THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

HEIMO RIEDEL,
Grievant,

v. **DOCKET NO. 07-HE-395**

WEST VIRGINIA UNIVERSITY,
Respondent.

DISMISSAL ORDER

This grievance was filed by Grievant, Heimo Riedel, against his employer, West Virginia University, on February 7, 2007. The statement of grievance is nearly two pages in length, and contains the text of an email Grievant sent to Dr. Jim O'Donnell on February 5, 2007. The initial paragraph of the grievance statement reads as follows:

> Biochemistry Interim Department Chair O'Donnell has notified me that he will inform my research staff[,] Manchao Zhang, Ph. D.[,] of his plans not to renew Dr. Zhang's appointment at this time[,] five months prior to the expiration of the contract. Any discussion of re-appointment with Dr. Zhang is premature since I have requested his re-appointment and have filed repeated grievances to challenge WVU's decision to terminate the funds supporting my research program[,] including Dr. Zhang. Since WVU has consistently delayed the resolution of the grievances, apparently in order to obtain a rationale to terminate my research support, I can only interpret the current efforts of the Department Chair to prematurely discuss these issue[s] at this time with Dr. Zhang as discriminatory and retaliatory to my previous grievances - and aimed at discouraging Dr. Zhang from his participation in my program. This discussion can easily be postponed until a formal resolution on the grievances is available and any notification period can be much shorter (without damage to Dr. Zhang) as it is normally applied in comparable circumstances at WVU. If Dr. Zhang is discouraged now from continuing in my program through Dr. O'Donnell's premature communication my research program will be irreversibly terminated even if funds to support Dr. Zhang become subsequently available.

As relief Grievant seeks:

> I ask for any discussion of this issue with Dr. Zhang to be postponed and his appointment to be continued until a ruling has been issued at Level IV on the pending grievances that challenge the termination of my research support by WVU. In particular, I ask to ensure that Dr. Zhang is not discouraged from participating in my program in the interim.
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> I ask to be fully compensated for any damage that has resulted from the actions of the University or its representatives and/or that will result to me personally or to my research program.[1]

A conference was held at level one of the grievance procedure on February 8, 2007.[2] In a decision issued by James M. O'Donnell, Ph.D., Interim Chair of the Department of Biochemistry, on February 12, 2007, Dr. O'Donnell advised Grievant that there were no funds available to support Dr. Zhang's reappointment, and that Dr. Zhang had to be notified of this. Dr. O'Donnell stated further that he would not discourage Dr. Zhang from participating in any way in Grievant's program, and that he could not address the issue of damages. Grievant appealed to level two on February 20, 2007. A conference was held at level two on February 20, 2007, and a decision was issued on March 5, 2007, denying the grievance. Grievant then appealed to level three on March 9,

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[1]This second paragraph of the relief sought is identical to the last paragraph of the relief sought by Grievant in a grievance filed against his employer on November 13, 2006, which was assigned Docket No. 07-HE-411 by the Grievance Board.

[2]In 2007, the Legislature in S.B. 442 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 being 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. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

2007. A level three hearing was held on March 20, 2007, but when Grievant did not appear, the grievance was dismissed. Grievant filed a default claim at level four, which was denied, and the grievance was remanded to level three for hearing. A level three hearing was held on September 13, 2007, and a decision denying the grievance was issued on September 17, 2007. Grievant appealed to level four on September 24, 2007. A level four hearing was held before the undersigned Administrative Law Judge on March 18, 2008, in the Grievance Board's Westover office.[3] Grievant represented himself, and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision with the filing of Respondent's Proposed Findings of Fact and Conclusions of Law on April 15, 2008. Grievant presented oral argument at the level four hearing in lieu of written proposals.

Synopsis

This grievance requested that notice to Grievant's research assistant that his contract would be terminated due to lack of funding be stayed, pending the outcome of another grievance filed by the same Grievant. Termination of the research assistant's contract directly impacted the research assistant, not Grievant. Grievant did not have

[3] Respondent requested permission to submit into evidence the transcripts of certain testimony from the level three hearing in *Riedel v. West Virginia University*, Docket No. 07-HE-411 (at level four). The testimony is that of Tim Palencik, Associate Dean of Finance for the School of Medicine, and Dan Flynn, Deputy Director of the Mary Babb Randolph Cancer Center. The purpose of submitting the transcripts was to save hearing time. The transcripts and exhibits submitted by Respondent after the March 18, 2008 hearing in this matter, of the testimony of Mr. Palencik and Dr. Flynn will be marked as Respondent's Exhibit Number 2, and Respondent's Exhibit Number 2 is ORDERED admitted into evidence.

standing to file this grievance. Further, the damages alleged by Grievant were speculative and were tort-like or punitive damages, which the Grievance Board does not award.

The following Findings of Fact are made based upon the record developed at levels three and four.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU"), in the Department of Biochemistry (formerly the Department of Biochemistry and Molecular Pharmacology) and the Mary Babb Randolph Cancer Center of the West Virginia University School of Medicine, as a tenured professor.

2. Grievant was offered employment at WVU in 2003, and was placed on the payroll August 18, 2003. His offer letter stated that "the School of Medicine will provide the following commitments for a three-year period." Among these commitments was start-up funds of $200,000 for the purchase of equipment to continue Grievant's research program, $50,000 for laboratory supplies, and $140,000 in salary support for personnel.

3. Timothy Palencik, Associate Dean of Finance at the WVU School of Medicine, discovered at the beginning of October 2006, that Grievant was still spending his start-up funds. He told Lana Yoho, the Office Manager for the Department of Biochemistry, that Grievant's start-up funds had expired, and Grievant would not be allowed to charge any additional purchases to his start-up funds. Associate Dean Palencik asked Ms. Yoho to relay this information to Grievant, and she did so.

4. Grievant filed a grievance on November 13, 2006, grieving, among other things, the termination of his start-up funds. A level four decision was issued on August

5, 2008 (*Riedel v. West Virginia University*, Docket No. 07-HE-411), denying the grievance with regard to the termination of the start-up funds, as untimely filed.

5. By letter dated November 15, 2004, Grievant offered Manchao Zhang, Ph. D., a Research Assistant Professor position in his laboratory. The offer letter states this is a full-time, non-tenure track position, at a starting salary of $45,000, with full benefits. The offer letter states that the position is "fully supported by research grants and set-up funds. As is typical for a non-tenure track position in the event that these funds were to become unavailable in the future West Virginia University were [sic] not obliged to continue your employment." Level three Exhibit Number 4.

6. Dr. Zhang accepted the offer, and began working in Grievant's laboratory. He had a one-year contract for the 2006-2007 fiscal year. At the beginning of the year, his salary was funded from Grievant's start-up funds. When the start-up funds expired, Grievant had no other funds to pay Dr. Zhang. WVU continued to pay Dr. Zhang's salary through the end of the fiscal year, because he had one year contract as a faculty member. Dr. Zhang's salary was paid out of the general fund of the Mary Babb Randolph Cancer Center for the remainder of the fiscal year.

7. Dr. Zhang was given notice on February 9, 2007, that his appointment would not be renewed after June 30, 2007, due to lack of funding.

8. Dr. Zhang was able to obtain employment in another laboratory at WVU, and was an employee during the 2007-2008 fiscal year. He was not in Grievant's laboratory.

9. Grievant had no grants on July 1, 2007, to fund Dr. Zhang's salary, nor did he have any other funding available for Dr. Zhang's salary.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The 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).

Respondent filed a Motion to Dismiss on March 7, 2008, shortly before the level four hearing, arguing the grievance should be dismissed for failure to state a claim on which relief can be granted, because the Grievance Board cannot award personal or punitive damages. Respondent further argued the Grievance Board could not require Respondent to fund Dr. Zhang's employment in Grievant's lab, the issue raised by Grievant was moot because Dr. Zhang's was no longer in Grievant's lab, and Grievant lacked standing to file this grievance. Grievant filed a response to the Motion on March 13, 2008, arguing he had standing because he was losing a valuable asset to his laboratory and would be damaged by the loss. He argued the grievance was not moot because his ability to conduct research was still being damaged. Finally, he argued the Grievance Board could award him back pay, "as his ability to obtain financial incentives and support have been materially damaged,"[4] and the Grievance Board could order the return of his start-up funding.

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[4] Grievant presented no evidence that he had, in fact, suffered a loss of pay, nor did he present any documentation from which the undersigned could calculate a back pay award.

This grievance must be dismissed for several reasons. The first issue is whether Grievant can grieve the loss of his research assistant. The definition of "grievance" includes, "any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees." W. VA. CODE § 29-6A-2(I).

> "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). Although poor morale among the workers resulting from such an error is a real and difficult problem, it simply does not give Grievants standing to contest [another employee's] reallocation, which did not otherwise personally harm them.

Mason, et al., v. W. Va. Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001).

In particular, the Grievance Board has found that an employee has no standing to grieve on behalf of a co-worker. *Lucas, et al., v. Dep't of Health and Human* Res., Docket No. 07-HHR-141 (May 14, 2008); *Guminey/Jamison v. Monongalia County Bd. of Educ.*, Docket No. 02-30-090 (July 26, 2002). Grievant alleged, however, that he would

personally be harmed by the loss of Dr. Zhang, because the termination of his research assistant would interfere with his ability to carry out his research. While an interesting argument, this is no different from any supervisor alleging that his unit could be negatively impacted by the transfer or reduction in force of an employee under his or her supervision. It is the person who is being moved from his position who is personally affected by the decision, and that is the person whose issues the grievance procedure is designed to address. Any effect on Grievant is remote from the action being taken. Grievant has no standing to grieve Dr. Zhang's notice of termination.

Further, in this case Grievant has alleged no violation of any rule, regulation, statute or policy. To the contrary, Respondent believed it had to give Dr. Zhang notice of the termination of his contract due to lack of funding. "A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. *McDonald, et al., v. Hancock County Bd. of Educ.*, Docket No. 15-88-055-3 (Sept. 30, 1988). 'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety.' *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997)." *Pristavec v. W. Va. Dep't of Health and Human Res.,* Docket No. 99-HHR-328 (Oct. 27, 1999).

Finally, Grievant's assertion that the loss of Dr. Zhang's will, in the future, harm his research program, is speculative. The grievance procedure was put in place to resolve workplace issues, such as actual back pay lost, reimbursement for travel, placement in a

position, or restoration of seniority. The Grievance Board does not award relief based upon speculation about what might happen (*Pristavec, supra)*. Nor does it award tort-like or punitive damages.

> *W. Va. Code* § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Miker v. W. Va. Univ., Docket No. 06-HE-133 (July 18, 2006).

> [A]n administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". *W. Va. Code* § 18-29-5(b). This Grievance Board has applied this *Code* Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. *Accord, Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n.11 (1995).

Snodgrass, supra.

Grievant cannot obtain compensation through the grievance procedure for personal damages or damage to his research program, and Grievant's request that notice to Dr. Zhang be essentially stayed, pending the outcome of another grievance, is moot.[5] Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is

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[5] In fact, the ruling in the previously filed grievance specifically challenging the termination of Grievant's start-up funding likely rendered this entire grievance moot. *See Riedel v. W. Va. Univ.*, Docket No. 07-HE-411 (Aug. 5, 2008).

stated or a remedy wholly unavailable to the grievant is requested."[6] Grievant spent a substantial amount of time at the level four hearing trying to prove that his start-up funding should not have been withdrawn by WVU, and that it should not have been withdrawn without written advance notice. Despite Grievant's creative arguments, this grievance is clearly not about the termination of Grievant's start-up funding. It is about whether the notice to Dr. Zhang of the termination of his employment should be delayed because of the grievance that was pending at the time over the issue of the start-up funding. A level four decision was issued on August 5, 2008, involving the very same parties, denying Grievant's challenge to the removal of his start-up funding, as untimely filed. The statement of grievance and the relief requested on the grievance form clearly acknowledged that the issue of the removal of the start-up funding was the subject of a separate grievance. The undersigned declines to revisit this issue. This grievance will be dismissed.

The following Conclusions of Law support the Dismissal of this grievance.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The 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).

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[6] The procedural rules in effect at the time this grievance was filed contained a nearly identical provision.

2. The definition of "grievance" includes, "any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees." W. VA. CODE § 29-6A-2(I).

3. "'Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy.' *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996)." *Mason, et al., v. W. Va. Dep't of Transp.*, Docket No. 00-DOH-345 (Mar. 28, 2001).

4. An employee has no standing to grieve on behalf of a co-worker. *Lucas, et al., v. Dep't of Health and Human* Res., Docket No. 07-HHR-141 (May 14, 2008); Guminey/Jamison *v. Monongalia County Bd. of Educ.*, Docket No. 02-30-090 (July 26, 2002).

5. Grievant does not have standing to challenge Dr. Zhang's notice of termination.

6. "A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. *McDonald, et al., v. Hancock County Bd. of Educ.*, Docket No. 15-88-055-3 (Sept. 30, 1988). 'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety.' *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997)." *Pristavec v. W. Va. Dep't of Health and Human Res.,* Docket No. 99-HHR-328 (Oct. 27, 1999).

7. The Grievance Board does not award relief based upon speculation about what might happen. *Id*. Nor does it award tort-like or punitive damages. *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

8. Pursuant to the Procedural Rules of the West Virginia Education & State Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board at level four.

Any party may appeal this Dismissal Order 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. *See* W. VA. CODE § 29-6A-7 (*See Footnote* 2). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

BRENDA L. GOULD
Administrative Law Judge

Date: February 24, 2009