THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PRISCILLA SHILARO,
Grievant,

v. **Docket No. 2008-0398-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Priscilla Shilaro, Grievant, formerly employed by West Virginia University ("WVU") as an Assistant Professor of History, filed this grievance on May 31, 2007, after she was denied a contract of employment for the 2007-2008 academic year. For relief, Grievant requests that she be reinstated and made whole.

This grievance was denied at level one on June 14, 2007. This grievance was then transferred to the new grievance procedure by agreement of the parties. The new grievance procedure became effective on July 1, 2007.[1] This grievance was once again denied at level one by Decision dated January 31, 2008, and entered by Sue Keller, President's Designee/Chief Grievance Administrator. Appeal was made to level two, and on April 24, 2008, an unsuccessful mediation session was conducted. Grievant appealed to level three on May 2, 2008. A level three hearing was conducted before the undersigned Administrative Law Judge on December 12, 2008, at the Grievance Board's

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[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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

office in Westover, West Virginia. Grievant appeared in person and by her representative, Christine Barr, AFT-West Virginia/AFL-CIO. WVU was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision following the receipt of the last of the parties' fact/law proposals on February 20, 2009.

Synopsis

Grievant was employed by WVU as a tenure-track Assistant Professor of History. Grievant is a foreign national who was working during the 2006-2007 academic year under authorization of a temporary work visa. Grievant sought an additional one-year terminal contract for the 2007-2008 academic year when it appeared to WVU that Grievant was an unauthorized alien with respect to such employment. WVU was not legally permitted to offer Grievant this contract because, at that time, she lacked a green card, visa, or other authorization permitting her to work in the United States. For reasons more fully set out below, this grievance is denied.

After a thorough review of the record of this matter, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was a full-time tenure-track Assistant Professor of History employed by WVU since August 2002.

2. Grievant, a citizen of Kenya, has been in the United States since August 1994, when she applied to study. As a foreign national, she had been employed since the 2002 academic year under authorization of an H1B visa, a temporary work visa, which was due to expire on June 20, 2007.

3. Doina Jikich, Assistant Director of Immigration Services at WVU, explained the visa process at level three. Prior to the expiration of the H1B visa, the WVU foreign national employee would normally apply for an EB2 visa, which would allow for permanent residency. WVU routinely assists all tenure-track faculty with this procedure.

4. An EB2 visa is a permanent resident visa which involves a three-step process; labor certification, immigrant visa petition, and adjustment of status. The first two criteria must be completed by WVU. The last criterion must be completed by the applicant/foreign national.

5. WVU properly completed the first two criteria of the EB2 visa application for the Grievant. Grievant filed the adjustment of status criterion of the application process. The U.S. Citizenship & Immigration Service ("USCIS") denied her application for adjustment of status in the summer of 2006.[2]

6. Considering that her EB2 visa petition was unsuccessful, and that her HB1 visa was expiring, Grievant decided to pursue an O1 visa. This type of visa has extremely high standards, and requires that applicants possess extraordinary abilities to obtain this visa. Some of the criteria that must be met by the applicant to receive an O1 visa include; national or international recognition or receipt of a major award of excellence in their field of expertise; editor of a scientific journal; publish extensively in a major media; must be one of only a few in their chosen field; and, major significant scholarly contributions.

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[2]According to Doina Jikich, it is uncommon for the USCIS to deny an application for adjustment of status. In fact, this was the first time that such an application had been rejected in her 18-year employment at WVU.

7. WVU is not obligated to file an O1 visa application on behalf of an employee. Very few O1 visa applications are sought because of the very high standards the applicant must meet for approval. Other visa applications were available to Grievant that were not employment based. She chose not to pursue those visa applications.

8. On February 13, 2007, the WVU Immigration Oversight Committee was formed by Jennifer McIntosh, WVU's Executive Officer for Social Justice. C.B. Wilson, WVU Associate Provost, Academic Personnel, was a member of the committee. The WVU Oversight Committee looks at issues that relate to the employment of foreign nationals and visa issues. The committee reviewed Grievant's O1 visa application.[3]

9. On April 11, 2007, Doina Jikich was notified via an email from Jennifer McIntosh, chair of the WVU Immigration Oversight Committee, that WVU would not be going forward with Grievant's O1 visa application because of the likelihood the visa application would not be successful.

10. C.B. Wilson, a member of the WVU Immigration Oversight Committee, indicated that because Grievant's visa had expired, and she was not eligible to work for that one-year terminal contract, the Grievant's immigration status precluded the university from offering her a one-year contract.

11. Grievant was notified by certified letter dated May 15, 2007, that her employment was terminated effective May 15, 2007, and that WVU was not offering her a one-year terminal contract because she would be ineligible to work in the U.S. after June 20, 2007.

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[3]In the past, Doina Jikich and the department chair were the responsible parties for approving and processing faculty visa applications.

12. On May 31, 2007, Grievant filed a level one grievance concerning WVU's decision not to offer her a one-year terminal contract. A June 14, 2007, level one decision from Provost Lang denied the grievance.

13. On Friday, June 29, 2007, Grievant hand-delivered her level two appeal to Gloria Bowers, Executive Secretary to the President, at the WVU Office of the President in Stewart Hall.

14. On the same day at 5:23 p.m., Grievant emailed her level two appeal to President Hardesty and President-Elect Garrison, and informed them that she had delivered hard copies of her appeal to Gloria Bowers on the same date.

15. Grievant's level two appeal was subsequently date-stamped as received on Monday, July 2, 2007. Ms. Bowers explained that anything received after the close of business at 4:45 p.m. would not be date-stamped as received until 8:15 a.m. of the next business day.

16. Ms. Bowen indicated that while she may be in the President's office until 5:00 p.m., the official closing time for the office is 4:45 p.m. However, the business hours for the President's office are not posted in the office and Grievant was not informed that the office was closed.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "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).

WVU contends this grievance is untimely, as it was not appealed to level two within the time lines contained in W. VA. CODE § 29-6A-4(b). This grievance presents the undersigned with a procedural issue which the Board has addressed in numerous past grievances. In particular, the mutual agreement of the parties to transfer the grievance to the new grievance procedure but, notwithstanding this request by the parties, continuing to argue the application of time lines under the old grievance statute. The record of this matter indicates that the parties were given the option to transfer the pending case to the new process, agreeing to be governed by the statutory changes which went into effect in July of 2007; accordingly, the instant grievance should be governed by the provisions of W. Va. Code §§ 6C-2-1, *et seq*.

As a practical matter, the application of either W. VA. CODE § 29-6A-4(b) or W. Va. Code § 6C-2-4(b)(1) does not change the outcome of a timeliness ruling in this grievance. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has

not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

As WVU and Grievant argue in their submissions, W. VA. CODE § 29-6A-3(a)(1) requires "[a] grievance shall be filed within the times specified in section four of this article . . . " W. VA. CODE § 29-6A-4(b) identifies the time lines for filing an appeal of a level one decision and states:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency.[4]

WVU asserts that this grievance was untimely appealed as Grievant had an obligation to file an appeal of Provost Lang's decision within five working days. Accordingly, Grievant had to file the written appeal by or before June 29, 2007. The record of this grievance indicates that is what occurred. Grievant did timely appeal her grievance to level two by hand-delivering her appeal to the President's Office five days after receiving the level one decision.[5] This appeal date of June 29, 2007, was further corroborated by

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[4]W. Va. Code § 6C-2-4(b)(1) provides that "[w]ithin ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation, or private arbitration."

[5]This grievance was also timely appealed under the new grievance procedure.

evidence of emails of her appeal to President Hardesty and President-Elect Garrison on the same date. Grievant's level three Exh. 3. Therefore, the undersigned finds that this grievance was timely appealed.

Turning to the merits of the grievance, WVU asserts that this grievance must be denied because WVU was legally obligated to deny Grievant a one-year terminal contract for the 2007-2008 academic year pursuant to Grievant's ineligibility to work in the United States. Grievant counters that it was an arbitrary and capricious act by the WVU Immigration Oversight Committee to stop the application process for the O1 visa. In addition, Grievant had a reasonable expectation that WVU was seriously pursuing her O1 visa status because Grievant had been actively involved in the complicated and time-consuming application process with an agent of WVU since August 2006. Had Grievant known that WVU was going to disrupt that process, she would have timely pursued other avenues for obtaining a work permit and visa.

"In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*, at 286." *Hill and Cyrus v. Kanawha County Bd. of Educ.*, Docket No. 96-20-362 (Jan. 30, 1997). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision

that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

WVU's decision not to renew Grievant's contract cannot be characterized as remotely unreasonable in any fashion, nor was it arbitrary and capricious. WVU was not legally permitted to offer Grievant the one-year terminal contract because she lacked a green card, visa, or other authorization permitting her to work in the United States. The Immigration and Nationality Act found at 8 U.S.C. 1324a, states in pertinent part at section 274A the following:

> (2) Continuing employment - It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

The record of this grievance reflects that WVU assisted Grievant in the attempt to obtain the EB2 visa which allows for permanent residency. Grievant, for reasons that do not appear from the record, was denied an EB2 visa by the United States Citizenship & Immigration Service in the summer of 2006. Thereafter, Grievant attempted to apply for an O1 visa with the assistance of WVU; a visa which has extremely high standards and requires an applicant possess extraordinary abilities to successfully obtain. WVU is not obligated to assist with an O1 visa application on behalf of an employee. In fact, WVU does very few O1 visa applications because of the difficulty an applicant experiences in

receiving this type of visa. In addition, the record of this grievance established that Grievant could have filed for another type of visa on her own behalf without the assistance or sponsorship of WVU. Grievant chose not to do so. Because of the very high standards for the O1 visa, the WVU Oversight Committee, charged with the review and analysis of all visa applications, made the determination that Grievant did not meet the high standards necessary for this visa. They chose to withdraw their sponsorship of Grievant. This action cannot be said to be arbitrary and capricious under this set of facts.

The following conclusions of law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "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).

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

3. This grievance was timely appealed to level two.

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. WVU's decision not to renew Grievant's one-year terminal contract was not arbitrary and capricious, nor was it unreasonable under the circumstances.

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: March 17, 2009

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RONALD L. REECE
Administrative Law Judge