WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VEELLA R. GROOMS,
Grievant,

v. **Docket No. 2009-1693-SCTC**

WEST VIRGINIA STATE COMMUNITY AND TECHNICAL COLLEGE,
Respondent.

D E C I S I O N

Grievant, Veella R. Grooms, filed an expedited grievance against West Virginia State Community and Technical College ("WVSCTC"), Respondent.[1] The intent of the grievance was not initially apparent; however, it is now readily acknowledged by all parties that this grievance is in regard to disputed severance benefits (alleged discrimination), and not a protest of the discharge action itself. The June 29, 2009, Grievance Statement states:

> On June 10, 2009 my employment with WV State Community and Technical College was terminated. Although my position, VP of Institutional Effectiveness and Planning, was an at will appointment, the duties and responsibilities were critical to the operation of the institution. The reason given for the termination was the position was being eliminated. Based on incidents leading up to my termination, the President displayed questionable behavior, disparate treatment among employees and discriminatory practices toward me with the most recent being the elimination of my position and termination of my employment. I have supporting and collaborating documentation to demonstrate the discrimination and disparate treatment that resulted in the violation of the West Virginia Human Rights Act.

Relief Sought:

> To be made whole by withdrawing the disciplinary action and to be paid through the length of my contract, which to my knowledge is legal and binding, until June 30, 2009. Also, any and all benefits to which I am

[1] W. VA. CODE § 6C-2-4(a)(4) provides that an employee may proceed directly to level three when s/he has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in these matters.

> entitled, including but not limited to, loss of pay, health benefits and retirement compensation. Additionally, I am requesting punitive relief due to damages to my reputation.

The rationale for Grievant's termination is not at issue pursuant to this grievance. Grievant filed this matter directly to Level Three of the Grievance process. Before this forum, Grievant is grieving that she was denied severance pay alleging that Respondent engaged in disparate and discriminatory behavior.

A Level Three hearing was held before the undersigned Administrative Law Judge on September 9, 2009, in the Grievance Board's Charleston office. Grievant appeared *pro se*, representing her interest. Respondent was present by Dr. Joseph L. Badgley, President of WVSCTC and by counsel, James "Jake" Wegman, Assistant Attorney General. This case became mature for decision on or about October 7, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law documents.

Synopsis

An African-American, Grievant alleges discriminatory employment behavior on the part of her former employer, in that upon the termination of her employment, she was not granted severance pay for the outstanding time period of the annual service contract. Grievant, formerly an at-will-employee, is not grieving the discharge but the perceived inequitable treatment upon separation. Grievant highlights the differences in Respondent's conduct in the termination of a Caucasian professor's employment/service contract and her own. The record demonstrates that Grievant and the comparative employee were not similarly situated. The contract non-renewal of a faculty member and the termination of at-will administrative personnel are governed by different procedural rules and regulations.

Further, no rule or policy exists granting severance pay to Grievant. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by WVSCTC as Vice President of Institutional Effectiveness, a non-classified, at-will position. Grievant commenced employment with Respondent in July 2003.

2. Grievant signed an employment contract with Respondent annually. Grievant's contract provided that her position was "an administrative appointment to serve at the will and pleasure of the President and the appointment can be terminated by either party upon written notice." (Gr. Ex. 1) Grievant accepted the position, with this and other specified conditions outlined, evident by her signature of August 8, 2008.

3. WVSCTC, Respondent, is a Higher Educational Institution. Respondent is an agency whose employees are governed pursuant to Higher Education Policy Commission Legislative Rules related to the administration of personnel. W. VA. CODE §§ 18B-1-6; 18B-1-9. *See also* 133 C.S.R. 8. (2001).[2]

4. WV Council for Community and Technical College Education, Series 8, "Personnel Administration," establishes and sets forth policy in a number of areas regarding personnel administration for Higher Education Policy Commission Employees.

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[2] Authority to adopt these rules is granted to the West Virginia Higher Education Policy Commission by W. VA. CODE § 18B-1-6.

Said Series provides, among other provisions, that non-classified employees "shall serve at the will and pleasure of the president." (Resp. Ex. 2; 133 C.S.R. 8 § 2.1.7).

5. Among other applicable employment principles, Grievant was an at-will, non-classified employee, whose employment was administered pursuant to Series 8 "Personnel Administration." Grievant was notified of her termination two and one-half weeks prior to the end of the fiscal year, which ended June 30, 2009.

6. By letter dated June 10, 2009, WVSCTC's President Joseph Badgley informed Grievant "[t]he position titled Vice President of Institutional Effectiveness and Planning at WVSCTC is a non-classified will and pleasure appointment. I am eliminating the position and terminating your appointment effective today, June 10, 2009." (Gr. Ex. 2).

7. On June 29, 2009, Grievant filed a Grievance against WVSCTC, stating, among other things, that she was subjected to "discriminatory practices." (*See* Grievance statement, supra). Pursuant to Grievant's subsequent admissions she was not grieving her discharge, but was grieving that she had been treated differently than Judy Chamberlain, a former WVSCTC professor. Specifically, Grievant alleged that Chamberlain had been granted severance pay and that WVSCTC engaged in discrimination by not offering severance pay to Grievant.

8. Judy Chamberlain was employed by WVSCTC as an Assistant Professor of Nursing, with a contract running from "August 19, 2008 through Commencement 2009, this is a one year term appointment." The contract specifically provided that "this appointment is for 9 months." (Resp. Ex. 1).

9. By memorandum dated April 13, 2009, President Badgley notified Assistant Professor Chamberlain that "you are relieved of your teaching, supervisory and clinical

responsibilities. . . You will remain an employee of the college until the end of the current contract period . . . I will not be offering you a contract for the 2009-10 academic year." (Gr. Ex. 3).

10. WV Council for Community and Technical College Education, Series 9, "Academic Freedom, Professional Responsibility, Promotion, and Tenure" provides the policy and procedure relevant to the employment of faculty personnel. Judy Chamberlain was employed by Respondent as faculty personnel governed by Series 9. (Resp. Ex. 3; *see also* Barbara Rowell testimony).

11. Pursuant to Series 9, faculty are given contracts with a specified end date. Further, there are specific and detailed procedures for terminating a faculty member under Series 9. The process is lengthy. (*See* Resp. Ex. 3).

12. President Badgley determined that instead of terminating Chamberlain pursuant to Series 9, Section 12, Assistant Professor Chamberlain would work off-campus for the remaining period of her contract and her contract would not be renewed.(Gr. Ex. 3).

13. Upon non-renewal of her contract, Assistant Professor Chamberlain did not receive severance pay.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The issue(s) of severance benefits was not readily apparent in reading the June 29, 2009 Grievance statement. Nevertheless, the rationale for Grievant's termination is not at issue pursuant to this grievance.[3] Pursuant to Grievant's admissions, she is not grieving her discharge, but is alleging that she was treated impermissibly differently than a Caucasian professor. Specifically, Grievant alleged that an identified comparative employee (Judy Chamberlain) had been granted severance pay and that WVSCTC engaged in discriminatory behavior by not offering severance pay to Grievant.[4] As relief, Grievant has expressed interest in either being granted the amount of compensation that was outstanding on her service contract and/or "severance pay." While in this case two weeks of severance pay and the outstanding balance of Grievant's contract compensation are virtually the same amount, the concepts are not synonymous actions.

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[3] A significant portion of Grievant's Level Three efforts tended to relate to notice and validity of Respondent's stated rationale for the dismissal decision. Neither, why or when Respondent ultimately decided to terminate Grievant is an issue present for determination by this grievance.

[4] Throughout the Level Three proceedings Grievant tended to interchange the concept of paying the remaining contract compensation balance with the term "severance pay."

Respondent asserts that the action(s) taken with regard to terminating Grievant's employment was proper and in accordance with applicable law and policy. Respondent specifically denies discriminatory action and notes that they are not required to grant Grievant severance pay. Further, Respondent clarifies that Assistant Professor Chamberlain did not receive severance pay.

In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The crux of such claims is that the complainant was treated differently than similarly situated employees.

Grievant testified in her own behalf, and presented the testimony of Dr. Joseph L. Badgley, President of WVSCTC; Carmen Parrish, Budget Director; and Barbara Rowell, Director of Human Resources. No information presented by any of the witnesses establishes the so-called comparative employee's employment was similarly situated with that of Grievant's or that said employee received severance pay upon termination. In the instant grievance no evidence of record establishes that an employee, similarly-situated to Grievant, has been granted severance pay. Accordingly, there is no basis for her claim that she was the subject of discrimination.

The facts of this matter establish that Grievant and Chamberlain were **not** similarly situated. Respondent did not violate substantial public policy. Grievant was employed as an administrator, regulated under Series 8 (Resp. Ex. 2) whereas Chamberlain was faculty under Series 9. (Resp. Ex. 3). As an at-will employee, WVSCTC could terminate Grievant's employment for any reason that did not violate substantial public policy. In contrast, under Series 9, faculty are given contracts with a specified end date and the process of terminating a faculty member under Series 9 is lengthy. (*See* Resp. Exh. 3, § 135-9-12). Chamberlain never received severance pay. Instead of terminating Chamberlain pursuant to Series 9, Section 12, it was determined by President Badgley that she would work off-campus for the remaining period of her contract. Grievant's contract did not have a specified end date, and the undersigned is unaware of any rule or policy which mandates that Respondent must grant Grievant any outstanding balance of her contract's compensation.

Grievant seeks severance pay. In her proposed fact/law document she cites West Virginia Division of Personnel, Severance Pay Policy. W. VA. CODE § 29-6-10 (12) is not applicable to parties of this grievance.[5] Grievant perceived the primary issue of this matter is whether "Dr. Badgley exercised fair and equitable treatment among employees in relation to final compensation." (Gr. Opening Statement). While Grievant may truly believe this is the issue, this contention is not correct. Not all employees of Respondent are

[5] West Virginia Division of Personnel, Severance Pay Policy, is applicable to the termination of State and Public Employees. WVSCTC, Respondent, is a Higher Educational Institution, its employees are governed pursuant to Higher Education Policy Commission Legislative Rules related to the administration of personnel. W. VA. CODE § § 18B-1-6; 18B-1-9. *See also* 133 C.S.R. 8 (2001). DOP's Severance Pay policy is not applicable to the parties of this grievance.

employed under the same terms and conditions of employment. Further, the applicable rules and regulations for termination of diverse employment may also differ. In accordance with the facts, applicable law, and circumstances as discussed above, Grievant has not established that Respondent was obligated to grant her the outstanding compensation balance of her terminated contract or that Respondent has violated any statute, rule or policy in not providing her with severance pay.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. The Supreme Court of Appeals of West Virginia has stated that "West Virginia has set out a very specific system of procedural protections that apply to different carefully defined categories of college employees." *Loundmon-Clay v.Higher Educ. Policy Comm'n/Bluefield State College*, Docket No. 02-HEPC-013, (Aug. 29, 2002) *citing Tuck v. Cole*, 182 W.Va. 178, 386 S.E.2d 835 (1989). The Supreme Court of Appeals has also

noted that "administrators...have only the rights attendant to their current contracts." *Id*. An employer may refuse to renew these types of employee contracts without giving a reason and without providing a hearing. *Id*.

3. "Unless the employment is for a fixed term, the well established common law rule is that either party can terminate employment at will with or without cause." *Samples v. Bd. of Directors/Glenville State College*, Docket No. 94-BOD-564 (July 28, 1995), *citing Setzer v. W.Va. Dep't of Public Safety*, Docket No. 89-DPS-476 (Nov. 24, 1989). "An employee serving at-will has little protection from even arbitrary dismissal." *Samples*, *citing Carson v. W.Va. Bd. of Directors/Fairmont State College*, Docket No. 90-BOD-176 (Nov. 30, 1990). "The only exceptions to the general at-will rule are based in either contractual or statutory provisions which alter the at-will employment relationship, or involved dismissals shown to be motivated by reasons in substantial contravention of public policy." *Samples, supra.*

4. Employment action in contravention to substantial public policy includes termination based upon whistleblowing, retaliatory discharge, exercising rights under the Veterans Reemployment Act, filing a Workers' Compensation claim, refusing to violate safety standards, or refusing to submit to a polygraph test. *See Wilhelm v. Dep't of Tax and Revenue/Lottery Commission*, Docket No. 94-L-038, *affirmed* 198 W.Va. 92, 479 S.E.2d 602 (W.Va. 1996); *See also Roberts v. Adkins*, 191 W.Va. 215, 218, 444 S.E.2d 725, 728 (1994). "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 reason for the

termination is not at issue and the termination stands." *Loundmon-Clay*, *supra*, *citing Wilhelm*, *supra*.

5. Grievant has failed to prove that her termination was in contravention to substantial public policy.

6. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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

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

7. Grievant has failed to establish that Respondent's actions were discriminatory.

8. Grievant failed to prove by a preponderance of the evidence that Respondent violated any applicable rule or policy in not granting her severance pay.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 27, 2009

Landon R. Brown
Administrative Law Judge