THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LAWRENCE MICHAEL CUDA,
Grievant,

v. **DOCKET NO. 2011-0617-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Lawrence Michael Cuda, filed this grievance against his employer, West Virginia University, on October 27, 2010, at level three of the grievance procedure, after he was notified that his employment was being terminated. The statement of grievance reads:

> I have filed this grievance because I believe I have been unduly terminated from West Virginia University effective 11/05/10.

As relief Grievant sought:

> That my current Notification of Employment dated July 15, 2010 be honored to its completion.[1]

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[1] In his written argument Grievant for the first time requested fees for his representative, who was not a lawyer, in the amount of $5000.00. It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." *Cosner v. Div. of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

A level three hearing was held before the undersigned Administrative Law Judge on February 15, 2011, in the Grievance Board's Westover office. Grievant was represented by Andrea Williams at the hearing, and Respondent was represented by Samuel R. Spatafore, 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 March 17, 2011.

Synopsis

Grievant was an at-will employee whose position was terminated four months into his most recent annual appointment. Grievant's appointment was "dependent upon the quality of your work, the extent to which you fulfill the responsibilities of the position, and the continued need for and continued funding of the position." Respondent demonstrated that Grievant did not fulfill the duties of his high level administrative position at the level expected of him by his supervisor. This is sufficient under the terms of the annual appointment to justify termination of the appointment before its ending date, for this otherwise at-will employee.

The following Findings of Fact are made based upon the evidence presented at level three.

Findings of Fact

1. Grievant was employed by Respondent, West Virginia University ("WVU") as Associate Director of Solutions. He was hired as an at-will employee, but was given a one-year appointment letter. His first appointment was from June 1, 2009, through June 30, 2009.

2. Grievant's May 8, 2009 offer letter states that his "service is at the will and pleasure of the University." The letter further states that Grievant would receive a renewal of his appointment each year, for a duration of one year, "dependent upon the quality of your work, the extent to which you fulfill the responsibilities of the position, and the continued need for and continued funding of the position." The letter states that Grievant's duties and responsibilities "may be changed or modified in the future at management's discretion."

3. Although Grievant's supervisor, Kathleen Hazen, Executive Director, Administrative Technology Solutions, had several issues with Grievant's performance in late 2009 and early 2010, effective July 1, 2010, Grievant's one year appointment was renewed, and ran through June 30, 2011.

4. Grievant's appointment was terminated by Respondent by memorandum dated October 13, 2010, effective November 5, 2010, four months into his third appointment. The memorandum states "your service is at the will and pleasure of the University. And, as we discussed, your performance and the quality of your work has not met the expectations of the position." The memorandum stated that Grievant was being assigned projects to complete "off site" between October 13 and November 5, 2010, and detailed those projects.

5. In the Summer of 2010, Ms. Hazen's department was responsible for implementing the computer program for a new classified employee time keeping system at WVU, the "My Time" system, which the department had been developing for about a year. This was a huge undertaking, and was time consuming. The department was also responsible for training all WVU employees on this system, and setting up a HELP desk.

6. In July 2010, Ms. Hazen became concerned that Grievant was struggling with the volume of work involved with implementation of the My Time system. As a result, she told the five most senior Business Analysts in Grievant's area that they would no longer report to Grievant, but would report directly to her.

7. Grievant was tasked with scheduling employees to work at an all day employee fair designed to introduce employees to the My Time system. Grievant's plan was confusing, and employees told Ms. Hazen they did not know when they were supposed to work. Ms. Hazen had to step in and meet with all the employees to set up the staffing for this event.

8. In August 2010, Grievant was assigned by Ms. Hazen to work with the Assistant Director of Operations in staffing the HELP center and developing a knowledge tree which would map out solutions to problems, which HELP center employees could use to answer caller questions. The HELP center was to be set up sometime in September. Employees of Ms. Hazen's department were coming to her and telling her they did not know when they were supposed to work, or what they were supposed to tell callers as they could not follow the knowledge tree developed by Grievant. Ms. Hazen reviewed the knowledge tree developed by Grievant and found it incomplete, and she could not follow it. Ms. Hazen told Grievant she needed the knowledge tree and the scheduling completed by the end of the day. Grievant had found the scheduling of employees to be time consuming, and told Ms. Hazen her expectations were too high. This was not a friendly exchange. Ms. Hazen removed this assignment from Grievant and gave it to two of his subordinates and a project manager to complete.

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. HEPC/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). "For [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 understandings. . . [t]he expectation must be more than unilateral." *Scragg v. Bd. of Directors/ W. Va. State College*, Docket No. 93-BOD-436R (Jan. 30, 1996).

Grievant was hired as an at-will employee, but with an annual appointment. This is not a case where Respondent simply declined to renew the annual appointment; rather, Respondent renewed Grievant's annual appointment, and then, four months into the appointment, Respondent terminated Grievant's employment. The Grievance Board has determined that in cases where the grievant has been given an annual notice of appointment, "Grievant's administrative assignment was not at-will employment because the annual notice of appointment serves as an administrative contract, stating his position, salary, and term of employment." *Cook v. W. Va. Univ.*, Docket No. 05-HE-352 (May 22,

2006).[2] Grievant had an expectation of continued employment through at least June 30, 2011, "dependent upon the quality of [his] work, the extent to which [he] fulfill[ed] the responsibilities of the position, and the continued need for and continued funding of the position." In cases such as this then, Respondent bears the burden of proving the charges by a preponderance of the evidence. *Olmsted v. Bd. of Directors/Bluefield State College*, Docket No. 98-BOD-108 (Oct. 21, 1998); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991), *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent terminated Grievant's employment for failure to perform his duties as required. Respondent produced evidence regarding issues Ms. Hazen had with Grievant's performance through June 2010, including a draft of a performance appraisal, yet Respondent renewed Grievant's contract for the next year. This information is of limited relevance in this proceeding. Ms. Hazen's decision to terminate Grievant's employment was made when, after having issues with Grievant getting other tasks completed, Grievant

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[2] Respondent asserted in its written argument that Grievant could be terminated for any reason or no reason as an at-will employee, and that because Grievant did not assert or prove a violation of substantial public policy, the dismissal must be upheld. Not only is this statement of the law in error, Respondent specifically accepted the burden of proof in the grievance at the beginning of the hearing.

was unable to schedule employees for training and had not developed the knowledge tree within the time period required by Ms. Hazen; and then he responded to her directive to get it done by telling her, in a less than friendly tone, that her expectations were too high. Although Grievant contended that Ms. Hazen's veracity was at issue in this case, he did not dispute Ms. Hazen's version of this incident.

Grievant was hired into a high level administrative position. Respondent demonstrated that ultimately, during the final year of his appointment, he did not fulfill the obligations of the position at the level expected of him by his supervisor. This is sufficient under the terms of the appointment to justify termination of the annual appointment before its ending date, for this otherwise at-will employee.

Finally, Grievant's argument that Ms. Hazen was not qualified to evaluate his work must be addressed. This argument was based solely on Ms. Hazen's resume. It is not Grievant's role to determine whether Ms. Hazen's education and experience make her qualified for the position she has held since July 2007. Respondent made the determination that she was qualified for the position when she was placed in it. Grievant provided absolutely no testimony that he ever had any interaction with Ms. Hazen where she was unable to comprehend what he was saying or what he had done because she did not have the knowledge to follow the conversation.

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).

2. A protected property interest in employment is more than an abstract desire or unilateral expectation of it. An employee must have a legitimate claim of entitlement to it, grounded in contract, statutes or regulations. *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 181, 386 S.E.2d 835 (1989); *Loundmon Clay v. HEPC/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).

3. The Grievance Board has determined that in cases where the grievant has been given an annual notice of appointment, "Grievant's administrative assignment was not at-will employment because the annual notice of appointment serves as an administrative contract, stating his position, salary, and term of employment." *Cook v. W. Va. Univ.*, Docket No. 05-HE-352 (May 22, 2006).

4. Grievant had an expectation of continued employment through at least June 30, 2011, provided he met the conditions of the appointment. In cases such as this, Respondent bears the burden of proving the charges by a preponderance of the evidence. *Olmsted v. Bd. of Directors/Bluefield State College*, Docket No. 98-BOD-108 (Oct. 21, 1998); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

5. Respondent demonstrated that Grievant did not fulfill the duties of his high level administrative position at the level expected of him by his supervisor. This is sufficient under the terms of the appointment to justify termination of the annual appointment before its ending date, for this otherwise at-will employee.

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: May 27, 2011