

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBJANI CHAKRABARTI,
Grievant,

v.

DOCKET NO. 2023-0817-BSC

BLUEFIELD STATE UNIVERSITY¹,
Respondent.

DECISION

Grievant, Debjani Chakrabarti, is employed by Respondent, Bluefield State University. On May 5, 2023, Grievant filed this grievance against Respondent stating the following:

Grievant, Dr. Debjani Chakrabarti has been unfairly dismissed after 5 years employment as a tenure-track faculty member with Bluefield State University. Her current position is a tenure-track Associate Professor of Sociology at BSU. Her upcoming 6th year (academic year 2023-2024) will be her tenure application year. She has been experiencing discriminatory and hostile working conditions for a number of years, and especially since the 2022 no-confidence vote against BSU President Robin Capeheart, BSU General Counsel Brent Benjamin, and the BSU Board of Governors. Dr. Chakrabarti is well loved and respected by her students and has performed her duties with distinction. The action by Bluefield State University comes as retribution and retaliation after retaliatory threats.

For relief, Grievant seeks the following:

To be reinstated to full-time employment status as a 6th year tenure-track Associate Professor of Sociology at BSU starting in academic year 2023-[2]023; to be made whole in terms of all salary and benefits as stated in employment contract; to return to faculty status in an environment free of harassment, hostility, discrimination, and retaliation; and to be treated with respect in terms of her race, gender, nationality, age, religion,

¹ The Respondent was originally named "Bluefield State College." However, the school's name was changed to Bluefield State University in May 2022.

and all other protections afforded in accordance with campus, local, state, and federal policies, regulations, code, statutes, and law.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.² A level three hearing was held on October 10, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person, via Zoom teleconference, and was represented by William (Bill) S. Winfrey, II Esq. Respondent appeared by Bluefield State University President, Robin D. Capehart and was represented by counsel, Jane Charnock Esq. After the level three hearing, Grievant made a motion to reopen the evidence for the purpose of introducing evidence showing the Higher Learning Commission, ("HLC"), issued a report dated October 25, 2023, to demonstrate actions by President Capeheart which raised concerns for the HLC. The motion was granted over Respondent's objections. This matter became mature for decision on November 13, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant challenges Respondent's decision not to renew her contract as a tenure-track faculty member. Grievant claimed the basis for non-renewal of her contract was arbitrary and capricious, without a factual basis, and was caused by discrimination. Grievant failed to establish Respondent's non-renewal of her contract was arbitrary and capricious, without a factual basis, or done as a form of discrimination. Respondent

² W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

established legitimate business reasons were the factual basis of Grievant's non-renewal due to the university's decision to move the curriculum away from liberal arts towards STEM classes. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Debjani Chakrabarti, was employed by Respondent for five years as a tenure track Associate Professor of Sociology beginning in 2018.

2. Grievant's upcoming sixth year, (academic year 2023-2024) would have been her tenure application year.

3. On March 1, 2023, Grievant was notified by letter that she was not being offered an appointment for a position for the subsequent year by Respondent. (*Grievant's Exhibit #2*).

4. The March 1, 2023, letter cited Respondent's Board of Governors Policy No. 403B, Section 3.7.3, which required the President's office to notify all tenure-track faculty members as to whether they will be offered an appointment for the subsequent year. Policy No. 403B became effective August 4, 2022.

5. By letter on March 10, 2023, Grievant requested Respondent's reasons for not offering an appointment for a position for the subsequent year by Respondent. Grievant also requested reconsideration for her appointment and provided Respondent with a substantial amount of information showing she was an exceptional faculty member who is well liked and respected by her peers and students.

6. By letter, on March 17, 2023, Respondent responded to Grievant's request and explained the information provided by Grievant was unpersuasive in terms of Grievant's request for reconsideration and stated the decision to not offer Grievant another appointment for an academic year is confirmed. (*Grievant's Exhibit #3*).

7. On April 11, 2023, Grievant sent Respondent a substantial amount of information regarding her academic record, recommendations for hire, letters of support and a student petition with signatures asking for reconsideration for employment. (*Grievant's Exhibit #4*).

8. On April 21, 2023, Respondent responded to Grievant's April 11, 2023, reconsideration request via letter. The April 21, 2023, letter stated that after the President's office completed a review of Grievant's provided information that the Respondent was affirming its decision to not offer Grievant a contract of employment for the 2023-2024 academic year. The April 21, 2023, letter also stated, that in addition to the President's office, the recommendations by the Compensation Committee, the Dean of the College of Liberal Arts, and the provost, all affirmed the decision to not offer Grievant a contract of employment for the 2023-2024 academic year. (*Grievant's Exhibit #5*).

9. It was uncontested that Grievant was exceptional at her job and well-liked by faculty and students.

10. At the level three hearing, President Robin Capehart and General Counsel Brent Benjamin both agreed the decision not to renew Grievant's contract had nothing to

do with her academic performance but rather was a part of the business decision of the university to focus more on STEM³ core curriculum as opposed to liberal arts programs.

11. At the level three hearing, President Capehart described Respondent's financial situation as severely poor, and that Respondent was having difficulty meeting payroll. President Capehart explained the Faculty Appointment Review Committee recommended Grievant's contract not be renewed as not renewing Grievant's contract would mean spreading her salary among other employees of Respondent.

12. In deciding to change from liberal arts to STEM, President Capehart examined all aspects of the university's curriculum in effort to keep the school sustainable.

13. As part of this new focus on STEM education, Respondent determined that sociology was not a degree program that would be offered in the future.

14. Respondent did not hire another tenure-tracked sociology professor to replace Grievant. Instead, Respondent made the decision that all sociology courses would be taught by adjunct professors which were paid less than Grievant.

15. Another liberal arts professor died, and Respondent made the decision not to replace the position with a tenure-tracked professor in its effort to refocus the curriculum to STEM education and away from liberal arts.

16. The HLC issued a report⁴ dated October 25, 2023, revealing several actions by President Capeheart which raised concerns. The report included a concern that a post-tenured faculty member was terminated due to merely speaking out during HLC's visit.

³ STEM" is an acronym for Science, Technology, Engineering and Math.

⁴ The Respondent objected to the admission to the report as it has not had an opportunity to respond to the report's concerns.

17. The report discussed the Board of Governors of Bluefield State University updated and approved new Board policies on August 4, 2022, as part of the "University Improvement Package." The Improvement Package gave President Capeheart almost unlimited control in recruitment, appointment, and evaluations of faculty.

18. The report did not include discussions regarding tenured-track faculty members.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The 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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

The Grievance Board has repeatedly stated that, "[g]enerally, institutions of higher education in West Virginia have broad discretion to terminate non-tenured probationary faculty members for any reason that is not arbitrary and capricious, or without factual basis. However, these institutions are bound to follow the substantive and procedural requirements set forth in the policies which they promulgate. See *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Hall v. Mingo County Bd. of Educ.*, Docket No. 95-29-529 (Mar. 28, 1996); *Wright v. McDowell County Bd. of Educ.*, Docket No. 93-33-115 (Nov. 30, 1993)." *Pauls v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-160/175 (Dec. 12, 1999).

The Grievance Board has consistently applied this principle in ruling that grievants employed in higher education pursuant to annual contracts do not automatically have the right to renew their contracts. See *Colson v. WVU*, Docket No. 2013-1554-WVU (Feb. 2014). "This reasoning also applies to determinations not to renew non-tenured faculty. Thus, Grievant must prove by a preponderance of the evidence that Respondent's retention decision was either arbitrary and capricious or violated one of the substantive and procedural requirements set forth in the policies which it promulgated." *Smith v. Higher Educ. Policy Comm'n/Fairmont State College*, Docket No. 02-HEPC-144 (Dec. 18, 2002); *Vehse v. West Virginia University*, Docket No. 2014-0030-WVU.

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. 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). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-

HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

In her grievance, Grievant alleged she was unfairly dismissed from her tenure-track faculty position. Grievant initially asserted she experienced discriminatory and hostile working conditions since the 2022 no-confidence vote against BSU President Robin Capeheart, BSU General Counsel Brent Benjamin, and the BSU Board of Governors. Grievant also initially claimed her dismissal was due to retribution and retaliation. In her Proposed Findings of Fact and Conclusions of Law, (“PFOFCOL”), Grievant seemingly chose to abandon many of her previous allegations against the Respondent. Grievant instead chose to only focus her PFOFCOL argument on claiming Respondent’s decision to not renew her contract was arbitrary and capricious, that the “needs of the University” was not a factual basis for non-renewal of her contract, and non-renewal of her contract was due to racial⁵ discrimination.

Respondent argues the non-renewal decision on the part of the respondent was not arbitrary or capricious or done without a factual basis. Respondent contends it did not violate any procedural requirements of its policies and had legitimate, non-retaliatory reasons for not renewing Grievant’s contract for the 2023-2024 academic year. Respondent alleged the decision to not renew Grievant’s contract was purely a business decision to move away from liberal arts into the new job growth in STEM education.

Grievant failed to meet her burden to establish, by a preponderance of the evidence, that her non-renewal for her non-tenured faculty member contract was arbitrary and capricious, or without a factual basis. Indiscriminately Grievant also failed to

⁵ Grievant argued “racial” discrimination in her PFOFCOL but failed to introduce any evidence regarding race throughout her case. As such, this decision will broadly address discrimination.

establish, by a preponderance of the evidence, that her non-renewal for her non-tenured faculty was due to discrimination. Firstly, Respondent's decision not to renew Grievant's contract was not arbitrary and capricious. President Capeheart addressed the decision not to renew Grievant's contract was purely a business decision.

President Capeheart discussed how the University was barely meeting payroll and major changes needed to be done. The biggest change was moving away from liberal arts towards STEM core curriculum. President Capeheart addressed that Grievant's position was not replaced by another tenure-track faculty member. Instead, Grievant's position was taught by an adjunct professor for financial reasons and her salary was spread around the University. The record also demonstrated that another liberal arts professor was not replaced with another tenured-track professor when he passed away. Instead, the deceased professor's liberal arts classes were likewise taught by an adjunct professor to lower costs. It is reasonable for a university that is struggling financially to choose to not renew the contract of a faculty member in an area which is being phased out.

This business decision not to renew Grievant's contract was not arbitrary made solely by President Capeheart. In addition to the President's office, the recommendations by the Compensation Committee, the Dean of the College of Liberal Arts, and the provost, all affirmed the decision to not offer Grievant a contract of employment for the 2023-2024 academic year. The university was merely moving away from liberal arts programs toward STEM core curriculum courses. As such, Respondent lacked the need to include a tenured professor of sociology as it was phasing out the program. It is reasonable that the university needed to focus on the financial future of the school by reducing costs. A

business decision based on the financial success of the university is a legitimate factual basis for not renewing Grievant's contract.

Grievant also failed to show any evidence of the Respondent not following its substantive and procedural requirements set forth in its newly adopted policies. Grievant attempted to show improper actions of President Capeheart by making a motion to reopen evidence to introduce a report by the HLC. The report, did in fact, discuss several areas of concern regarding President Capeheart's leadership decisions. However, the report did not discuss any matters dealing with terminating tenure-tracked faculty members as it only discussed post-tenured faculty members. The HLC's report did discuss that the Board of Governors of Bluefield State University updated and approved new Board policies on August 4, 2022, as part of the "University Improvement Package." The policies essentially gave President Capeheart almost unlimited control in recruitment, appointment, and evaluations of faculty.

Respondent followed its policies to give notice of non-renewal in the March 1, 2023, letter to Grievant. The March 1, 2023, letter cited Respondent's Board of Governors Policy No. 403B, Section 3.7.3 which only required the President's office to notify all tenure-track faculty members as to whether they will be offered an appointment for the subsequent year. Respondent also answered Grievant's reconsideration requests in writing on March 17, 2023, and April 21, 2023. Respondent may have avoided this grievance had it articulated a detailed reasoning behind its decision to not renew Grievant's contract. However, nothing in the records demonstrates that Respondent failed to follow its substantive and procedural requirements set forth in its newly adopted policies.

Grievant also failed to demonstrate Respondent discriminated against her. Discrimination for purposes of the grievance process has a very specific definition. "Discrimination" means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). The record was void to any reference to Grievant's race. The record further demonstrated Grievant was not treated differently than similarly situated faculty members. Another liberal arts faculty member who passed away was not replaced by another tenure-tracked faculty member. The record shows the deceased faculty member's classes were also replaced by adjunct professors due to the University's business decision to change from liberal arts to STEM curriculum. As such, this grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The 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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The Grievance Board has repeatedly stated that, "[g]enerally, institutions of higher education in West Virginia have broad discretion to terminate non-tenured probationary faculty members for any reason that is not arbitrary and capricious, or

without factual basis. However, these institutions are bound to follow the substantive and procedural requirements set forth in the policies which they promulgate. See *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Hall v. Mingo County Bd. of Educ.*, Docket No. 95-29-529 (Mar. 28, 1996); *Wright v. McDowell County Bd. of Educ.*, Docket No. 93-33-115 (Nov. 30, 1993). *Pauls v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-160/175 (Dec. 12, 1999).

3. The Grievance Board has consistently applied this principle in ruling that grievants employed in higher education pursuant to annual contracts do not automatically have the right to renewal of their contracts. See *Colson v. WVU*, Docket No. 2013-1554-WVU (Feb. 2014).

4. "This reasoning also applies to determinations not to renew non-tenured faculty. Thus, Grievant must prove by a preponderance of the evidence that Respondent's retention decision was either arbitrary and capricious or violated one of the substantive and procedural requirements set forth in the policies which it promulgated." *Smith v. Higher Educ. Policy Comm'n/Fairmont State College*, Docket No. 02-HEPC-144 (Dec. 18, 2002). *Vehse v. West Virginia University*, Docket No. 2014-0030-WVU.

5. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. "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. 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).

7. “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Resources*, Docket No. 93- HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

8. “Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. Va. Code § 6C-2-2(d).

9. Grievant failed to establish, by a preponderance of the evidence, that her non-renewal for her non-tenured faculty member contract was arbitrary and capricious, or without a factual basis. Grievant also failed to establish, by a preponderance of the evidence, that her non-renewal for her non-tenured faculty was due to discrimination.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.⁶ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

⁶ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5.

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: January 30, 2024.

Wes H. White
Administrative Law Judge

Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.