THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ALITA SELLERS,

Grievant,

v. Docket No. 06-HE-276D

WEST VIRGINIA UNIVERSITY -

PARKERSBURG,

Respondent.

DECISION

Grievant Alita Sellers, a tenured professor at West Virginia University - Parkersburg ("Respondent" or "WVU-P"), grieves the non-renewal of her contract as Chairperson of West Virginia University - Parkersburg's Health Sciences Division. Grievant filed directly at Level Four on May 23, 2006, stating the following as her grievance: "Informed that WVU- P intends to terminate effective 5/31/06." She sought the following relief: "Retain position currently held - Chairperson, Health Sciences Division, WVU-P." By Order entered June 22, 2006, then-Administrative Law Judge ("ALJ") Reynolds remanded the grievance to Level Three (See footnote 1) **because it did not involve a disciplinary issue.**

On August 11, 2006, Grievant filed a notice of default based on Respondent's failureto hold a Level Three hearing within the required time limit. Following a Level Four hearing on the default issue on September 22, 2006, former ALJ Marteney, on February 27, 2007, entered an

order granting the default. *Sellers v. West Virginia University - Parkersburg*, Docket No. 06-HE-276D (June 22, 2006) (Order Granting Default). The Respondent appealed Judge Marteney's order to the Wood County Circuit Court, which upheld the Default Order on August 21, 2007, denying Respondent's Petition for Appeal, in an order entered by Judge Beane.

The case then returned to the Grievance Board, where Respondent requested a hearing on the remedy, (See footnote 2) which took place before Acting Chief ALJ Reynolds at the Board's office in Charleston, on January 7, 2008. Grievant was represented by her counsel, Walt Auvil. Respondent was represented by Assistant Attorney General Elaine L. Skorich. The case became mature for decision on January 31, 2008, the deadline for the parties' submission of proposed findings of fact and conclusions of law on the remedy. The case was reassigned to the undersigned following Acting Chief ALJ Reynolds's retirement.

Summary

Following a decision by this tribunal that the Grievant had prevailed below by default, upheld on appeal to the Circuit Court, the grievance returned to Level Four for a decision whether the Grievant was entitled to the remedy she sought, continuation in her year-to-year position as Chairperson of the WVU-P Health Sciences Division. The Respondentestablished by clear and convincing evidence that the Grievant possessed only a year-to- year contract as Chairperson, terminable at Respondent's will on any annual anniversary. The remedy Grievant sought is clearly wrong and contrary to law, because it would convert an administrative position, terminable by its express terms, into what would amount to a tenured chairmanship. The Respondent has satisfied the heightened burden imposed on a defaulting employer, and the grievance must therefore be DENIED.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. At the time her grievance was filed, Grievant had been the Chairperson of the Health Sciences Division at WVU-P from the 1991-1992 academic year through the 2005- 2006 academic year.

2 2. Grievant's academic-year appointments as Chairperson ran from August 1 through

May 31 of the succeeding year.

3 3. Separate from her appointment as Chairperson, the Grievant served, and continued to serve after the filing of the grievance, as a tenured member of Respondent's faculty. Her employment status as a tenured member of the faculty was not affected by the facts relevant to her chairmanship of the Health Sciences Division.

4 4. On March 31, 2006, the WVU-P Executive Dean for Academic Affairs notified Grievant that he was recommending to the WVU-P president that Grievant's contract as chairperson not be renewed for the 2006-2007 academic year. On April 28, 2006, the WVU-P president notified Grievant that she supported the dean's non-renewal recommendation. 5

5. WVU-P did in fact choose not to renew the Grievant's contract as chairperson for the period commencing August 1, 2006.

6 6. At the time she filed this grievance, Grievant's contract recited the contract term as: "Start 01-AUG-2005" and "Stop 31-MAY-2006." Resp. Ex. 1 at Level Four.

Discussion

W. Va. Code § 29-6A-3(a)(2) (2006), applicable to cases which _ like this one _ were pending before July 1, 2007, *see* footnote 1, *supra*, provides: (See footnote 3)

> **The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.**

[Emphasis added.]

An employer seeking to prevent the award of the requested remedy may rebut the presumption established by § 29-6A-3(a)(2). The employer must do so by clear and convincing evidence, however _ a more difficult standard of proof than the preponderance-of-evidence standard which ordinarily applies before the Grievance Board. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).

Although the language of § 29-6A-3(a)(2) establishes a presumption that "the employee prevailed on the merits," which would appear to encompass questions of both fact and law, the term "presumption" is generally used in connection with questions of evidence, rather than law. *Lohr, supra*, citing Cleckley, *Handbook on Evidence for W. Va. Lawyers* (1978). "To rebut the presumption created in W. Va. Code §29-6A-3(a)(2), a respondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true." *Lohr v. Div. of Corr*., Docket No. 95-CORR-157D (Nov. 15, 1999).

> **Aside from showing the relief requested is contrary to law or clearly wrong in its own right, the Grievance Board has also held the presumption created by W. Va. Code § 29-6A-3(a)(2) is rebuttable by showing the relief requested is clearly wrong by clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).**

***Bailey v. Dep't of Health and Human Res.*, Docket No. 03-HHR-167D (June 30, 2004) (footnote omitted). *See Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999).**

In this case, the evidence on which the Respondent relies to rebut the statutory presumption is the Grievant's written contract, or appointment, as Chairperson of the Health Sciences Division, a contract which by its terms was from year to year, renewable if agreed to by both parties (and therefore non-renewable at the instance of either party). The Grievant concedes this description of the contract's terms in her Proposed Findings of Fact and Conclusions of Law. Her Conclusion of Law 5 is: "The decision to appoint or notappoint the Grievant or anyone else as Chairperson of the Health Sciences Department [sic] is a discretionary decision with the University President. The position is 'at will,' as opposed to the Grievant's underlying and continuing position as tenured Professor." (See footnote 4) **The Grievant concedes the Respondent's right, other things being equal, not to renew her contract as chairperson.**

As a result, the evidence on which the Respondent relies to rebut the statutory presumption is better than clear and convincing. It is undisputed.

Pointing to the year-to-year nature of the Grievant's contract as chairperson, the Respondent maintains that to keep her in that position beyond the end of the contract's term, against the will of the University Administration, would be clearly wrong or contrary to law.

According to the Grievant, however, "[t]he issue . . . is not whether the Agency, *ab initio*, had the authority to remove the Grievant . . . . Rather, given the default, the issue is whether the remedy requested by the Grievant is clearly wrong or contrary to law." Grievant's Proposed Conclusion of Law 6. In order to demonstrate that reinstatement is clearly wrong or contrary to law, the Grievant maintains, Respondent would have to prove "that the Grievant had engaged in serious failures of judgment, misconduct, or incompetence. The Grievant argues that "[t]here is . . . no evidence that the Grievant was other than a competent, professional, and effective Chair of the Health Sciences Department [sic]." Grievant's Proposed Conclusion of Law 8. The Grievant's argument misapprehends the meaning of W. Va. Code § 29-6A-3(a)(2) (2006), as it has been interpreted by decisions of the Grievance Board. The presumption that a grievant has prevailed on the merits confers an advantage on the grievant in litigating (or negotiating) the grievance. Presumably, the prospect of facing such a presumption also deters employers from ignoring or missing grievance procedure deadlines. The use of the term "presume," however, and the establishment of a respondent's right to show that a remedy is "contrary to law or clearly wrong," mean that the statute does not confer an insurmountable advantage on a grievant. The statute does not contemplate the award of a remedy which is contrary to fact, or contrary to the law.

The Grievant in this case advocates a result which would be contrary to both. She advocates permitting the presumption that she prevailed on the merits of her grievance to transform her year-to-year appointment as chairperson into a kind of tenured chairmanship. In the Grievant's view, as a result of the default, her request that she be maintained in the chairmanship trumps the fact that the position is not one to which an expectation of continued employment attaches. *Tuck v. Cole*, 182 W. Va. 178, 386 S.E.2d 835 (1989). Her requested remedy would transform the chairmanship of the Respondent's Health Sciences Division into a job from which the Grievant could only be dismissed for cause. This result would be contrary both to the facts of the case (that she possessed only a year- to-year contract as division chairperson); and contrary to law (her appointment was subject to non-renewal on any yearly anniversary, for any reason (See footnote 5) **or for no reason). This result would go well beyond what § 29-6A-3(a)(2) contemplates. In a grievance which turns primarily on contested facts, the statutory presumption could confer a meaningful advantage**

on the grievant. In her proposed findings of fact and conclusions of law, for example, the Grievant argues from *Leeson v. Dep't of Transp./Div. of Highways,* Docket No. 06-DOH-033D (August 29, 2006), a non-selection case, to support granting her grievance. In a case involving the selection of one candidate over others, like *Leeson*, the employer's default requires it to meet the clear and convincing evidentiary standard in order to uphold the selection it made (and thereby rebut the presumption), rather than merely being required to justify its decision by a preponderance of the evidence. The higher standard of proof might well change the result in a such a fact-dependent case. In this case, however, the relevant facts are not disputed, (See footnote 6) and the Respondent therefore easily meets the heightened clear and convincing standard of proof for rebutting the presumption.

Similarly, and primarily because the facts regarding the Grievant's contract are uncontested, the Respondent easily meets the legal requirement to show that the requested remedy is contrary to law.

> A state college administrator . . . has no property right in continued employment with the college beyond his current contract; therefore, the college's refusal to rehire him or grant him a hearing does not deprive the administrator of property without due process of law. U.S. Constitution, Amend. XIV; W.Va. Constitution, Art. 3, Sec. 10; W.Va. Code, 18-26-1 *et seq*. [1969, rep. 1989]. Syllabus, *Tuck v. Cole*, 182 W. Va. 178, 386 S.E.2d 835 (1989). *See also Cook v. W. Va. Univ*., Docket No. 05-HE-352 (May 22, 2006); *Loundman-Clay v. Higher Educ. Policy Comm'n/Bluefield State College* , Docket No. 02-HEPC-013 (Aug. 29, 2002); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept. 11, 1997).
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> "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 (Jan. 30, 1996). Here, Grievant was not dismissed, as he was allowed to serve the full term of his contract. As in *Tuck, supra,* WVU has done nothing to create any objective expectancy that Grievant's employment as an administrator would be continued beyond the initial five-year term which expired in 2000. Grievant's property rights in his administrative employment as Program Director ended when his contract expired in 2005, and absent a basis for entitlement to continued employment in that role, any expectation was unilateral. *Smith, supra. See Whitaker v. Bd. of Director/West LibertyState College*, Docket No. 99-BOD-231 (Jan. 11, 2000).

Cook v. W. Va. Univ., Docket No. 05-HE-352 (May 22, 2006).

Because the Respondent has rebutted the presumption that "the employee prevailed on the merits of the grievance," and has established that the remedy she seeks is "contrary to law"

and "clearly wrong in light of that presumption," W. Va. Code § 29-6A-3(a)(2) (2006), the remedy she requested, and her grievance, must be DENIED.

Conclusions of Law

1 1. In pertinent part, W. Va. Code § 29-6A-3(a)(2) (2006) provides, in cases of default by a respondent, that "[i]n making a determination regarding the remedy, the hearing examiner [ALJ] shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption." 2 2. An employer may rebut the presumption established by § 29-6A-3(a)(2) by discrediting its factual basis by clear and convincing evidence. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999)*; Bailey v. Dep't of Health & Human Resources*, Docket No. 03-HHR-167D (June 30, 2004). *See also* Cleckley, *Handbook on Evidence for W. Va. Lawyers* (1978).

3 3.

> **Aside from showing the relief requested is contrary to law or clearly wrong in its own right, the Grievance Board has also held the presumption created by W. Va. Code § 29-6A- 3(a)(2) is rebuttable by showing the relief requested is clearly wrong by clear and convincing evidence that the basic facts underlying the asserted presumption are not true. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).**

***Bailey v. Dep't of Health and Human Res.*, Docket No. 03-HHR-167D (June 30, 2004) (footnote omitted). *See Williamson v. W. Va. Dep't of Tax & Revenue*, Docket No. 98-T&R-275D2 (Jan. 6, 1999).**

4 4. The Grievant's written contract as Chairperson of the Health Sciences Division, by its terms, ran from year to year. It was renewable if agreed to by both parties, and therefore non-renewable at the instance of either party. The facts on which this conclusion is based are not in dispute.

5 5.

> **A state college administrator . . . has no property right in continued employment with the college beyond his current contract; therefore, the college's refusal to rehire him or grant him a hearing does not deprive the administrator of property without due process of law. U.S. Constitution, Amend. XIV; W.Va. Constitution, Art. 3, Sec. 10; W.Va. Code, 18-26-1 *et seq*. [1969, rep. 1989]. Syllabus, *Tuck v. Cole*, 182 W. Va. 178, 386 S.E.2d 835 (1989). *See also Cook v. W. Va. Univ*.,**

Docket No. 05-HE-352 (May 22, 2006); *Loundman-Clay v. Higher Educ. Policy Comm'n/Bluefield State College* , Docket No. 02-HEPC-013 (Aug. 29, 2002); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept. 11, 1997).

6 6. Under *Cook v. W. Va. Univ*., Docket No. 05-HE-352 (May 22, 2006):

"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 (Jan. 30, 1996). Here, Grievant was not dismissed, as he was allowed to serve the full term of his contract. As in *Tuck, supra,* WVU has done nothing to create any objective expectancy that Grievant's employment as an administrator would be continued beyond the initial five-year term which expired in 2000. Grievant's property rights in his administrative employment as Program Director ended when his contract expired in 2005, and absent a basis for entitlement to continued employment in that role, any expectation was unilateral. *Smith, supra. See Whitaker v. Bd. of Director/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000).

7 7. The Respondent has rebutted the presumption that "the employee prevailed on the merits of the grievance," and has established that the remedy the Grievant seeks is "contrary to law" and "clearly wrong in light of that presumption," W. Va. Code § 29-6A- 3(a)(2) (2006) .

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (2006) (repealed, *see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they 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.

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Thomas J. Gillooly

Administrative Law Judge

Date: May 30, 2008

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Judge Marteney's Order Granting Default provided: "Respondent may request a hearing on the remedy in order to demonstrate that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999)."

Footnote: 3

Although Chapter 29, Article 6A, of the West Virginia Code (W. Va. Code §§ 29- 6A-1 through 29-6A-12 (2006)), does not by its terms apply to employees of state institutions of higher education, W. Va. Code § 18B-2A-4(k) (2006) made it so applicable. (As amended in 2007, § 18B-2A-4(k) continues to make the grievance process of the Public Employees Grievance Board, W. Va. Code §§ 6C-2-1 to 6C-2-7 (2007), applicable to higher education employees.) Chatfield v. W. Va. State Univ., Docket No. 06-HE-074 (Jan. 4, 2007).

Footnote: 4

The Grievant's position as chairperson is not, strictly speaking, at will. "Grievant's administrative assignment was not at-will employment because the annual notice of appointment serves as an administrative contract, stating his position, salary, and term of employment." Cook v. W. Va. Univ., Docket No. 05-HE-352 (May 22, 2006). However, the Grievant's year-to-year contract for the chairmanship in this case is, by its terms, terminable at the will of the employer, at the conclusion of any one-year term.

Footnote: 5

Any reason not contrary to law, that is, e.g., prohibited discrimination. No such claim has been made in this case.

Footnote: 6

The Grievant's case sought to establish that the Grievant performed well as Chairperson of the Division. (Her performance in the position was essentially the sole issue addressed at the Level Four hearing.) But these facts are not relevant to her entitlement to the remedy she seeks (keeping the chairmanship). For such facts to be relevant, the division chairmanship would have to be a position from which the incumbent could be dismissed

only for cause.