THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAMELA SUE SCHADE,
Grievant,

v. **DOCKET NO. 2011-0591-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Pamela Sue Schade, filed this grievance against her employer, West Virginia University, on October 22, 2010, at level three of the grievance procedure, after she was notified that her annual contract of employment was not being renewed. The statement of grievance is more than two pages long. It essentially claims that Grievant had been the victim of retaliation, harassment, discrimination, and bullying for five years prior to the non-renewal of her contract after she made a good faith report of wrongdoing and/or waste, and that the decision not to renew her contract was in retaliation for her whistleblower activities five years ago. Grievant asserted that she had suffered emotional

distress and other general damages.[1] As relief Grievant sought, "contract renewal and all monetary damages available to her."

The grievance was remanded to level one on January 3, 2011. A conference was held at level one on January 26, 2011, and a decision denying the grievance at that level was issued on February 14, 2011. Grievant appealed to level two on February 24, 2011, and a mediation session was held on May 13, 2011. Grievant appealed to level three on May 25, 2011, and a level three hearing was held before the undersigned Administrative Law Judge on October 24, 2011, in the Grievance Board's Westover office. Grievant was represented by Edmund J. Rollo, Esquire, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of Respondent's Proposed Findings of Fact and Conclusions of Law, on December 2, 2011. Grievant did not submit written proposals.

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[1] The Grievance Board has never awarded punitive or tort-like damages in making an employee whole.

> *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).

Synopsis

Grievant was an at-will, non-classified employee, employed pursuant to an annual contract, whose contract was not renewed. Grievant's annual appointment was dependent on funding for the position. Respondent's funding sources dramatically declined, and Respondent had to cut a number of positions, including Grievant's. Grievant's claim that her contract was not renewed because of her whistle-blowing activity more than five years prior to the non-renewal of her contract, was not proven. Respondent's Director was not even aware of the whistle-blowing.

The following Findings of Fact are made based upon the evidence presented at levels one[2] and three.

Findings of Fact

1. Grievant was employed by Respondent, West Virginia University ("WVU") as a Program Coordinator for the National Environmental Services Center ("NESC"). She had been a NESC employee for almost 25 years, and her position was a non-classified, faculty equivalent position, and she was an at-will employee. Each year she received an annual appointment and contract, and her continued employment was subject to available funding.

2. On June 30, 2010, Grievant was notified that her appointment during the next fiscal year would be for only four months, through September 30, 2010, and that her appointment would be extended only if funding were available. On July 30, 2010, Grievant was notified in writing by Richard Bajura, Director of the National Research Center for Coal and Energy ("NRCCE"), and Gerald Iwan, Director of NESC, that additional funding "has

[2] Although there was not a level one hearing, exhibits were submitted at level one, and were made a part of the record at the level three hearing by agreement of the parties.

not been identified that would sustain the continuation of your employment." Her appointment was extended until October 31, 2010, to provide her with "as much notice time as possible." Grievant's last day of employment at NESC was October 31, 2010.

3. NESC's primary funding source is grant money. NESC had a $2.7 million grant from the Environmental Protection Agency ("EPA"), but that funding stream is now gone, as is much of the grant funding previously available from the EPA, and the competition for the remaining grants is fierce. NESC had a $1 million companion grant from the United States Department of Agriculture, but that grant funding has been reduced.

4. Because of the lack of grant funding, NESC has lost 16 employees since 2008, going from 24 employees to 8, plus Director Iwan.

5. In 2005, Grievant made a report to WVU's Office of Social Justice that she had become aware that a former employee continued to be paid from NESC funds, and that NESC did not have a contract in place to pay this former employee, nor was there grant money to fund these payments as she had been led to believe by Rick Phalunas, the Interim Division Manager. This report was investigated and Mr. Phalunas was subsequently reassigned to Director Bajura's office, and his contract of employment was not renewed.

6. NESC Director Iwan did not begin working for NESC until 2008, and he was not aware that Grievant had made a report to the Office of Social Justice in 2005.[3]

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[3] Grievant testified that she was told by another employee that one of the other employees gave Director Iwan "the dirt" on her. This double hearsay appears to the undersigned to be nothing more than someone spreading rumors with the intent of causing trouble, and is entitled to no weight. Grievant has been around long enough to know that she should not believe everything she hears.

7. Director Iwan made the decision not to renew Grievant's employment contract based on his review of the funding available to him. He determined that he did not have sufficient funding to continue to keep Grievant on the payroll. Grievant was being paid out of Director Iwan's NESC overhead account, and he decided, based on his review of the dire financial situation, that the money remaining in his NESC overhead account should be used to fund the salaries of the few employees left at NESC that he needed to maintain operations.[4]

Discussion

The West Virginia Supreme Court of Appeals has held that higher education employees assigned as administrators have only the rights attendant to their current contracts. In such cases, an employer may refuse to renew these types of employee contracts without giving a reason and without providing a hearing. "The only exception to this general principle is in cases where an employee demonstrates that he had a property right in continued employment, entitling him to due process of law." *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 181, 386 S.E.2d 835 (1989); *Loundmon-Clay v. Higher Educ. Policy*

[4] Grievant testified at length about Director Iwan "harassing" her via email when she took sick leave, his evaluation of her performance as unsatisfactory, and what Grievant apparently perceived as his unreasonable requirement that she report to work on time. None of this demonstrates that Director Iwan knew anything about Grievant's whistle-blowing activity. Director Iwan testified that the reason he had sent Grievant an email about her sick leave was that employees were supposed to let him know before 9:00 a.m. if they were taking sick leave, and they were supposed to supply the necessary documentation in a timely manner, and Grievant was not doing either. He acknowledged that he had made an improper inquiry regarding her medical condition, but once he was made aware that he could not make such inquiries, he no longer did so. As to Grievant's testimony that she had always been allowed to come to work late, and she stayed late to make up the time, if the new Director required employees to report to work on time, that was his call, and it certainly was not an unreasonable requirement.

Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept. 11, 1997). Although Grievant is not an administrator, her position was a faculty equivalent position, and the terms of her employment were the same as an administrator in that she was a non-classified, at-will employee, with an annual appointment, employed under an annual contract.

Here, Grievant was not dismissed, as she was allowed to serve the full term of her contract. As in *Tuck, supra,* WVU has done nothing to create any objective expectancy that Grievant's employment would be continued beyond the expiration of her employment contract on September 30, 2010. Grievant's property rights in her employment ended when her contract expired, and absent a basis for entitlement to continued employment in that role, any expectation was unilateral. *Smith, supra. See Whitaker v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000).

Grievant was not entitled to any reason for the decision not to renew her contract, but was advised, nonetheless, that her employment could not be continued because of lack of funding. Grievant asserted that this is a false statement, because funding was available for her position from Director Bajura's discretionary fund. Grievant argues this supports her assertion that she was fired in retaliation for reporting wrongdoing in 2006.

A "whistle-blower means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." W. VA. CODE § 6C-1-2(g). Information helpful in clarifying this definition is:

> "Wrongdoing" means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest or the public or the employer.

W. VA. CODE § 6C-1-2(h).

> "Good faith report" means a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

W. VA. CODE § 6C-1-2(d).

> "Appropriate authority" means a federal, state, county or municipal government body, agency, or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

W. VA. CODE § 6C-1-2(a).

Additionally, W. VA. CODE § 6C-1-3(a) indicates that discriminatory and retaliatory actions against whistle-blowers are prohibited, and states:

> No 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.

An employer may not retaliate against a whistle-blower, and any such act would be seen as an act of reprisal. W. VA. CODE § 6C-1-3. "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an

instance of wrongdoing or waste to the employer or an appropriate authority." W. VA. CODE § 6C-1-4. Finally, "[i]t shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." *Id.*

Respondent did not dispute Grievant's status as a whistle-blower five years preceding the non-renewal of her contract. Respondent argued, however, that the whistle-blowing activity is too remote in time from the non-renewal to be considered, and that Director Iwan, who made the decision not to renew Grievant's contract, was not aware of the incident in 2005. Grievant argued that Respondent had to wait several years before letting Grievant go so that it would not look like she was being retaliated against. The undersigned finds this hard to believe.

The fact is that NESC had to let 16 employees go in a span of 2 to 3 years due to a drastic reduction in the availability of grant money. For Grievant to argue that a lack of funding played no role in the decision not to renew her contract demonstrates a failure to grasp reality. Grievant argued that there was enough money in Director Bajura's overhead account to continue to fund her position. While this may be true, with other funding sources drying up, Director Bajura may well have found that his overhead account was needed elsewhere. Further, these funds were not made available to Director Iwan, and he was the one who decided that he did not have sufficient funds to keep Grievant. He noted that Director Bajura had contributed money from his overhead account to NESC to maintain the technical staff needed to meet NESC's grant operations. Director Iwan's analysis of NESC's funds led him to determine that he had enough money to fund his own

position and eight others for nine to ten months during fiscal year 2010-2011. He kept Grievant on staff as long as he could.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Absent a protected property interest in their employment, higher education employees assigned as administrators have only the rights attendant to their current contracts. *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 386 S.E.2d 835 (1989). This same standard applies to higher education employees in non-classified, faculty equivalent, at-will positions.

2. Grievant's property rights in her employment ended when her contract expired. Respondent was not required to renew Grievant's employment contract.

3. A "whistle-blower means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." W. VA. CODE § 6C-1-2(g).

4. An employer may not retaliate against a whistle-blower, and any such act would be seen as an act of reprisal. W. VA. CODE § 6C-1-3. "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." W. VA. CODE § 6C-1-4.

5. "It shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." *Id.*

6. Respondent's decision not to renew Grievant's employment contract was not related to any whistle-blowing activity.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: December 21, 2011