THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANIEL FROST,
Grievant,

v. **Docket No. 2009-0920-BSC**

BLUEFIELD STATE COLLEGE,
Respondents.

DECISION

Grievant, Daniel Frost, filed a grievance against his employer, Bluefield State College, on January 22, 2009. The statement of grievance reads:

> Bluefield Sate [sic] College has refused to re-evaluate [sic] my PIQ and take the Personal Counseling requirement out of my PIQ as was agreed upon in the case styled Daniel Frost v. Bluefield State College Docket No. 2009-0009.[1] Furthermore, to supply data line after said evaluation to ensure PG-17.

For relief Grievant seeks:

> Bluefield State College to adhere to the Mediation agreed upon and to rewrite Grievant's PIQ to reflect said agreement to include the removal of Personal Counseling and to furnish grievant with the data line to ensure the Grievant will remain at a PG 17.

A Level III hearing was held on April 29, 2009, in the Grievance Board's Beckley office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Bluefield State College was represented by Kristi A. McWhirter, Assistant Attorney General. This case became mature for decision on May 15, 2009, upon the parties' submission of Findings of Fact and Conclusions of Law.

---

[1]The grievance form supplied to the undersigned at the hearing indicated the docket number to be 2008-0009-BSC. However, the appropriate number for this grievance is 2009-0009-BSC, and will hereinafter be referred to as that number.

Synopsis

Grievant had previously filed a grievance because his Position Information Questionnaire ("PIQ") stated he would provide "personal counseling" to students. Grievant did not feel qualified to do that. Grievant asserts he and Respondent entered into an agreement whereby Respondent agreed to reevaluate Grievant's PIQ. Grievant avers that a month after that settlement, Respondent informed him there would be no change to his PIQ. Grievant also appears to be looking for assurance his pay grade will not be reduced.

Respondent argues all promises and obligations were set forth in the settlement agreement, and that it complied with all of its obligations under that agreement. Respondent avers Grievant is attempting to grieve the same issue raised in 2008-0009-BSC. Lastly Respondent asserts Grievant has failed to state an injury-in-fact.

Grievant has failed to state a claim upon which relief could be granted, as his paygrade will not be reduced. Therefore, this grievance is denied.

Findings of Fact

1. Grievant is employed as a Counselor II, pay grade 17 and has been employed in this position since October 1, 2007.

2. On July 2, 2008, Grievant filed a grievance which stated:

> I have been ordered not to do personal counseling when that is exactly what the job entails. Therefore, creating a detrimental effect on performance and a reason to be downgraded. See attachment.[2]

---

[2]Only the grievance form was submitted as Level III, Respondent's Exhibit No. 1. Since the undersigned has no independent knowledge of 2008-0009-BSC, she cannot say what documents were attached to the grievance form when filed.

For relief Grievant was seeking, "Documentation to ensure I will not be downgraded and/or re-evaluation to be placed in proper job title at a pay grade [sic] 17." Level III, Respondent's Exhibit 1.

3. On December 8, 2008, Grievant and Respondent participated in Level II mediation, and agreed to enter into a Settlement Agreement and Release of All Claims on grievance 2008-0009-BSC.

4. This settlement agreement consists of 9 paragraphs. The first 6 paragraphs contain standard language about the legal and practical effect of the agreement. The remaining paragraphs state:

> Bluefield agrees to reevaluate Frost's Counselor II position pursuant to West Virginia Higher Education Policy Commission Procedural Rule Series I, a copy of which has been provided to Frost.
>
> Frost and Bluefield understand that for the purposes of Frost's Counselor II position, he is required to provide counseling intake services to assist students in recognizing and utilizing personal, social, educational skills and abilities that will enhance growth by referring students to the proper community resources when deemed necessary. Frost understands that he is also required to maintain confidential progress notes and contact sheets on students.
>
> Frost understands that he will not be required to provide personal counseling services for which licensure by the State of West Virginia is required nor will any adverse action, including a reslotting in a position in a lower pay grade be taken against Frost by Bluefield for failing to provide personal counseling services for which licensure is required by the State of West Virginia.

5. This agreement was signed on December 8, 2008, by Grievant, Leah Taylor, Human Resources Representative, and Paul W. Roop, mediator.

6. On January 12, 2009, Ms. Taylor sent Grievant a letter informing him that the re-evaluation of his Counselor II position had been completed and that after reviewing his PIQ Grievant's immediate and second level supervisors did not feel his principle job duties

and responsibilities had significantly changed. The letter went on to inform him that he would remain a Counselor II, pay grade 17.

7. Grievant received the data line for his Counselor II position.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994). This Grievance Board has recognized the principle that grievance settlements should be upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. *Adkins v. Logan County Bd. of Educ.*, Docket No. 97-23-216 (Sept. 29, 1997); *Vance v. Logan County Bd. of Educ.*, Docket No. 95-23-190 (Mar. 15, 1996).

There has been no evidence presented that the settlement agreement is invalid or in contravention of some law or public policy. Quite to the contrary, from reviewing the agreement it appears as if the parties intended to settle all the issues raised in grievance

2008-0009-BSC. Therefore, the agreement is a valid agreement, voluntarily entered into by both Grievant and Respondent.

The next issue to address is whether Respondent failed to comply with the terms and conditions of the agreement thereby causing Grievant an injury. "The Grievance Board has held that a grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute." *Milbert v. Division of Corr./Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994). The Grievance Board does not award relief based upon speculation about what might happen. *Pristavec v. W. Va. Dep't. of Health and Human Res.*, Docket No. 99-HHR-328 (Oct. 27, 1999).

When looking at the specific terms of the settlement agreement and taking them individually, Respondent first agreed to reevaluate Grievant's Counselor II position, and provide Grievant with a copy of the West Virginia Higher Education Policy Commission Procedural Rule Series 8. Contained within the language of the agreement, Grievant received a copy of the Procedural Rule. Grievant presented as evidence a letter from Leah Taylor, Director of Human Resources, which states Grievant's PIQ was reviewed and there was no significant change in duties. Granted, the PIQ was signed by Grievant and dated October 19, 2007. Yet, after reviewing that PIQ, it was determined Grievant would remain in the Counselor II pay grade 17.

Frankly, Grievant's argument is nonsensical. Grievant is requesting an assurance that he remain at pay grade 17, and after a review of the letter from Ms. Taylor, it is clear that Respondent does not intend to lower Grievant's pay grade. The letter specifically states, "After review of your present PIQ dated and signed by you on October 19, 2007,

your immediate and second level supervisors do not feel that your principle job duties and responsibilities have significantly changed including but not limited to the personal counseling intake and referral functions." Level III, Grievant's Exhibit 3. Clearly, Respondent has taken into consideration Grievant's concerns about personal counseling.

The second term of the settlement agreement ensures Grievant understands he will still be required to provide counseling intake services "to assist students in recognizing and utilizing personal, social, educational skills and abilities that will enhance growth by referring students to the proper community resources when deemed necessary." This clearly describes what "counseling" duties Grievant is expected to provide.

The last term of the agreement sets forth that Grievant will not be required to provide personal counseling services for which a license by West Virginia is required. This clears up any confusion over the term "personal counseling."

Grievant has failed to prove any injury-in-fact. It appears as if he received exactly what he bargained for in the settlement agreement. He has been ensured that he will remain at a pay grade 17 and will not have to conduct personal counseling for which a license is required. Grievant may disagree with the evaluation of his PIQ, but to assert Respondent has refused to re-evaluate the PIQ is disingenuous.

For the above stated reasons, this grievance is denied.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan.

22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation, and the law will uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy. *McDowell County Bd. of Educ. v. Stephens*, 191 W. Va. 711, 447 S.E.2d 912 (1994).

3. The Grievance Board has recognized the principle that grievance settlements should be upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. *Adkins v. Logan County Bd. of Educ.*, Docket No. 97-23-216 (Sept. 29, 1997); *Vance v. Logan County Bd. of Educ.*, Docket No. 95-23-190 (Mar. 15, 1996).

4. "The Grievance Board has held that a grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute." *Milbert v. Division of Corr./Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994). The Grievance Board does not award relief based upon speculation about what might happen. *Pristavec v. W. Va. Dep't. of Health and Human Res.*, Docket No. 99-HHR-328 (Oct. 27, 1999).

5. Grievant has failed to show an injury-in-fact.

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: July 17, 2009

_____

Wendy A. Campbell Elswick
Administrative Law Judge