THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROGER OLEAN,
Grievant,

v. **DOCKET NO. 2012-0874-PSCWVU**

WEST VIRGINIA UNIVERSITY
POTOMAC STATE COLLEGE,
Respondent.

DECISION

Grievant, Roger Olean, filed this grievance against his employer, West Virginia University Potomac State College, on February 22, 2012, at level three of the grievance procedure, after he was notified that his employment was being terminated. The statement of grievance is a page and a half long, and contests the charges and the manner in which the investigation was conducted.[1] As relief Grievant sought a new impartial investigation and meeting to discuss the charges, and "to be reinstated as a[n] employee of Potom[a]c State College with full salary and benefits starting from the time of my old termination date of Feb 17, 2012 through the new investigation and determination of employment status."

A level three hearing was held before the undersigned Administrative Law Judge on June 8, 2012, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This

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[1] Given that Respondent presented sufficient evidence at the level three hearing to prove the charges against Grievant, whether the investigation was conducted to Grievant's satisfaction is of no relevance.

matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on July 10, 2012.

Synopsis

Grievant was employed under a one year contract. His employment was terminated prior to the end of the contract period for pushing a student. Respondent proved that Grievant pushed a student, and that he could be terminated for this improper behavior.

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 Potomac State College ("PSC"), in a non-tenure track, faculty equivalent/academic professional ("FEAP") position as an Athletic Trainer, under a one-year contract, which would have ended May 31, 2012. The 2011-2012 school year was either the first or second year Grievant was employed by Respondent.

2. On February 13, 2012, Grievant was notified that Respondent intended to terminate his employment effective February 17, 2012, for inappropriate workplace conduct, specifically an incident on January 19, 2012, when he "became verbally confrontational and unprofessional with students, resulting in you ultimately physically pushing a student with your hands." Grievant's employment was terminated effective February 17, 2012.

3. On January 19, 2012, Grievant was sitting in the gymnasium at PSC on a cooler right outside the doors leading into the hallway. The PSC men's baseball team was

milling around in the hallway, waiting to practice in the gymnasium. The PSC women's basketball team was practicing in the gymnasium. The members of the men's baseball team were making enough noise in the hallway that the noise could be heard by people sitting in the gymnasium.

4. Steve Miele, a member of the PSC men's baseball team, was standing in the hallway looking through the small, vertical window in one of the double doors, watching the women practice. Mr. Miele was looking through the window in the left door, and another member of the men's baseball team, Zackery Markle, was standing looking through the window in the right door. A third member of the men's baseball team, Demetrius Taylor, was standing behind Mr. Markle.

5. Mr. Markle opened the right door to the gymnasium to allow Trevor Poe, another member of the men's baseball team to enter the gymnasium to get his hand taped by Grievant. Mr. Miele yelled out to Mr. Poe that he was a "pussy" because he was getting his hand taped. Grievant stood up and forcefully opened the door on the right, charging into the hallway where Mr. Markle was standing, hitting Mr. Markle in the foot with the door, and causing Mr. Miele to back up a step. Grievant's face was red, and he began yelling at Mr. Miele, and he then pushed Mr. Miele.[2] Mr. Miele asked Grievant what he was doing, and Grievant told Mr. Miele something to the effect that he "needed to fucking treat him like a coach," and to "shut the fuck up."

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[2] Mr. Miele and Mr. Taylor testified that Grievant pushed Mr. Miele with two hands. While Mr. Markle only saw Grievant place his right hand on Mr. Miele, he acknowledged that his view was somewhat blocked by the door.

6. At the time of the incident, PSC baseball coach Douglas Little was sitting in his office with the door open. Coach Little's office is located off the hallway where the incident occurred, about 15 feet away from the incident. He heard someone hit the pushbar on the door to the gymnasium, as though it had been pushed with some force, and then he heard Grievant yelling. He went out into the hall and he heard Grievant say, "you don't treat me like a fucking coach." He observed that Grievant was visibly upset, was talking loudly and shaking his hands. Coach Little asked what was going on and Mr. Miele responded that he did not do anything, and that Grievant had pushed him.

7. Respondent has in place a Workplace Violence Policy. This Policy prohibits violent conduct, actions, or behavior directed toward students and others. The Policy further defines what this means by stating that it "includes actions, both verbal and physical, that threatens, harasses, coerces, or inflicts harm." This Policy further states that, "[e]mployees are expected to refrain from fighting, horseplay, or other conduct that may be dangerous to others." This Policy specifically states that, "[s]uch actions may be considered gross misconduct and subject to immediate dismissal."

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 by Respondent into a non-tenured FEAP position, under a one-year appointment and contract. This is not a case where Respondent simply declined to renew the annual appointment; rather, Respondent renewed Grievant's annual appointment, and then, prior to the end of 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, the grievant has an expectation of continued employment through at least the end of the contract term, in this case May 31, 2012, "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.*

Grievant was dismissed for pushing a student. Grievant denied the charges. Several witnesses to the incident were called to testify. Three student witnesses to the incident, Mr. Miele, Mr. Markle, and Mr. Taylor, testified that Grievant pushed Mr. Miele. Three of the witnesses, Coach Little, Victoria Thompson and Ruth Wheeler, two students who were sitting in the gymnasium, were not in a position to see whether Grievant pushed Mr. Miele. Robert Andrew Rickli, a member of the men's baseball team who was standing in the hall, testified that he did not see Grievant push Mr. Miele, but there could have been contact which he could not see from his vantage point about 20 feet down the hall. Mr. Rickli, who was called by Grievant as a witness, did testify that Mr. Miele made no derogatory statements directed toward Grievant, that the door came flying open, and that Grievant was "pretty heated," and yelling and had his finger in Mr. Miele's face. Only Grievant testified that he did not push the student. It is necessary to evaluate the credibility of the witnesses.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the

witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The testimony of all the students was generally consistent regarding what occurred at the time of the incident and immediately before it. One inconsistency was that Mr. Miele, Mr. Taylor, and Mr. Rickli, testified that Mr. Miele made no derogatory comments through the door, while Mr. Markle and Grievant testified that Mr. Miele called Mr. Poe a “pussy.” Mr. Markle also testified that Mr. Miele said nothing to Grievant, while Mr. Taylor testified that Mr. Miele asked Grievant what he was doing, and Ms. Thompson testified that Grievant and Mr. Miele were arguing, although she could not hear what was being said. Ms. Thompson, however, also testified that the baseball players were being loud generally, and she did not explain how she had determined through the noise that Grievant and Mr. Miele were arguing when she was sitting in the gym and the door to the hall was closed. The undersigned must also take into consideration that Mr. Miele received a bad grade from Grievant in a class, which could have affected his perspective. The undersigned does

not find these minor inconsistencies to be anything more than the ability of the witnesses to recall all the details of what occurred several months after the incident. Also, to some extent, the exact wording of the questions asked may have elicited differing answers. Further, although the parties made a good effort to make sure Mr. Miele understood what was being asked, his testimony was taken by telephone, and it is clear from some of the answers he gave that he did not understand what was being asked until the question was asked a second time and clarification provided. The undersigned finds the testimony of the student witnesses to be consistent and credible.

The undersigned does not find Grievant to be a credible witness. Of all the witnesses to this event, Grievant was the only one who testified that Mr. Miele said anything to or about Grievant before Grievant stood and crashed through the door. Grievant testified that Mr. Miele started talking to him about an incident that had occurred between Grievant and two other students shortly before this, and that he was making derogatory comments about Grievant, and that he kept saying "these things" to Grievant. Grievant testified that he got up and started going through the door, and he told Mr. Miele to "stop, be quiet." Then he told him to "shut up." Grievant testified that Mr. Miele continued to "taunt and harass him" and he then told Mr. Miele to "shut the fuck up." When asked by the undersigned what Mr. Miele was saying to Grievant, Grievant testified that he could not state what specific words Mr. Miele had used. Grievant testified that he wanted to separate himself from the situation, so he reached for the door handle with his right hand with some force, and that he accidentally brushed Mr. Miele on the shoulder, and Mr. Miele responded by saying, "why are you pushing me?" In his written statement dated January 25, 2012, Grievant stated, "I entered the crow[d]ed hallway, and tried to close the door.

If I made any contact with [Mr. Miele] it was d[ue] to the confining space of the hallway and large number of baseball athletes located in that area at the time." Grievant testified that after Mr. Miele asked why he was pushing him, he then turned back into the hall and went to get Coach Little, who was in his office with his door closed. All the other witnesses who were in a position to observe the hallway interaction testified that Coach Little's office door was open, and Grievant did not go get him, rather, Coach Little came out into the hall when he heard Grievant's raised voice. Grievant's testimony is not only inconsistent with that of the other witnesses, it is inconsistent with the written statement he gave shortly after the incident.

There is no question that Respondent acted appropriately in dismissing Grievant for physical abuse of a student in this case. Grievant argued that coaches yell and swear at players all the time during practice, with no consequences. Grievant's actions bear no resemblance to a practice situation. Grievant completely lost his temper, apparently in response to Mr. Miele's comments to Mr. Poe, and regardless of whether he pushed Mr. Miele or not, he approached him in an inappropriate, confrontational manner, which, even by his own testimony achieved only an escalation of the situation. Not only was physical force unnecessary in this instance, but a verbal assault, particularly one where Grievant was face-to-face with Mr. Miele, was uncalled for. It is surprising that the situation did not get completely out of hand. Grievant clearly engaged in an unjustified verbal and physical assault of a student. Respondent believed this was a serious offense, and that the safety of the students was compromised by Grievant's continued employment. Respondent demonstrated that Grievant violated the Workplace Violence Policy, and that termination of his contract was justified.

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. Grievant had an expectation of continued employment through at least May 31, 2012, 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).

3. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

4. Grievant's testimony denying the charges was not credible.

5. Respondent demonstrated that Grievant violated its Workplace Violence Policy, and that his conduct was such that his contract could be terminated.

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
Acting Deputy Chief
Administrative Law Judge

Date: August 20, 2012