THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MOLLIE B. JARRELL,

Grievant,

v. **Docket No. 2008-1826-NRCTC**

NEW RIVER COMMUNITY AND TECHNICAL COLLEGE,

Respondent.

DECISION

Mollie B. Jarrell ("Grievant") challenges the decision of Respondent New River Community and Technical College ("NRCTC") to not renew her one-year contract. The June 12, 2008, "Statement of Grievance" generally provides that the non-renewal decision was discriminatory and retaliatory.[1] As relief, Grievant seeks to be made whole, including instatement into a full-time professorship.

This grievance was denied at Level One on July 30, 2008. A Level Two mediation was held on September 24, 2008. At Level Three, three days of hearings were held before the undersigned Administrative Law Judge ("ALJ") in Beckley, West Virginia. Hearings were held on March 1, 2009, May 4, 2009, and June 9, 2009. Grievant appeared pro se. Respondent appeared by and through its counsel James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about July 24, 2009.

Synopsis

Grievant was employed as a non-tenure track visiting instructor at New River Community and Technical College, for a term of one year. Grievant was given a letter from

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[1] The "Statement of Grievance" was seven pages in length.

her local NRCTC dean to give to her bank when purchasing a home. The letter provided that Grievant held a contract subject to annual renewal. During her period of employment, while at a faculty meeting, Grievant participated in the questioning of an administrator. Ultimately, Grievant's contract was not renewed, and her position was not posted because of low enrollment and the decision to fill student needs through other modes.

Grievant argues that NRCTC's decision not to renew her contract was discriminatory and retaliatory. Respondent argues that Grievant has no property interest in her continued employment, and its decision not to renew her contract was reasonable and not pernicious.

Grievant has failed to establish, by a preponderance of the evidence, that she was discriminated or retaliated against. This grievance is **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter.

Findings of Fact

1. Grievant was hired by NRCTC as a non-tenure track[2] visiting instructor, to teach at the Nicholas County campus in the Legal Assisting and Law Enforcement (Legal Studies) program after the previous instructor suddenly ceased employment with NRCTC. Level Three, Grievant's Exhibit 2.

2. Grievant's visiting instructor contract had a start date of August 20, 2007. The

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[2] "Non-tenure Track" is defined as "[t]hose faculty members who have not been appointed in a tenure track . . . or tenured status." Level Three, Respondent's Exhibit 6 (BOG Policy 19 § 3.2.6). *See also* Respondent's Exhibit 11; 135 C.S.R. 9 § 3.2.7. "Appointment or reappointment to a non-tenured track full-time faculty position shall create no right or expectation of continued appointment beyond the one-year period of appointment or reappointment." Respondent's Exhibit 6 (BOG Policy 19 § 3.11.6). *See also* Respondent's Exhibit 11; 135 C.S.R. 9 § 3.12.6.

contract had an end date of May 15, 2008. *Id*.

3. The contract stated Grievant was a "term"[3] employee.

4. NRCTC has approximately four campuses throughout southern West Virginia.[4] Grievant worked out of NRCTC's Nicholas County campus.

5. On December 3, 2007, Dr. John R. Mullens, who was then Dean of the Nicholas County campus, wrote a letter for the Grievant so she could obtain a home mortgage. The letter provided as follows:

> Ms. Jarrell is employed as an Assistant Professor of Criminal Justice and Legal Assisting studies at the Nicholas County Campus of New River Community and Technical College. All faculty members, regardless of rank or longevity, are employed by year-to-year contracts. The Contract period runs from August 15th (or as near that date as possible) to May 15th (or, again, as near to that date as possible).
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> Faculty contracts are only valid for the academic year and therefore are issued annually. As the Dean of the Nicholas County Campus, it is my intent to continue Ms. Jarrell's employment in the years to come.

Level Three, Grievant's Exhibit 3.

6. Pursuant to NRCTC policy, NRCTC President, Dr. Ted Spring, has been granted wide authority in personnel matters. Level Three, Respondent's Exhibits 8 and 9. Dr. Spring has "final institutional-level authority and responsibility for every personnel action." Level Three, Respondent's Exhibit 8.

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[3] "Term" is defined as "[t]hose faculty members at community and technical colleges who have been appointed for a specified term as defined by the institution." Respondent's Exhibit 6 (BOG Policy 19, § 3.2.5). *See also* Respondent's Exhibit 11; 135 C.S.R. 9 § 3.2.5. No number of term appointments shall create any presumption of a right to appointment as tenure-track or tenured faculty. *Id*.

[4] Its central administrative offices are located in "The City of Champions," Beckley, West Virginia.

7. Non-tenure track appointments are outside the tenure-track status and are subject to annual renewal. Level Three, Respondent's Exhibit 6 (BOG Policy 19 § 3.11.2).[5]

8. On or about April 25, 2008, the NRCTC's faculty senate held a meeting to discuss issues concerning the failure of NRCTC Vice President and Chief Academic Officer, Dr. Harry Faulk, to follow college policies in regard to a student dropping a course after the requisite time frame. Apparently, Dr. Faulk permitted at least one student to take a course at a later date where the student was confused about the content the course would cover. The faculty senate believed this to be contrary to NRCTC policy. At this meeting, Grievant asked Dr. Faulk several general questions related to policies and the incident. After the questioning, Grievant asked Dr. Faulk to leave the room so the faculty could deliberate in private. At the meeting, Grievant did not make any public statements concerning the situation.[6]

9. Grievant created course schedules in corrections, law enforcement and legal studies courses for the Fall 2008 school term. She was also consulted by the local dean in regard to textbook selection for the 2008-2009 school year.

10. NRCTC decided not to renew the Grievant's term contract due to low enrollment and the ability to complete the Grievant's work through other modes.[7]

11. By letter dated May 19, 2008, Grievant was thanked for her service to NRCTC

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[5] *See also* 135 C.S.R. 9 § 3.12.2.

[6] At the end of the meeting, the faculty senate voted to send Dr. Spring and Dr. Faulk a letter voicing their displeasure with the situation.

[7] NRCTC utilizes distance education which includes both the internet and video-conferencing technologies. It also utilizes adjunct faculty to teach a portion of its course offerings.

and notified that "[s]hould a vacancy became available in the future in your field of expertise, the notification will be posted on our college website." Level Three, Grievant's Exhibit 5.

12. If a Legal Studies position had been posted, Grievant would have had to follow the same application and selection process as other applicants. There was no guarantee that the Grievant would have been the successful candidate.

13. NRCTC ultimately determined to not post nor fill a Legal Studies visiting instructor position at the Nicholas County campus.

14. NRCTC's long-term plan includes focusing upon its criminal justice course offerings in 2012-2013. Level Three, Respondent's Exhibit 10.

Discussion

The first issue to be considered is whether Grievant has a sufficient expectation of continued employment so as to require contract renewal. "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, 180, 386 S.E.2d 835, 837 (1989). "Temporary (non-tenure-track) faculty members . . . have only the rights attendant to their current contracts." *Tuck*, 182 W.Va. at 181, 386 S.E.2d at 838. *But c.f. W.Va. Univ. v. Sauvageot*, 185 W. Va. 534, 408 S.E.2d 286 (1991)(finding that the repeated practice and the long-term renewal of an employee's term contract created a property interest in the particular circumstances presented).[8] In *Tuck*, the employee had

[8] In *Sauvageot*, the employee's annual contract, which was based upon receipt of grant funding, was renewed for almost 14 continuous years even when grant funding was not received. The employer also had a policy which sought to retain the most senior employees. Under these circumstances, the Court found the employee had a sufficient

a temporary faculty contract that the College did not extend. In rejecting the employee's claim that he had a property right to his job, the Court stated that the employee's "property right in employment ended when his contract with the College ended . . . ." *Id*. For a property right to exist, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Tuck*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, "the employer may refuse to renew." *Id*.

In *Whitaker v. Board of Directors/ West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), the employee grieved West Liberty State College's decision to not renew his temporary teaching contract of employment. Like the present grievance, the *Whitaker* grievant had signed a teaching contract that specified his teaching appointment was temporary. In denying the grievance, the ALJ stated, "[f]or [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 understanding . . . [t]he expectation must be more than unilateral." *Id*. (citations omitted). The *Whitaker* decision also noted that "[w]hile it is true that temporary faculty have few rights . . . temporary faculty are told this when they are hired. By signing the contract they have agreed to be employed in this capacity with the inherent limitations." *Id*. *See also Kloc v. Bd. of Trustees/WVU*, Docket No. 96-BOT-507 (Aug.20, 1997); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept.11, 1997).

The *Whitaker* grievant also claimed that he had a property right in his position due

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property interest to be entitled to nonarbitrary and noncapricious treatment by the employer.

to the reliance he placed on various statements of college officials that led the grievant to believe his contract would be renewed. In rejecting this detrimental reliance argument, the ALJ noted that the *Whitaker* grievant's "contract states on its face that it was temporary and was to last the nine months of the academic year." *Whitaker*, *supra*. Therefore, "where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies or custom and practices, such claim must be established by clear and convincing evidence." *Id*. *citing Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). The ALJ finally determined that grievant failed to show that "his belief of continued employment was more than 'an abstract need or desire' or 'a unilateral expectation', and as such he cannot demonstrate by clear and convincing evidence that he had any reason to expect he would be employed for the 1999-2000 academic year." *Id*.

Like the cases above, the Grievant had no legitimate entitlement to the renewal of her temporary visiting instructor contract. Nor has the Grievant established such an expectation by clear and convincing evidence. By the contracts own terms, Grievant's employment with NRCTC ceased on May 15, 2008. Grievant argues that a letter dated December 3, 2007, from Dr. John R. Mullens, then-Dean of Nicholas County campus, to BB&T regarding a bank loan, created an expectation of continued employment with NRCTC. However, the letter clearly states that Grievant had a "year-to-year contract" and that contracts "are only valid for the academic year and therefore are issued annually." Level Three, Grievant's Exhibit 2. Moreover, Dr. Mullens lacked authority to guarantee Grievant future employment as NRCTC's president has final authority on posting positions.

The Grievant has merely a unilateral expectation in her position at NRCTC. Nevertheless, this unilateral expectation does not to sound the death knell to the Grievant's claims if she can establish a violation of some legally cognizable right. "As a general rule, contracts between a college and its employees are governed by the ordinary rules of contract, except as restricted by constitution or statute. *Oconee County v. Rowland*, 129 S.E.2d 373 (Ga. 1962); *McCoy v. Southern W. Va. Community College*, Docket No. 90-BOD-099 (Nov. 9, 1990)." *Chezik v. Marshall Univ.*, Docket No. 93-BOT-126/130 (May 19, 1994). Nevertheless, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). *See Chitwood v. Fester*, 468 F.2d 359 (4th Cir. 1972).[9] *See Holliman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971). *See generally McClung v. Marion County Comm'n*, 178 W. Va. 444, 360 S.E.2d 221 (1987); *Barnhart v. W.Va. Dep't of Educ.*, Docket No. 03-DOE-027 (Dec. 17, 2004); *Dr. P.E. v. Marshall Univ.*, Docket No. 06-HE-216 (Mar. 5, 2008).

Grievant has the burden of proving NRCTC unlawfully refused to renew her term contract 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*

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[9] Respondent NRCTC has filed a *Motion to Dismiss* in which it argues that Grievant has no standing to pursue this matter because she had no property interest in her contract renewal. Whether a grievant has been retaliated or discriminated against is a separate consideration from the due process analysis and requires a factual determination. *Perry v. Sinderman*, 408 U.S. 593, 597 Accordingly, Respondent's motion is hereby **DENIED**.

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).

This grievance must be denied because the Grievant has failed to establish by preponderant evidence that NRCTC's decision to not renew her terminal contract was contrary to law. There is no evidence that Grievant was treated adversely for participating in a protected activity. The record suggests that Grievant's contract was not renewed because of low enrollment and the desire of NRCTC to fulfill student teaching needs through other modes.

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. *See generally Sui v. Johnson*, 784 F.2d 238 (4th Cir. 1984); *Smith v. Univ. of N. Carolina*, 632 F.2d 316 (4th Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Despite that NRCTC's president has been granted broad authority in personnel matters, the Grievant argues that Dr. Spring was required to consult with the NRCTC's BOG prior to his decision not to reappoint her to a visiting instructor contract. Under NRCTC BOG Policy No. 1:

> [a]pproval by the NRCTC Board of Governors is required prior to implementation of the following changes in organizational structure:
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> 2.2 The president shall request the approval of the NRCTC Board of Governors prior to discontinuing, combining, or reorganizing any existing college, school, division, department, center, institute, or other administrative unit or creating any new non-instructional administrative unit.

Level Three, Respondent's Exhibit 1. This rule is inapplicable to this grievance. The Legal Studies program was not discontinued, combined or reorganized. President Spring, Dr. Faulk and Dean Sizemore[10] testified that the Legal Studies program still exists at NRCTC and that students can study Legal Studies at all NRCTC campuses, including the Nicholas County campus. Because the Legal Studies program was not discontinued, combined or reorganized, Dr. Spring was not required to seek BOG approval prior to his decision to not renew Grievant's contract. The decision not to reappoint the Grievant to a visiting instructor position was a day-to-day personnel decision that NRCTC's president can make without consulting with the NRCTC's BOG.

The Grievant also argues that NRCTC relies too much upon part-time professors. Dr. Faulk testified that NRCTC's accreditation with the Higher Learning Commission is in good standing. NRCTC's BOG Policy No. 26 specifically provides that NRCTC:

> shall determine the appropriate balance between full-time and part-time faculty members based on the institution's mission, degree program, availability of individuals qualified to serve as adjunct part-time faculty, and other relevant factors.

Respondent's Exhibit 3 at § 3.2. Additionally, pursuant to 135 C.S.R. 9 § 9.3:

> [i]n order to be fully responsive to the changing needs of their students and clients, the goal in the appointment of faculty is to limit the number of tenured and tenure-track faculty to no more than twenty percent of full-time faculty employed by the respective community and technical college.

Dr. Faulk testified that NRCTC's tenured and tenured-track faculty is approximately twenty percent, which is consistent with West Virginia community college standards.

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[10] Mrs. Sizemore is the Dean of the Beckley campus and the Title III Grant Director.

The Grievant also claims that she has been discriminated against. For the purpose of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim 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). In this matter, Grievant was treated the same as other visiting instructors because all visiting instructor contracts were temporally finite, with a specified end date. Additionally, Grievant argues that it was discriminatory that NRCTC reappointed the previous Legal Studies faculty member, Norville Clark; however, Grievant and Mr. Clark were not similarly situated because they did not have the same job responsibilities as Mr. Clark also performed computer-related duties.

There is insufficient evidence to establish that it is more likely true than not that the Respondent violated its internal rules or policies. Nor has the Grievant established that she was illegally treated differently than another similarly situated employee. Assuming *arguendo* a violation did occur, Grievant has not established that such a violation constitutes a permissible ground to reinstate the Grievant in accordance with *Sinderman*,

McClung and their progeny. *Supra*. Nevertheless, such a violation would be probative when determining whether Grievant's non-renewal was retaliation for engaging in protected activity.

WEST VIRGINIA CODE § 6C-1-3(a) provides that:

> [n]o employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

In general, a grievant alleging discrimination or retaliation in violation of WEST VIRGINIA CODE § 6C-1-3 may establish a prima facie case by showing:

> (1) that the employee engaged in activity protected by the statute;
> (2) that the employee's employer was aware of the protected activity;
> (3) that, thereafter, an adverse employment action was taken by the employer; and
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). *See Whatley v. Metropolitan Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Parker v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-HHR-282 (Apr. 22, 1992).[11]

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[11] Grievant has generally addressed reprisal under the grievance statue, WEST VIRGINIA CODE § 6C-2-2(o). This issue is analyzed under WEST VIRGINIA CODE § 6C-1-3 as this statute protects a greater breadth of conduct.

Once a prima facie case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n,* 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89- 26-56 (Sept. 29, 1989).

Grievant alleges that NRCTC's decision to not reappoint her to a visiting instructor position was based upon the Grievant participating in a faculty senate meeting on April 25, 2008. However, it was President Spring who ultimately made the decision to not post a Legal Studies position. He was not in attendance at the April 25th meeting. The testimony revealed that not posting a Legal Studies position at the Nicholas County campus was based upon enrollment, and because other instructors and video-based instruction could be used for Legal Studies instruction. There is no indication it was based upon Grievant's participation in a protected activity.

The nature of the Grievant's involvement in the April 25, 2008, meeting was *de minimus*.[12] Grievant asked questions to an administrator and asked the same administrator to leave while the faculty senate conversed. She did not make any statements at the meeting; she simply asked some questions and asked an administrator

[12] This ALJ recognizes that the date of the faculty senate meeting and the date upon which the Grievant's contract was to expire were close in time. This fact alone does not establish that the Grievant was retaliated against.

to leave.[13] Bickering and running disputes with administrators are not protected activities. *See Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972)(finding that bickering and internal disputes are not protected by the First Amendment). Even if this ALJ assumes that the Grievant's conduct was protected and she has established a prima facie case, Grievant still has not met her burden of proving she was retaliated against by a preponderance of the evidence.

In summation, the Grievant has not established that Respondent's decision not to renew her term contract was contrary to law. The record reveals that NRCTC decided not to renew Grievant's contract based upon permissible factors. Accordingly, this grievance must be denied.

Conclusions of Law

1. For an employee to possess a property right in her employment she "must have more than an abstract need or desire for it. [S][h]e must have more than a unilateral expectation of it. [S][h]e must, instead, have a legitimate claim of entitlement to it." *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 179, 386 S.E.2d 835, 836(1989)(citation omitted).

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[13] Grievant's argument that this is somehow related to academic freedom is not precise. "Academic freedom is defined as 'liberty to pursue and teach relevant knowledge and to discuss it freely without restriction from school or public officials or from sources of influence.' *The American Heritage Dictionary* at 70." *Kilburn v. Bd. of Directors/W. Va. State College*, Docket No. 94-BOD-1046 (Dec. 29, 1995). *See also* 135 C.S.R. 9 § 2.2. Nevertheless,135 C.S.R. 9 § 2 does contain some general averments of objectivity and integrity under the academic freedom heading. The questions asked by the Grievant to Dr. Faulk were not related to academic inquiries or classroom teachings. The record does not indicate Grievant made any statements, but merely asked questions and asked Mr. Faulk to leave the meeting. There is no indication that her questioning or conduct was a motivating factor or the factor for non-renewal of her one-year contract. Grievant has not directly raised or articulated a First Amendment claim.

"'[W]here an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies or custom and practices, such claim must be established by clear and convincing evidence." *Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992).

2. Grievant has not established, by clear and convincing evidence, that she has more than a unilateral expectation in her continued employment with NRCTC.

3. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

4. In order to establish a discrimination claim under the grievance statute, WEST VIRGINIA CODE § 6C-2-2(d), 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).

5. A grievant alleging discrimination or retaliation in violation of WEST VIRGINIA CODE § 6C-1-3 may establish a prima facie case by showing:

> (1) that the employee engaged in activity protected by the statute;
> (2) that the employee's employer was aware of the protected activity;
> (3) that, thereafter, an adverse employment action was taken by the employer; and
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). *See Whatley v. Metropolitan Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Parker v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-HHR-282 (Apr. 22, 1992).

6. Once a prima facie case of discrimination or retaliation under WEST VIRGINIA CODE § 6C-1-3 is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller, supra. See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n,* 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89- 26-56 (Sept. 29, 1989).

7. Grievant has not established retaliation by a preponderance of the evidence.

8. Grievant has not established, by a preponderance of the evidence, that the Respondent's decision to not renew her contract was contrary to law.

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 WEST VIRGINIA 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 7, 2009

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Mark Barney
Administrative Law Judge