, 2000 letter stated several concerns. One, Grievant believed there would be a new Vice President for Enrollment Management position created to be filled by a non-qualified person, John Cardwell. Two, President Moore had lied to her when he said he would review of returning the enrollment management duties to her position. Three, her "appointment to this position appears to be a sham." The reasoning for this statement was because she was not in charge of enrollment management and did not have "the usual decision power." Grievant then noted Mr. Cardwell was not successfully performing his duties, she was better prepared to perform the duties of Mr. Cardwell's position, and Mr. Cardwell was paid too much money. Four, her attempts to discuss issues with President Moore had been unsuccessful, and President Moore had been "disrespectful of her role and status," tried to "fluff her off," had been untruthful with her,and did not pay her enough money. Five, she had not been included in discussions about student housing, and she believed President Moore might have "no intention of allowing [her] to function in her rightful role." Six, she was a "token" cabinet member, the students should not be deprived of her expertise, and she was better prepared than Mr. Cardwell. Seventh, she requested an academic appointment, and affirmed her right to teach a course at another college. (See footnote 9) Grt. Ex. No. 6, at Level II, Dec. 14, 2000 hearing.

37. No advertisements for a Vice President of Enrollment Management position had ever been posted. Mr. Cardwell was serving in the newly created position of Director of Enrollment Management, and he had served in a variety of student affairs type positions at BSC for many years. He does not have a doctorate and could not and did not apply for the Vice President of Student

Affairs position. (See footnote 10)

38. At Grievant's request, President Moore did consider whether the enrollment management and counseling duties should be returned to the Vice President of Student Affairs, and he decided against it.

39. After receiving this letter, President Moore attempted unsuccessfully to arrange three appointments with Grievant. Grievant could not meet because of her health, and Grievant's secretary informed President Moore Grievant would not return to work until July 31, 2000. President Moore then set a meeting time for July 31, 2000. Grt. Ex. No. 7, at Level II, Dec. 14, 2000 hearing.

40. Grievant believed little was accomplished at this meeting, as the Enrollment Management duties remained with Mr. Cardwell. However, President Moore did tell Grievant to slow down and take care of her health, to give herself time to learn BSC's policies, and to prioritize her duties.

Problems with the Director of Enrollment Management

41. When Grievant arrived on campus, Mr. Cardwell gave her the keys to the office, but kept one set as he still had some files in the office. Grievant did not like this arrangement and demanded his set of keys. Mr. Cardwell gave them to her.

42. Grievant did not think Mr. Cardwell was competent to perform the duties he had been assigned, and believed he was paid too much money. She so informed President Moore and Mr. Cardwell.

43. Grievant and Mr. Cardwell had some difficulties in their interaction. Mr. Cardwell complained to President Moore. President Moore directed Mr. Cardwell to work with Grievant and to try to get along. Mr. Cardwell did this, and at the time of the Level IV hearing, Grievant reported their working relationship had improved.

Work Orders

44. On August 30, 2000, Grievant sent a memo to President Moore complaining about the failure of the maintenance department to fill her numerous work orders in a timely manner. Grievant viewed this failure to complete her work orders as discrimination. Grt. Ex. No. 10, at Level II, Dec. 14, 2000 hearing.

45. President Moore directed the Vice President of Financial Affairs, Sheila Johnson, to

investigate the matter, as she is in charge of this Department. 46. BSC's maintenance work force is small, and, at times, there was no one to fill Grievant's specific requests because of accident or illness.

47. After investigating this complaint, Ms. Johnson found no discrimination against Grievant. She did find the number of Grievant's requests far exceeded the requests made by any other staff member, even those of President Moore. She found no discrimination or intentional failure of the staff to fill these requests.

Blue Devil Mascot

48. Shortly, after arriving on campus, Grievant decided the school symbol, the Blue Devil, should no longer be used, as she considered it to be Satanic. She directed the already purchased parking decals be issued with the symbol covered up, and she was planning to paint over the Blue Devils on campus walls. She did not receive prior approval for these actions and plans, and she did not address the issue with the Student Government Association ("SGA") prior to these changes.

49. Some students became upset, and deliberately removed the covering on their parking decals.

50. President Moore heard about this problem and directed Grievant to cease her activities to do away with the school mascot.

Homecoming

51. Homecoming is scheduled in the Fall. Shortly before Homecoming, Grievant found out several activities were scheduled off campus, and one of the reasons appeared to be so adult students could drink alcoholic beverages. The mean age of BSC students is 27. Grievant went to the Student Government Association ("SGA") meeting to get the activities changed to being held on campus. 52. The SGA did not want to change the activities, but Grievant told them they were required to do so. The SGA agreed to consider the suggestion. After this meeting, Grievant unilaterally changed the location of both the dance and the picnic to campus.

53. The students complained to President Moore, and sent him a letter indicating the change of the location of the picnic and dance. The following day President Moore met with these students, and the SGA followed this meeting with a letter specifically listing their complaints. This letter identified the

following summary of complaints and/or requests: (See footnote 11)

1. Return the location of the dance and picnic to the previously agreed upon location and follow state laws for alcohol usage as has been done in the past.

2. Grievant would follow SGA's constitutional amendments, decisions, and guidelines, and to no longer bypass the SGA, or overstep her authority in future.

3. Grievant would show proper professionalism and courtesy to students, faculty and staff members at meetings, and to follow the proper rules of order without interrupting and loud outbursts. Additionally, the SGA requested Grievant be reprimanded for publically threatening, embarrassing, and demeaning students and imposing her religious beliefs and standards of dress on students.

4. Grievant would cease trying to do away with the Blue Devil mascot because she believes it is "satanic".

5. Grievant would cease interfering with the smoking policy that is currently in place as everyone seems to be following it.

6. Grievant would cease imposing her religious and moral beliefs on others as there is to be a separation of church and state. SGA understood Grievant had strong beliefs, and these were "sincere" and "heart felt," but she should not coerce these ideas on others.

Grt. Ex. No. 2, at Level II, Dec. 14, 2000 hearing.

54. Grievant saw this letter from the SGA as "public castigation," and she believed the students were "coached" by President Moore to criticize her. Grievant's Statement of Grievance; Grievance Number 1. Grievant also believed the writing of this letter was insubordination on the part of students.

55. President Moore also met with Grievant to discuss the situation. He was upset that Grievant had taken it upon herself to unilaterally change the location of Homecoming dance and picnic without any discussion with him.

56. After the discussion with students and Grievant, and after receiving the SGA's letter,

President Moore wrote Grievant noting the problem, Grievant's unilateral action without proper authority, and her rationale for the changes. President Moore found the changes mandated by Grievant were not warranted and directed Grievant to reverse her action as soon as possible, with a note to him confirming the changes. President Moore noted at hearing that many of the students at BSC were adult learners, and wished to have some college events where they could have a drink if they wanted to do so. He also noted he had not seen many problems with underage drinking at events, if alcohol was served in a business location the liability was theirs, and he had checked with BSC's legal counsel before making this decision. Grt. Ex. No. 8, at Level II, Dec. 14, 2000 hearing.

57. Grievant responded to this letter with a lengthy memo detailing her thoughts and noting it was unlawful to have alcohol on campus and unlawful for minors to drink. Grievant told President Moore he had to provide security personnel at the events being held off campus. This is incorrect, as no BSC policy requires this type of security. Grt. Ex. No. 9, at Level II, Dec. 14, 2000 hearing.

Catering

58. In September 2000, the Alumni Association asked Grievant to arrange an awards banquet. When Grievant arranged the food for the banquet, she did not use Mountain Vending, the company who had the right of first refusal to cater campus events. When Mountain Vending learned of the event, it demanded to be paid the same amount as the vendor catering the event.

59. Finally, it was decided no caterer would be used, BSC staff brought the food and drinks, and, through the intervention of Vice President Johnson, Mountain Vending agreed to withdraw its demand for payment.

60. After President Moore learned about the incident, he talked to Grievant about what had gone wrong. Grievant told him he had authorized her to use an outside vendor. President Moore told Grievant this statement was incorrect, Grievant became very upset, and Grievant told President Moore he was "calling [her] a liar." (See footnote 12)

Student Disciplinary Hearing

61. As one of her duties as the Vice President of Student Affairs, Grievant is to conduct disciplinary hearings.

62. A student was accused of providing beer to underage BSC students at a conference in

Atlanta. This alleged misconduct resulted in the student being brought up on disciplinary charges pursuant to the Student's Code of Conduct.

63. Grievant was to be the Hearing Officer at the proceedings. 64. President Moore was unaware of these allegations until the student attempted to discuss the situation with President Moore at the September meeting on the Homecoming problem. President Moore made no assessment and stated no opinion on the matter to the student.

65. The student was also an athlete, and he told his coach President Moore had dismissed the charges. The coach called Grievant, and Grievant called President Moore. President Moore clearly told Grievant he had not dismissed the charges, and he directed Grievant to hold the disciplinary hearing.

66. At the same time, the student admitted his guilt to his coach, signed a statement to that effect, and he was suspended from participation on the cross country team.

67. Grievant scheduled the hearing, but then dismissed the charges. On October 4, 2000, Grievant wrote President Moore explaining her decision. This letter stated:

> This is to inform you that I dismissed the hearing relative to B. D. He reported that you had implied that his violation of alcoholic beverage regulations was not significant and that you and Mr. Cardwell implied I was "making a mountain out of a molehill." In addition, Mr. B. C., the Student Government Association President, appeared not to be committed to upholding the standards of the college but rather of proving me wrong. Several students accompanied Mr. D., including two who were present on the trip to the APGA Conference in Atlanta. They, too, appeared more committed to supporting B. D. than in maintaining appropriate standards of behavior. This has created a major problem with Mr. D.'s involvement as an NCAA athlete and with Mr. Terry Brown's concerns about appropriate supervision of Mr. D.
>
> I sincerely regret that we have been hampered in helping the student improve his behavior, especially when he continues to be the president of the Programming Board and to be representing the college outside the campus. It is not to our advantage to have this kind of student representing the hundreds of students who want to have a better standard of behavior. (See footnote 13)

68. On October 9, 2000, President Moore wrote Grievant questioning her decision to dismiss the charges, and her failure to hold a hearing. President Moore was upset by Grievant's dereliction of duty. Grievant believed Mr. Delp was telling the truth and President Moore's statements were lies.

Student Health Center

69. As Vice President for Student Affairs, Grievant was in charge of maintaining the Student Health Center. A portion of the students' fees goes to support this service. The nurse practitioner who had coordinated the Student Health Center during the prior year was not willing to take on this responsibility again. Some of the Nursing Faculty usually volunteered time to help with coverage, and some of these faculty members were paid for a portion of their time. Grievant did not like the way the Student Health Center had been run in the past, as she believed the staff had violated some rules and regulations.

70. Grievant and the Nursing faculty did not get along, and the Nursing faculty no longer wanted to participate in staffing the Student Health Center. The Nursing faculty is not required by their teaching contracts to participate in the services offered by the Student Health Center.

71. Grievant was able to get some volunteer coverage for a while, but this too ceased after a while. Grievant believed the Nursing Faculty had sabotaged this coverage. President Moore assisted Grievant in finding this temporary coverage. By December 2000, the Student Health Center was no longer operational. (See footnote 14)

72. Grievant was called to address the issue by BSC's Advisory Council, and was directed by them to work with the Nursing faculty to get the Student Health Center back into operation. Grievant believed being called to discuss the matter with the Advisory Council caused her to be "thoroughly humiliated."

73. This failure to provide required services resulted in a resolution adopted by the SGA in February 7, 2001, stating the students pay a fee for this service, and there had been no service for a considerable time. The SGA recommended Grievant not be in charge of the facility, as they believed Grievant had caused tension with the Nursing faculty. (See footnote 15) The General Faculty, in April 2001, also adopted a resolution, sent to President Moore, noting a second "vote of concern" about the failure of Grievant to obtain health services after the directive issued by the Advisory Board. Resp. Ex. No. 1 & 4, at Level II, Oct. 4, 2001.

College Funds

74. Grievant committed college funds for paint, carpet, and furniture without prior permission and the required invoices. There were no funds available to cover these purchases, and BSC had to shift money from other sources to cover the costs. 75. Grievant incorrectly insisted, over the

strong objections of the Director of Financial Aid, that he declare a student eligible for financial aid even though there was no proper documentation. BSC ended up having to reimburse the federal government $9,146.00 for this incorrect decision. Grt. Ex. No. 10, at Level II, Oct. 4, 2001.

76. Grievant also committed funds outside the agreed upon amount to a guest speaker, and the college was required to meet this expense.

Recruitment and Student Transportation

77. Grievant unilaterally initiated a ban on the recruitment of student athletes who lived outside commuting distance from BSC. She accomplished this ban by refusing to allow the coaches to use college vehicles for student recruitment. Grievant did not discuss this ban with anyone in administration before she instituted it. President Moore directed Grievant to reverse this directive.

78. It is unclear why, but Grievant refused to allow the baseball team to use a van when they needed to travel to a game site when BSC's own field was rained out. The students ended up using their own vehicles to travel to the game. This is against BSC practice due to safety concerns.

79. In March 2001, the Faculty Senate passed a resolution requesting Vice President Johnson to investigate the risk to the institution caused by the failure to permit use of BSC vans for necessary transportation for college athletes. (See footnote 16) Resp. Ex. No. 1, at Level II, Oct. 4, 2001.

Copy Machine

80. Because of numerous complaints by students and others that they did not have enough access to a copying machine in work off-hours, one was placed in the Student Center hallway. This decision was reached after consultation and approval with the Office of Campus Life and the Vice President of Financial and Administrative Affairs. The Director of Purchasing and Inventory, Paul Rutherford, is responsible for the machine and its placement.

81. Without consultation with anyone, Grievant moved the machine into her office. Numerous complaints followed the removal of the machine from its agreed location.

82. Grievant was directed to move the machine back, and she did.

83. Shortly thereafter, Grievant moved the machine back into her office. Again numerous complaints followed, and Grievant was again directed to return the machine.

84. On March 1, 2001, Grievant received a memo from President Moore about the phone call

he received from Grievant about these incidents. He perceived Grievant to be "very emotional and agitated," and went on to note Grievant needed to be aware of the rules and regulations of BSC, and the effect her decisions had on others and their commensurate responsibilities. He noted Mr. Rutherford had responsibility for the copier, and that neither Mr. Rutherford nor his supervisor was consulted when the moves were made. President Moore also expressed his concern about Grievant's mental state saying:

> I am concerned about your highly charged, emotional state of mind, because it is my wish that administrators' decisions should be based upon reason and not emotion. Actions by an individual Vice President in my Cabinet need to be taken with an awareness of applicable rules, regulations and procedures, as well as the impact of those actions upon other Vice President's responsibilities.

85. On March 7, 2001, Grievant replied to this memo with a three and one-half page response. In this letter, Grievant noted how well she worked with others and had received awards to that effect. She noted she was discouraged, and President Moore's memo was an example of their poor working relationship. Grievant then went on to list her multiple concerns including her "Sham Appointment," lack of authority, President Moore's failure to include her in planning student housing, and President Moore's failure to assist her with the Student Health Center. Grievant also noted she would not and did not follow President Moore's advice to talk the Director of Campus Life, John Carpenter, out of resigning because of his poor performance. She also noted President Moore had not filled the position as quickly as she had wanted, and she would now have to complete these duties herself for the rest of the academic year. Grt. Ex. No. 9, at Level II, Oct. 4, 2001. 86. The March 7, 2001 letter also stated she was "flabbergasted" by President Moore's intervention into the copier affair. She noted the purpose of the memo was "to embarrass, discourage, and annoy me," and President Moore's actions were further events "in what must now be seen to be a campaign of harassment and now retaliation for my previous grievance." Grievant asked to meet with President Moore to discuss whether there was a remedy for the situation, or if she must file another grievance against President Moore for retaliation. (See footnote 17)

SGA Elections

87. Student elections are to be held every year. Grievant was the administrator in charge of this procedure as the Vice President of Student Affairs. 88. Although student elections are required by the Student Government Constitution, Grievant decided not to hold them in the Spring of

2001. She did not inform President Moore of this decision prior to making it, nor did she tell the then President of the SGA. President Moore found out about this failure when the advisor of the SGA informed him. When he talked to Grievant about this decision, she said she did not have a copy of the SGA Constitution. Resp. Ex. No. 5, at Level IV.

89. Grievant had not provided the proper forms to the candidates, had not informed students of her decision, and students who were attempting to sign up to run for office did not know what to do. The President of the SGA e-mailed Grievant on April 17, 2001, to describe the problem and asked for Grievant's help in resolving the issues. Id. 90. President Moore directed Grievant to hold the elections, they were held, but a day late and without the time for proper campaigning, and not all positions were filled.

Grievances by Subordinates

91. Several grievances were filed by Grievant's subordinates about her treatment of them.

92. Mr. Carpenter resigned from his position as Director of Campus Life in the Spring of 2001 due to his inability to work with Grievant. He had filed a grievance prior to his resignation.

93. Rick Akers, Director of Campus Safety, also filed a grievance concerning Grievant's treatment of him.

94. Libby Belcher, EEO officer and the Director of Human Resources, is the individual in charge of assuring the grievance procedure time requirements are followed by supervisors. She has been doing this for years. 95. Ms. Belcher attempted to get Grievant to follow BSC's method for counting days to insure a default would not occur in the Akers grievance.

96. This attempt at guidance met with stiff resistance from Grievant, and Grievant sent a brusque memo to Ms. Belcher on February 15, 2001, accusing her of giving Mr. Akers "an improper and unauthorized interpretation of the time lines," of giving Mr. Akers "bad advice," and informing Ms. Belcher she had copies of the state law in her office if she wished to review them. Grt. Ex. No. 5, at Level II, Oct. 4, 2001.

97. Mr. Akers alleged a default, and BSC asked the Grievance Board to resolve the default issue. Akers v. Higher Educ. Interim Governing Bd., Docket No. 01-HE-39D (May 3, 2001). The Motion for default was denied.

98. On February 16, 2001, Grievant received a memo from President Moore informing her Mr.

Akers had alleged default, and he had asked the Grievance Board to resolve this issue. Grt. Ex. No. 5, at Level II, Oct. 4, 2001.

99. Grievant's memo to Ms. Belcher and the Findings of Fact in the Level IV Akers Decision indicated Grievant did not understand some of the procedures involved in the grievance time line requirements, and if Grievant had not followed Ms. Belcher's directive, the Level I meeting would have been scheduled a day late.

100. On February 23, 2001, Grievant responded to this February 16, 2001 memo noting she was puzzled by President Moore's decision to refer the issue to the Grievance Board, noted Ms. Belcher had "given all parties bad advice," and she believed Ms. Belcher was trying "to discredit me through a grievance finding against the College." Grt. Ex. No. 5, at Level II, Oct. 4, 2001.

101. Grievant also noted in this memo that BSC's attorney had mailed the proposed Findings of Fact and Conclusions of Law in her grievance a day late, and she directed President Moore to ask the Grievance Board if a default had occurred in her grievance. Grt. Ex. No. 5, at Level II, Oct. 4, 2001.

Cabinet and Staff Meetings

102. Grievant complained because President Moore held fewer administrative meetings during the 2000 - 2001 school year, and viewed this behavior as trying to shut her out. It is correct that President Moore held fewer meetings during this time than he had in the past.

103. President Moore held fewer administrative meetings during this time because Grievant's behavior at the meetings was not conducive to problem solving, and the other administrative staff preferred to meet with President Moore in a one-on-one manner.

104. Contrary to her testimony, Grievant was invited to all of these meetings just like the other administrative staff members. Also, contrary to Grievant's testimony, there were administrative meetings held after July 2000. This fact is confirmed by one of her own memos to President Moore.

Student Housing

105. One of the duties Grievant was hired to do was to develop student housing for a currently total commuter student body. She put forth several ideas to President Moore. He did not respond to these ideas as quickly as Grievant felt was appropriate.

106. In one incidence, President Moore engaged in housing discussions with private businessmen without Grievant's involvement, because the businessmen had requested that these discussions be confidential for the time being. 107. Grievant also disagreed with several of President Moore's potential plans for housing and expressed these to President Moore.

108. At a conference in the Spring of 2001, Grievant told fellow attendees that she questioned the legality of President Moore's initiatives to develop student housing.

Failure of President Moore to Meet with Grievant

109. Grievant wanted to meet with President Moore more frequently than he met with her. She wrote memos to assure he was aware of her positions and feelings. Although he does travel quite a bit on the business of BSC, President Moore has an open door policy, and, frequently, if people wanted to meet with him, they "dropped by." Grievant did not feel comfortable doing that. Additionally, there were times when President Moore wanted to meet with Grievant, and she was not available.

110. Generally, meetings and telephone conversations between Grievant and President Moore did not end well.

Other Issues and Problems

111. When Grievant came to campus, she was presented at a faculty affair at which she introduced herself and said a few words. When the prior Dean of Students was hired in 1995, he was introduced at a college council meeting and a reception followed. Grievant saw this difference as a slight, and evidence that she was not treated properly. 112. President Moore indicated there was no slight intended, and 1995 was a calmer time. No evidence was submitted about any other introductory gatherings from 1995 to 2000, when Grievant was hired.

113. Early in her tenure at BSC, Grievant talked to President Moore about her feelings that people did not like her. President Moore told Grievant what he thought wasthe best way to approach the people at BSC, and he had learned this method over the many years he had been there. When he arrived, he had been considered an outsider because he was from Rhode Island. He suggested discussing issues with her staff and considering their opinions. He indicated authoritarian behavior did not work well, and usually resulted in a lack of cooperation.

114. Grievant violated the parking regulations with some frequency and would park in loading zones, security areas, and in visitor parking spaces. On February 1, 2002, President Moore sent Grievant a memo on this matter telling Grievant to cease this behavior and informing her he expected the administrative staff to "lead by example." Grievant saw this memo as rude and insulting.

115. During the hearing, Grievant identified numerous people at BSC who were against her, some because of her race and gender. These people included President Moore, Ms. Belcher, Mr. Akers, Mr. Carpenter, Mr. Cardwell, the Nursing faculty, an athletic trainer, Vice President Johnson, and Mr. Brown, the Athletic Director.

116. Grievant was upset she had not been included in a security planning meeting, and wrote President Moore on March 15, 2001, to express her concerns. This meeting was for planning telecommunications and was not in Grievant's area of control.

117. Grievant had requested to call in a security expert to assess the safety of the campus, but this plan was not approved as the amount she wanted to spend would require putting the contract out for bid. The person she wanted to hire for this assessment was her son-in-law. Grievant viewed the failure to follow her advice on this issue as a rejection of her authority and expertise. 118. In their April 2001 meeting, the Advisory Board of the General Faculty voted a resolution of "No confidence" about Grievant's ability to perform the duties of her position. This resolution was presented to President Moore. Resp. Ex. No. 1, at Level II, Oct. 4, 2001.

119. On April 23, 2001, the Classified Senate at BSC reported to President Moore the results of a "No confidence" vote on Grievant, and her ability to perform the duties of her position. Resp. Ex. No. 2, at Level II, Oct. 4, 2001.

120. To accompany the "No confidence" vote memo, on April 24, 2001, the Classified Senate at BSC sent a letter of concern over the changes in the institutional climate since Grievant assumed her duties. The letter noted the grievances that had been filed as the result of Grievant's authoritarian approach to her leadership responsibilities. This letter also noted what it saw as an "irreparably damaged" relationship with the student body, and a negative atmosphere within the institution. Resp. Ex. No. 3, at Level II, Oct. 4, 2001.

Grievances

121. Grievant filed her first grievance on November 20, 2000, alleging 1) Her hiring was

dictated by the Office of Civil Rights and the Alumni Association; 2) Her appointment was pretensive and there was no intent to grant her the full range of duties; 3) Duties had been removed and given to the Director of Enrollment Management, an unqualified white male; 4) she had received institutionally sponsored harassment from Maintenance, Human Resources, and Administrative Affairs; 5) acts had occurred to disparage and remove her authority, including coaching students to criticize her in student publications and with the policy board; 6) President Moore had orchestrated criticism of her for following schoolpolicy to bring the Student Health Service into compliance with state regulations; and 7) President Moore failed to include her in the planning of student housing.

122. This grievance was denied at Level II on February 27, 2001, and is currently in abeyance at Level IV, pending the outcome of this instant grievance.

123. Grievant also filed a second grievance on April 19, 2001, alleging harassment, discrimination, and retaliation, non-support by President Moore, and encouragement from President Moore for others to criticize her. The relief sought was cessation of the negative behaviors and discipline for those involved. Grievant alleged default stating she had asked President Moore to meet with her in March 2001, and he had not done so. This default grievance is also in abeyance at Level IV.

Non-renewal of Contract

124. On May 15, 2001, President Moore wrote Grievant informing her that her will and pleasure employment contract expired on June 30, 2001, and he did not intend to renew this agreement. (See footnote 18) This letter noted she would be relieved of her duties as of May 15, 2001, but she would continue to receive her contracted pay until June 30, 2001. Grievant was hand-delivered this dismissal letter at her home, on May 15, 2001.

125. President Moore stated he no longer had confidence in Grievant's ability to perform her "duties efficiently and productively." He noted he had serious concerns about Grievant's ability to communicate with staff, faculty and students. He regarded her behavior as contentious, and noted she treated her subordinates in an unfriendly manner. He reported he understood Grievant's lack of knowledge of BSC's policies and regulations when she first arrived, but he had not seen any improvement in this area in the last few months. He also believed Grievant did not work well within established administrative procedures. Jt. Exh. 1, Oct. 4, 2001, at Level II.

126. This grievance was filed on June 20, 2001.

Discussion

The various issues raised by the parties will be dealt with one at a time. The first issue to address is whether Grievant's situation is a termination or a non-renewal of a contract, as this would affect the burden of proof. The non-renewal of a contract is not a termination; thus, an employee whose contract was not renewed has the burden of proof.

I. Termination or non-renewal

The West Virginia Supreme Court of Appeals has indicated that "West Virginia has set out a very specific system of procedural protections that apply to different carefully defined categories of college employees." State ex rel. Tuck v. Cole, 182 W. Va. 178, 181, 386 S.E.2d 835 (1989)(citing W. Va. Code §§ 18-26-1 et seq. [1969, representative. 1989] and W. Va. Bd. Regents, Policy Bulletin Series 36 (March 5, 1981)). The West Virginia Supreme Court of Appeals also noted in Tuck that "administrators . . . have only the rights attendant to their current contracts." In such cases, an employer may refuse to renew these types of employee contracts without giving a reason and without providing a hearing. Id. at 180. "The only exception to this general principle is in cases where an employee demonstrates that he had a property right in continued employment, entitling him to dueprocess of law." Smith v. Bd. of Directors/Fairmont State College, Docket No. 97-BOD-238 (Sept. 11, 1997).

"For [an] employee to possess a property interest in his employment he must have a sufficient expectancy of continued employment derived from state law, rules or understandings. . . . [t]he expectation must be more than unilateral" Scragg v. Bd. of Directors/ W. Va. State College, Docket No. 93-BOD-436R at 2 (Jan. 30, 1996) (citations omitted). In Scragg, supra, the grievant proved he had a property interest, because there was an expectation on the part of both parties that his employment contract would not be terminated prior to the end of the contract term. See Smith, supra; Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997).

Here, Grievant was allowed to serve the full term of her contract and was advised well in advance that her contract would not be renewed. She was not entitled to any reason for the non-renewal decision, but she was given several. Grievant has not established any basis for entitlement to continued employment with BSC, as any expectation was unilateral. Smith, supra. See Whitaker v.

Bd. of Director/West Liberty State College, Docket No. 99-BOD-231 (Jan. 11, 2000). Accordingly, this is a non-renewal, and Grievant has the burden of proof.

II. Effect of classified-exempt/at will status

Grievant was a classified-exempt employee and as such served at the will and pleasure of Respondent. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). See Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996) and cases cited therein. A classified-exempt employeeis not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). Grievant's at-will status would indicate she could be fired for good reasons, bad reasons, or no reasons, provided she was not terminated for a reason that violates a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Wilhelm, supra; Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). The burden of proof is upon the at-will employee to demonstrate a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. (See footnote 19) Wilhelm, supra.

In this instance, Grievant's contract was for one year, and there were no assurances her contract would be renewed. These facts were indicated in her Notice of Appointment, which she signed and returned. As Grievant pointed out, many of these contracts, for other at-will employees, had been renewed on a yearly basis, if Respondent approved of the performance of the employee, and the responsibilities still needed to be executed. President Moore did not find Grievant's performance of her duties to be satisfactory and believed Grievant's continued employment would not be in the best interest of BSC.

However, even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

The rule that an employer has an absolute right to discharge an at-will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policyprinciple, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless v. First National Bank, 169 W. Va. 673, 289 S.E.2d (1982).

Grievant has alleged her contract was not renewed because she is an African- American and because she is a female. If this is true, this non-renewal would contravene a substantial public policy. Grievant has the burden of proof to establish her contract was not renewed for reasons that violate a substantial public policy based on race and gender by a preponderance of the evidence. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

III. Credibility

The next issue to address is witness credibility, as the testimony of Grievant and President Moore was frequently diametrically opposed. In situations where the existenceor nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

The Grievance Board has applied these factors in many cases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

In evaluating the available evidence, the undersigned finds that the testimony of President Moore was substantially consistent, and Grievant's testimony was less consistent. President Moore's demeanor and responses under cross-examination revealed no particular animosity toward Grievant, which would cause him to fabricate or embellishhis statements. On the other hand, Grievant, while professing no animosity against President Moore and others at BSC, talked consistently about how everyone had treated her badly with the encouragement of President Moore, and most employees did not respect her or her authority, especially President Moore.

Where Grievant's and President Moore's testimony differed, the undersigned Administrative Law Judge has found the facts of the events to basically be correctly stated by both Grievant and President Moore, but the perception and interpretation of these events were vastly different. In many of these incidences, the interpretation, and thus, the credibility of Grievant must be called into question. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). The undersigned Administrative Law Judge will review several incidents where the interpretation of the two differed in order to demonstrate.

1) The student disciplinary hearing. Grievant believed President Moore had given the student assurances of his support, even though she was told directly by President Moore that he had not. Grievant then decided not to hold the hearing, and in a subsequent letter basically informed President Moore it was his fault the student would not be helped to "improve his behavior."

2) Parking. When Grievant was told to stop violating parking procedures, she did not deny she had violated the regulations, but still viewed the letter as harassment and insulting. 3) Job duties. Grievant consistently testified job duties were removed after her arrival, and she did not know there

were changes in her job duties. The change in job duties was identified on the posting, and discussed in the interview.

Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony to be distorted and influenced by her own bias; thus her credibility in the interpretation of events must be called into question.

IV. Discrimination

Grievant argued she had been discriminated against because she is an African- American female. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code §§ 18-29-2(m), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show theoffered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Additionally, it must be considered that the discrimination provision of the grievance procedure

was not intended to restrict or limit the state's ability to terminate the employment of an at-will employee. See Williams, supra. This reasoning would also apply to the non-renewal of a contract, as a non-renewal action is not viewed as so severe an event, as the employee has no expectation of continued employment. The West Virginia Supreme Court held in Williams, supra, that a duty of good faith and fair dealing is not owed to an at-will employee in the public sector. Id. at 781. The Court reasoned that to impose this duty would be contrary "to the general principles . . . that grant the appointing authority an unfettered right to terminate an appointee." Id. The Court reported it found no jurisdiction that imposed a duty of good faith and fair dealing upon employers in at-will public employment and refused to impose such a duty.

In any case, Grievant has not established a prima facie case of discrimination. While it is true Grievant is a female, African-American, she did not demonstrate the action of non-renewal was related to these factors. First of all, Grievant did not establish she was similarly situated to any Caucasian and/or male employee who had been treated differently than she, within this set of circumstances.

Secondly, Grievant's non-renewal was directly related to her ineffective performance of her duties. Grievant alienated the very people she was there to serve, the students, onthe issues of Homecoming, the Student Health Center, the school mascot, smoking regulations, and with her authoritarian behavior. She did not hold the required disciplinary hearing, failed to hold student elections, and forced the Financial Aid Department to commit funds to a student incorrectly resulting in a nine thousand dollar repayment. She was unable to work effectively with other members of the administration, and had difficulties with her subordinates. Grievant was an at-will employee, and BSC no longer desired to employ her in this important position. BSC is not required to continue Grievant's employment in this at-will position. (See footnote 20) Accordingly, the undersigned Administrative Law Judge does not find Grievant's non-renewal was motivated by a discriminatory motive.

V. Retaliation/Reprisal

Grievant has also alleged her non-renewal was reprisal for filing grievances. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant 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 a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she 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;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store, supra; Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non- retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Within the past year, Grievant has filed two other grievances. The non-renewal of Grievant's contract, "the adverse action" followed "within such a period of time that retaliatory motivation can be inferred." Given this state of affairs, the undersigned Administrative Law Judge finds Grievant has established a prima facie case of reprisal, and the burden shifts to Respondent to rebut the presumption of retaliation.

Respondent has demonstrated legitimate, non-retaliatory reasons for the adverse action. BSC established Grievant's contract was not renewed because Grievant was ineffective in performing the duties to which she was assigned, and consistently created problems with staff, students, and other administrative employees. Grievant failed to follow directions and seemed to think the rules did not apply to her because she was a Vice President. Additionally, the difficulties with Grievant's job performance started prior to the first grievance being filed, and continued throughout the year until the non-renewal. Further, as Vice President of Student Affairs, Grievant was in a position of responsibility at BSC. She was responsible for all student services. It was important the

Administration have confidence in her abilities. The person serving in this position must be able to work effectively with many BSC employees. Dr. Moore testified he had lost confidence in Grievant and in her ability to perform her job, and he made the decision to not renew Grievant's contract based upon the problems and conflicts that had occurred during the year. He stated he was not retaliating against Grievant, and he had no reason to do so. Grievant did not demonstrate the reasons given by Respondent were merely pretextual.

VI. Harassment

Grievant also argues BSC's treatment of her constitutes a pattern of harassment. W. Va. Code §18-29-2(n) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor 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). Similarly, repeated comments of a sexual nature by a supervisor have been found to constitute harassment. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997). See Tibbs v. HancockCounty Bd. of Educ., Docket No. 98-15-016 (June 16, 1998). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Johnson v. Dep't of Health and Human Resources, Docket No. 98-HHR-302 (Mar. 18, 1999).

Grievant has not demonstrated she has been subjected to harassment. She has not shown a pattern of repeated and continual treatment, or that she has been treated in a manner that is contrary to law. While it is true Grievant received memos informing her of various weaknesses and problems, with directives to reverse some actions she had taken; this fact alone does not constitute harassment. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. This feedback may not always be positive. Just because Grievant did not like the information she received, does not mean it was inappropriate or constitutes harassment. Rider v. Bd. of Trustees/Marshall Univer., Docket No. 99-

BOT- 348 (Apr. 7, 2000). The feedback and corrections Grievant received were proper and warranted.

Additionally, Grievant viewed the letter from students as harassment and insubordination. First, students are not her subordinates, and they cannot be insubordinate. Second, it is well understood that college students, like all others, have the right to express their views. To do so is not insubordination, but can be viewed as practice for the responsibilities they will soon be expected to assume in society. Grievant also saw the resolutions passed by staff and faculty as harassment and solicited by President Moore. President Moore did not solicit this feedback, and, again, faculty and staff have the right to express their views on events that effect their employment. **VII. Contract terms**

Grievant asserted President Moore made a commitment to hire her for five years, and she was unaware of her contract term until she arrived at BSC. Grievant signed her contract after discussion with President Moore, and she did not grieve its terms. The contract is clear on its face that it is a will and pleasure contract for one year only, just like the contracts of all the other administrative employees. "A written contract merges all negotiations and representations which occurred before its execution, and in the absence of fraud, mistake, or material misrepresentation extrinsic evidence cannot be used to alter or interpret language in a written contract which is otherwise plain and unambiguous on its face." Syl. Pt. 1, Warner v. Haught, Inc., 174 W. Va. 722, 329 S.E.2d 88 (1985). See Yoho v. Borg-Warner Chem., 185 W.Va. 265, 406 S.E.2d 696 (1991).

Grievant had the burden of proof on any oral modifications she believed were made to this contract. She was required to establish these modifications by demonstrating "clear and positive evidence" that the minds of the parties to the contract definitely met on the alteration. Combs v. McLynn, 187 W. Va. 490, 419 S.E.2d 903 (1992). Grievant did not meet this burden of proof.

VIII. At-will status, reprise

As Grievant did not meet her burden of proof on any issue of substantial public policy, the question of whether the non-renewal of Grievant's contract was improper must be studied in light of her at-will status. As previously stated, Grievant's at will contract could have been **terminated** for good reasons, bad reasons, or no reasons, provided she was not terminated for a reason that violates a substantial public policy. Williams, supra. See Wilhelm, supra. Here, with a non-renewal of a contract, the same rule certainly applies. The non-renewal of Grievant's contract must be upheld.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Public Safety, Docket No. 95-DPS- 119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Authority, Docket No. 91- HHR-400 (June 30, 1992).

2. The action taken in this grievance was a non-renewal, not a termination.

3. Because Grievant was an at-will employee at the time of the non-renewal of her contract, she this action could occur for "no reason" or a "bad reason", unless a substantial public policy is violated. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Higginbotham v. W. Va. Dep't of Public Safety, W. Va. State Police, Docket No. 97-DPS- 018 (Mar. 31, 1997); Myer v. W. Va. Racing Comm'n, Docket No. 95-RC-290 (May 3, 1996); Samples v. Glenville State College, Docket No. 94-BOD-564 (July 28, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

4. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

5. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

6. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

7. Grievant did not meet her burden of proof and establish a prima facie case of discrimination.

8. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code § 18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by proving the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she 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;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store, supra; Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

9. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

10. Grievant established a prima facie case of retaliation.

11. BSC rebutted the claim of retaliation by a preponderance of the evidence, and demonstrated the non-renewal decision resulted from Grievant's inability to perform the essential duties of the position in an effective and collegial manner. Grievant failed to demonstrate these reasons were either pretextual or a subterfuge for retaliation. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). 12. "Harassment" is defined under W. Va. Code § 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy, and professionalism."

13. Grievant has failed to prove by a preponderance of the evidence that she has been subjected to harassment. Rider v. Bd. of Directors/Marshall Univer., Docket No. 99- BOT-348 (Apr. 7, 2000). See Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22- 495 (Jan.29, 1999).

14. Grievant did not prove a violation of the terms of her contract. Syl. Pt. 1, Warner v. Haught, Inc., 174 W. Va. 722, 329 S.E.2d 88 (1985). See Yoho v. Borg-Warner Chem., 185 W. Va. 265, 406 S.E.2d 696 (1991).

15. Because Grievant was an at-will employee, and no substantial public policy has been violated, the non-renewal of her contract will not be overturned. See Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any 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. 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 record can be prepared and properly transmitted to the appropriate circuit

court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 29, 2002

Footnote: 1

Grievant was informed that the parties are responsible for their own legal fees at Level IV. No evidence was introduced into the record regarding medical fees, and this relief is deemed abandoned.

Footnote: 2

Grievant was represented by Attorney John Feuchtenberger, and Bluefield State College was represented by Attorney Howard Seufer.

Footnote: 3

No evidence was presented about Grievant's religion, and it is unknown what it is.

Footnote: 4

Each and every event will not be addressed.

Footnote: 5

For the reporting year 2000 - 2001, BSC was asked to supply additional data. Additionally, sometime in late 2000 or early 2001, a complaint was filed against President Moore for racial discrimination. On March 28, 2001, after an investigation, the West Virginia Higher Education Interim Governing Board ("Board") found "no evidence to support any claims that decisions made or actions taken by President Robert Moore or anyone acting at his behest were or are racially motivated." The Board indicated it fully supported President Moore and had every confidence in his ability to discharge his responsibilities. Resp. Ex. No. 3, at Level IV.

Footnote: 6

Grievant asserted for the first time at Level IV that she had applied for this position in 1997, but other witnesses stated Grievant had applied only for the position of Provost.

Footnote: 7

It was suggested to Grievant that she move into the newly created space, but when she did not want to, the trainer was asked to move and he did.

Footnote: 8

In this letter Grievant stated she was informed at "her final interview" that these duties would be returned. This is incorrect. The 1999 advertisement stated the duties of the position, and the duties of enrollment management were not listed, and, as previously stated, the recent change in duties was discussed at her interview.

Footnote: 9

Little information was put forth on this issue during any hearing. There was no mention of an academic appointment or teaching duties in Grievant's contract.

Footnote: 10

Initially, President Moore did want to create and post this position, but after receiving negative faculty input, this idea was dropped.

Footnote: 11

This summary is not a direct quote, except where the quotation marks indicate.

Footnote: 12

By the time Grievant arrived at Level IV, Grievant believed President Moore had called her a liar outright, without her using the word.

Footnote: 13

Per the Grievance Board's usual practice, the students' names have not been used.

Footnote: 14

There have been periods in the past when the number of hours the Student Health Center was open were very limited.

Footnote: 15

Grievant also received a Certificate of Appreciation from the SGA President, Polly Laxton, at a later time. This certificate came after Grievant, who was the only one who had the authority to do so, interceded on Ms. Laxton's behalf to get a professor to allow her to take a mid-term. Grt. Ex. No. 5, at Level VI.

Footnote: 16

It was noted by Respondent that the issue of transportation of athletes is a sensitive one at BSC because of the death of an athlete in an automobile accident.

Footnote: 17

On April 19, 2001, Grievant filed another grievance with a default motion, stating President Moore had not conducted an informal conference with her on March 7, 2001. See Finding of Fact 123.

Footnote: 18

Grievant was at home at this time as she had become sick at the conference she had attended, had recovered for a period at her former home, and then returned to Bluefield. Grievant had not been released to return to work at the time of the Level IV hearing.

Footnote: 19

Here, Grievant's contract was merely not renewed.

Footnote: 20

Grievant did present the testimony of another African-American female, who stated she believed she had been treated in a discriminatory manner during her tenure at BSC.