THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHARLES A. MORRIS,
Grievant,

v. **Docket No. 2012-0903-NCC**

WEST VIRGINIA NORTHERN COMMUNITY COLLEGE,
Respondent.

DECISION

Grievant, Charles Morris, filed this grievance at level one on March 2, 2012, when he was notified that his one-year renewable appointment at West Virginia Northern Community College would not be renewed for the 2012-2013 academic year. Grievant seeks to have the faculty evaluation expunged from his employee's record and that the notice of non-renewal be rescinded. This grievance was denied at level one by decision dated March 30, 2012, and authored by Dr. Martin Olshinsky, President of West Virginia Northern Community College. A level two mediation session was conducted on July 23, 2012. Grievant perfected his appeal to level three on July 30, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on January 24 and April 9, 2013. Grievant appeared in person and by his counsel, Daniel McCune, Sellitti, Nogay & McCune, PLLC. Respondent appeared by its counsel, Brian Lutz, Assistant Attorney General. This matter became mature upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 13, 2013.

Synopsis

Respondent hired Grievant in 2007 on a term appointment as an instructor in the Computer Information Technology Department. Grievant was employed by a series of one-year renewable term appointments for five academic years. While he was employed by Respondent, Grievant was placed on improvement plans on three separate occasions for unsatisfactory work. Record established that Grievant did not have a property interest or right to continued employment with Respondent. In addition, Grievant did not demonstrate by preponderate evidence that Respondent's decision to not renew Grievant's faculty appointment was an arbitrary and capricious act. This grievance is denied.

The following findings of fact are based upon the record established at level three.

Findings of Fact

1. Grievant was an instructor at West Virginia Northern Community College, teaching in the Computer Information Technology Department, since being hired in the academic year 2007-2008.

2. Grievant continued to work in that capacity for West Virginia Northern Community College each year through May of 2012, but his contract was not renewed for the 2012-2013 academic year.

3. During the academic year of 2010-2011, Grievant was placed on an Improvement Plan by the Chair of his department, Marian Grubor. It was noted in this memorandum that the Chair had been to Grievant's class twice during this school year and on both occasions the Grievant had been tardy to class.

4. On November 4, 2010, Professor Grubor received the following unedited complaint from a student:

> We have a test today in Mr. Morris's class but no one seems to ever know what were doing in the class and what well be tested on? His style of teaching is very incoherent and confusing, because of this many people have dropped the class for fear of failing because they don't know what were being tested on specifically. There is no structure or plan to follow when attending class, he just reads randomly through a chapter and throws in knowledge that he knows expecting us to know what hes talking about. I know its not just me that has a problem with the class, because every test we get back no one ever does well and Mr. Morris cant figure out why.

5. During the academic year of 2011-2012, Grievant was once again placed on an Improvement Plan by the Chair of his department. The Department Chair indicated that Grievant needed to improve in several areas, including tardiness, quality of instruction and timeliness of reporting grades.

6. Ms. Grubor was within her authority as the Department Chair to recommend against renewal of Grievant's contract.

7. Grievant submitted a response to Ms. Grubor's recommendation against renewing his contract on February 21, 2012. Grievant asserted that he had improved on issues of tardiness, grade reporting and his effectiveness in the classroom.

Discussion

The non-renewal of an annual contract is not a disciplinary action; therefore, the grievant has the burden of proving his complaint by a preponderance of the evidence. *P.E. v. Marshall Univ.*, Docket No. 06-HE-216 (Mar. 5, 2008). "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).

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. *See generally Siu v. Johnson,* 784 F.2d 238 (4th Cir. 1984); *Smith v. Univ. of N. Carolina*, 632 F.2d 316 (4th Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and non-retention of faculty status, the Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. *Gruen v. Bd. of Directors*, Docket No. 95-BOD-281 (Mar. 6, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995); *Carpenter v. Bd. of Trustees*, Docket No. 93-BOT-220 (Mar. 18, 1994); *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). *See Siu, supra; Kauffman v. Shepherd College*, Docket No. BOR1-86-216-2 (Nov. 5, 1986).

Grievant argues that Respondent's decision to not renew his term faculty appointment was arbitrary and capricious.[1] The recommendation not to renew Grievant's

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[1]"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.*

appointment was made initially by Professor Grubor, Department Chair and Grievant's supervisor. In this recommendation, Professor Grubor notes several recurring issues, including the failure to maintain the same level of instruction as other faculty, complaints from students, and a lack of participation from Grievant in the performance of the terms of his improvement periods. The record established that the Grievant had struggled with several employment issues since 2009, including tardiness, lack of instruction, and student complaints. The record also established that Grievant failed to improve his performance on many of these issues throughout the course of his employment at the college.

It is undisputed that Grievant was placed on improvement plans during the course of his employment at the college. Grievant was instructed to periodically observe a more experienced member of the faculty, but Grievant did this on only one occasion. The undersigned agrees with Respondent's counsel that the existence of multiple improvement plans demonstrates that this was not an arbitrary and capricious decision. Grievant was given indications by his supervisors that his performance was not satisfactory. On each occasion he was placed on an improvement plan, Grievant met with his supervisors and was informed that his teaching was not adequate. Grievant has not proven by a

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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). A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

preponderance of the evidence that Respondent's decision to not renew his annual appointment was arbitrary and capricious.

Finally, it is well established that Grievant has no property interest or right to continued employment with Respondent because his contract provided that he was a term employee.[2] Grievant had no reasonable expectation that his term appointment would be continually renewed. In fact, Grievant acknowledged that no one with the appropriate authority at West Virginia Northern Community College gave him assurances that his appointment would be renewed for the 2012-2013 academic year.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The non-renewal of an annual contract is not a disciplinary action; therefore, the grievant has the burden of proving his complaint by a preponderance of the evidence. *P.E. v. Marshall Univ.*, Docket No. 06-HE-216 (Mar. 5, 2008).

2. In applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and non-retention of faculty status, the Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. *Gruen v. Bd. of Directors*, Docket No. 95-BOD-281 (Mar. 6, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995); *Carpenter v. Bd. of Trustees*, Docket No. 93-BOT-220 (Mar. 18, 1994); *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987).

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[2] *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 180, 386 S.E.2d 835, 837 (1989).

3. Grievant failed to prove by a preponderance of the evidence that West Virginia Northern Community College's decision to not renew his term appointment for the academic year 2012-2013 was arbitrary and capricious.

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: July 19, 2013

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Ronald L. Reece
Administrative Law Judge