**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**ALI BAHU,**
**Grievant,**

**v.** **Docket No. 2011-1173-WVU**

**WEST VIRGINIA UNIVERSITY,**
**Respondent.**

## DECISION

Grievant, Ali Bahu, filed this grievance against his employer, West Virginia University, on February 14, 2011, in which he stated:

> My job was terminated and the reason I was given was that I failed to remove deceased students from one of the reports I generated for the WVU extended learning department. I am certain that the errors in the report were not because of my negligence and happened because of the variables beyond my control i.e. the data provided to the Office of Registrar is not the live data and the data I used for that report was not up to date resulting in this error.

For relief, Grievant amended his initial relief at level three to the following:

> I want to be reinstated to my position so that I can honorably resign. I am doing this to clear my name because the charges against me are baseless and I was targeted because of different reasons than those specified by the Registrar. I should also get pay from the date of unlawful termination to the end of my contract (Jan 2011 to July 2011). It is important for you to know that I have nothing against WVU and whatever I am today and ever will be, WVU will have a huge part in that. All my education both undergraduate and graduate degrees in computer science are from WVU. I am fighting this unjust decision because I want to clear my name and my record so that I can honorably work for WVU in the future.

This grievance was denied at level one by Decision dated April 1, 2011, and authored by Sue Keller, Respondent's Chief Grievance Administrator. A level two

mediation session was conducted on January 20, 2011. Grievant perfected his appeal to level three on January 28, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on June 25, 2012, at the Grievance Board's Westover office location. Grievant appeared *pro se*. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of the Respondent's proposed findings of fact and conclusions of law on July 25, 2012. Grievant did not submit proposals.[1]

**Synopsis**

Grievant was employed as a Professional Technologist 3, an exempt, non-classified position, assigned to the Office of Admissions and Records. Grievant was assigned to the Office of University Registrar upon its creation. Grievant signed an Annual Notice of Appointment that had an end date of June 30, 2011. Grievant's employment was terminated pursuant to his repeated failure to produce accurate reports for various clients of the Office of Admissions and Records. Respondent demonstrated that Grievant did not fulfill the duties of his administrative position at the level expected of him. Respondent has met its burden of proving by a preponderance of the evidence that the termination of Grievant's employment was for cause.

The following findings of fact are based upon the record developed at level one and level three.

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[1]One has to question how serious Mr. Bahu might be in the pursuant of this grievance given that the record at level three disclosed that he is now earning $70,000 in his new position compared to the $40,000 he earned with Respondent.

## Findings of Fact

1. Grievant was employed as a Professional Technologist 3, an exempt, non-classified position, assigned to the Office of Admissions and Records, effective March 16, 2009. Grievant was hired pursuant to an annual Notification of Appointment with an end date of June 30, 2011.

2. Grievant's Position Information Questionnaire ("PIQ") states that his duties and responsibilities include:

> Provides technical leadership and project oversight in design and development of complex information technology projects critical to the University in recruiting, graduation, student data reporting/file creation and data management support for Enrollment Management services, Admissions and Records and the University Community . . . Responsible for leveraging and coordination of the university information systems that are used for the distribution of student data used for recruiting, retention, course planning, department reviews, and Enrollment Management decisions.

3. On June 2, 2010, Grievant was issued a letter of counseling for numerous incidents including failing to report to work on time and for failing to utilize proper procedure for alerting a supervisor when unable to report to work on time.

4. On June 17, 2010, Grievant produced a report of minor degrees conferred for Joan Gorham, Associate Dean of the College of Arts and Sciences. Dean Gorham sent the completed report back to Grievant and requested that he correct all the errors that she found on the report. She responded that the numbers were off and did not add up. Grievant made corrections and produced the report a second time. On July 1, 2010, Dean Gorham noted that there continued to be inaccuracies in the report, including numbers assigned to subcategories that did not reflect the total number of degrees conferred, not all of the minors were posted, and some programs were counted twice.

5. In August, Dean Gorham again found problems with incorrect and missing data. In addition to advising Grievant of the problems, Dean Gorham asked for a meeting with Grievant's supervisors, including Tom Snider, Assistant Registrar, to discuss the problems with the reports and their continued inaccuracies.

6. Grievant's errors were the result of his continued failure to double check his work. No matter how often Respondent advised Grievant to double-check his work, he continually failed to do so, which resulted in ongoing erroneous reports being sent to the clients.

7. On September 16, 2010, Mr. Snider provided Grievant with a performance review for the period of January 1, 2010, through August 10, 2010. Of the ten performance elements evaluated, Grievant was rated as "Needs Improvement" in six areas: job knowledge; customer service; accountability; quality of work; quantity of work; and, communications.

8. On December 13, 2010, Grievant was issued a letter of warning stating his "behavior and performance has failed to satisfactorily meet the standards established for employees of the Office of the University Registrar and West Virginia University." It noted that Grievant was observed sleeping at his desk by an Associate and by an Assistant Registrar.

9. On December 21, 2010, Margaret Pinnell, Research/Budget Coordinator of WVU Extended Learning, requested a meeting with Grievant regarding a report she had requested in October. The report consisted of a list of students who had "stopped-out" of WVU, in other words, undergraduates who were enrolled at WVU for the coming semester and either did not graduate and/or were not enrolled, but were eligible to return. Ms.

Pinnell specifically asked that students who had graduated, been placed on suspension or probation, were deceased or unable to return for medical/personal reasons not be included on the report to avoid an inappropriate mailing. Ms. Pinnell identified multiple issues with the report, the most serious being the inclusion of a deceased student's name.

10. On January 21, 2011, Respondent notified Grievant of the intent to terminate his employment effective January 28, 2011, the letter stated, in pertinent part, the following:

> On June 2, 2010 you received a Letter of Counseling for failure to follow proper call-off procedures with your supervisor.
>
> In June and July, 2010 we met with you to discuss the lack of proper quality assurance and the timeliness of data production not being observed in regards to many of the reports that you are responsible for producing.
>
> On December 20, 2010 you received a Letter of Warning for sleeping on the job.
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> Recently, on December 21, 2010, we were once again notified by a client in Extended Learning that there were multiple issues with a report that you had prepared for them. One of the most serious concerns was that you failed to exclude deceased students from the report after being given explicit instructions on this matter specifically. This was an embarrassment for our office and could have had potentially injured the reputation of the institution if the contact information had been used to contact a deceased student's family. This is particularly of concern because these are the same issues that we dealt with in the summer which you said that you had corrected.
>
> You have continued to struggle with many of the same performance issues, including data integrity issues, failure to follow specifications laid out by the recipient, and an overall lack of quality assurance. This has been compounded by your failure to meet some of the behavioral expectations of employees in the office, as evidenced by the prior letters you received.

11. After meeting with Grievant to discuss the issues stated in the intent to terminate letter, Respondent advised Grievant by letter dated January 28, 2011, that his employment was terminated effective that date.

## 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 terminated Grievant's employment on a date within the annual appointment. 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). 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 asserts that Grievant's dismissal was based upon good cause illustrated by a record of repeated inability to perform his basic job duties despite repeated counseling. Reports generated by Grievant for external clients, as well as those for internal use, were plagued with data integrity issues and a failure to follow the specifications established by the recipient. The continued lack of quality assurance was creating a loss of confidence in the reports by the users and undermining the credibility of the Registrar's office.

Grievant conceded at level one and level three that he made mistakes, but argues that the problems were created by factors beyond his control. Grievant complains that he

was provided inaccurate data and was not provided the training he needed to use the specific program. Grievant further asserted that his supervisor was not available to help him and that no one talked to him but simply gave him letters of counseling. Grievant denies ever sleeping during the work day and suggests that the situation was only a problem because he works in a cubicle rather than an office with a door. The arguments by Grievant do not have any merit.

The record of this grievance established that Grievant continually demonstrated fundamental performance issues which ultimately resulted in their loss of faith in his ability to satisfactorily perform his job duties. In addition, attempts to improve the situation did not produce the intended improvement in performance. Based upon the record of this case, the undersigned concludes that Respondent demonstrated that during the final year of his appointment, Grievant did not fulfill the obligations of the position at the level expected of him by his supervisor. Respondent has proven the charges that led to Grievant's termination by a preponderance of the evidence, and that the termination of Grievant's employment was for cause.

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 during the final year of his appointment, Grievant did not fulfill the obligations of the position at the level expected of him by his supervisor. Respondent has proven the charges that led to Grievant's termination by a preponderance of the evidence, and that the termination of Grievant's employment was for cause.

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 (eff. July 7, 2008).

**Date: September 25, 2012**

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**Ronald L. Reece**
**Administrative Law Judge**