

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**MELINDA S. HOLLANDER**  
Grievant,

v.

**DOCKET NO. 2017-2049-WVU**

**WEST VIRGINIA UNIVERSITY,**  
Respondent.

**DECISION**

Grievant, Melinda S. Hollander, filed this grievance against her employer, West Virginia University, on April 7, 2017. The statement of grievance reads: "I was subjected to different treatment and harsher penalties than similarly situated colleagues. I believe Deyanira Santiago treated me differently on the basis of either my disability or gender in violation of the West Virginia Human Rights Act, W. VA. Code 6-11-1, et seq., and of W. VA. Code 6C-2-1, et seq."<sup>1</sup> As relief Grievant seeks: "I would like to retain the position as IACUC Program Coordinator, and work under the direction of another supervisor."

A conference was held at level one on June 6, 2017, and a decision denying the grievance at that level was issued on June 26, 2017. Grievant appealed to level two on July 10, 2017, and a mediation session was held on October 3, 2017. Grievant appealed to level three on October 20, 2017, and a level three hearing was held before the undersigned Administrative Law Judge on February 16, 2018, in the Grievance Board's

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<sup>1</sup> Grievant did not pursue the claim in her post-hearing written argument that she had been discriminated against. This argument is deemed abandoned and will not be further addressed.

Westover office. Grievant was represented by Matthew Harlin Nelson, Esquire, Farmer, Cline & Campbell, PLLC, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision on March 26, 2018, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed by Respondent as an at-will, non-classified employee, employed pursuant to an annual contract. Grievant's contract was not renewed. Grievant argued that the action was arbitrary and capricious. Grievant and her supervisor were unable to communicate with each other in an effective manner, and Grievant's supervisor wanted someone in the position who was more responsive to her needs, among other things. Grievant did not demonstrate that these were not factors which could be considered when deciding whether her contract should be renewed, or that the decision not to renew her contract was unreasonable under the circumstances.

The following Findings of Fact are made based on the evidence presented at level three.<sup>2</sup>

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<sup>2</sup> The record was left open to allow Respondent time to listen and make any objections to a tape recording made by Grievant's partner at the meeting described in Finding of Fact Number 3, which had been marked during the hearing as Grievant's Exhibit Number 4. Respondent objected to this recording being made a part of the record for three reasons. One of the objections was that Respondent did not have the opportunity to examine the individuals who spoke on the recording. Three of the five individuals who were in attendance testified at the level three hearing, and Respondent did not indicate what other factual information it needed to obtain from these individuals, if any. One of the remaining two was Grievant's partner, and the other was Mr. Vasgird, whom Respondent had access to at all times; and again, Respondent did not indicate what additional information needed to be elicited from these two individuals, nor did Respondent request an additional day of hearing to call these witnesses. Respondent also objected because the recording had not been provided in advance of the hearing as Jared Wood had requested at the time of the recording, which problem has been cured by allowing Respondent time after the hearing; and Respondent objected because the recording contains a private conversation between Grievant and her husband containing Grievant's opinions. This does not make the recording

### **Findings of Fact**

1. Grievant was employed by Respondent, West Virginia University ("WVU") in the Office of Research Integrity and Compliance ("RIC"), as the Program Coordinator for the Institutional Animal Care and Use Committee. She had been employed by WVU since December 2008, and began working as a RIC employee in August 2010. Grievant was an at-will employee, whose position was a non-classified, non-tenure-track, faculty equivalent/academic professional position. Each year she received an annual appointment and contract. Her most recent contract was for the period July 1, 2016, through June 30, 2017.

2. On March 23, 2017, Grievant was notified in writing by Dan Vasgird, Director of RIC, that her annual contract would not be renewed past June 30, 2017. No reason was given in this notification for the non-renewal of Grievant's contract.

3. A meeting was held on March 23, 2017, to inform Grievant that her contract would not be renewed. In attendance were Director Vasgird, Assistant Director of RIC Deyanira Sanitago, who was Grievant's supervisor, Grievant, Grievant's partner, and Jared Wood, who was a Senior Employee Relations Specialist from the WVU Human Resources Department at that time. Mr. Wood told Grievant that the decision not to renew her contract was not performance related, and that the reason for the non-renewal was that the department wanted to move forward in a different direction. Mr. Wood was relating to Grievant what he had been told by Mr. Vasgird and Ms. Santiago.

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irrelevant or inadmissible. Grievant's Exhibit Number 4 is **ORDERED ADMITTED**.

4. Ms. Santiago became Grievant's supervisor in September 2015. Ms. Santiago had issues with Grievant not reporting to her directly and not keeping her informed of her activities. Grievant attempted to correct these behaviors, but was unable to meet Ms. Santiago's expectations in this regard, and Ms. Santiago did not find that Grievant exhibited the professionalism or responsiveness to her directives that she desired. Ms. Santiago and Grievant did not work well together, and they did not communicate well with each other. Ms. Santiago was appointed Interim Director of RIC after Mr. Vasgird resigned as Director.

5. Grievant received documentation dated February 16, 2016, regarding a counseling meeting. The documentation states that Grievant had failed to fulfill a primary job responsibility, specifically, failure to timely submit an annual report. The documentation sets forth a list of expectations of Grievant for keeping her supervisor informed, and notes a general lack of professionalism.

6. Grievant received a letter of warning dated July 25, 2016, from Director Vasgird. The letter states that Grievant's behavior and performance "are indicative of a lack of sustained improvement in your job." The letter notes specifically that Grievant had "moved forward in the completion of this [investigative] report without first informing your direct supervisor, the Director, and/or the IACUC chair," and that she had "prepared and issued a report on this investigation without informing anyone in the department or providing an opportunity for the report to be reviewed." The letter further states that Grievant's "investigatory methods could have been perceived as curt and, in some cases, aggressive," which behavior could jeopardize relationships and have a negative effect on the department. The letter concludes that Grievant's action "are considered Gross

Misconduct,” and that “[i]mmediate and sustained improvement in your performance is necessary if you wish to avoid further disciplinary action up to and including the termination of your position with WVU.” Grievant did not grieve this letter of warning.

7. Ms. Santiago had decided the department would develop a new electronic system or program for the department, and it was her impression that Grievant was opposed to this plan, and voiced her opposition. Grievant did not recall that Ms. Santiago wanted to take a different direction with the electronic system.

8. The Institutional Animal Care and Use Committee is a creature of federal law. Federal oversight recommends that an Administrator be employed by WVU to assist the Committee, and Grievant served as this Administrator.

9. Grievant’s former position has been revised somewhat since Grievant’s contract was not renewed, and it has been posted more than once, but had not been filled as of the date of the level three hearing. Grievant was familiar with all the duties listed in the revised posting, and was capable of performing all the duties of the posted position.

### **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. Higher Educ. Policy*

*Comm'n/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). Although Grievant is not an administrator, her position was a faculty equivalent position, and the terms of her employment were the same as an administrator in that she was a non-classified, at-will employee, with an annual appointment, employed under an annual contract.

Grievant was allowed to serve the full term of her contract. The record does not reflect that WVU took any action to create any objective expectancy that Grievant's employment would be continued beyond the expiration of her employment contract on June 30, 2017, nor did Grievant argue that she had acquired any such expectation. Rather, Grievant's argument was that the decision not to renew Grievant's contract was arbitrary and capricious.

"Generally, 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). "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 non-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). This likewise applies to Grievant’s situation. *Vehse v. W. Va. Univ.*, Docket No. 2014-0030-WVU (Aug. 28, 2014).<sup>3</sup> 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 & 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.*

Generally, an action is arbitrary and capricious if factors intended to be considered were not relied upon, important aspects of the problem were entirely ignored, the decision was explained in a manner contrary to the evidence before the decision maker, or the decision reached was so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996).

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<sup>3</sup> Respondent argued the arbitrary and capricious standard was not applicable, pointing to *Colson v. West Virginia University*, Docket No. 2013-1554-WVU (Feb. 26, 2014), where the undersigned stated that “the question of whether the action was arbitrary and capricious is not brought into play unless the grievant demonstrates that he has acquired a property interest in his employment.” While this case does indicate that the analysis of whether the action was arbitrary and capricious may well be legally incorrect, the conclusion was that “[n]onetheless, given the Grievance Board’s longstanding case law, and Grievant’s argument, the undersigned will address whether the decision not to renew Grievant’s contract was arbitrary and capricious.”

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant argued that Ms. Santiago's testimony that the department wanted to go in a different direction was without foundation based primarily on the fact that the posting of Grievant's former position indicates that the duties are the same as those Grievant performed. It is clear to the undersigned, however, that in going a different direction, what Ms. Santiago means is that she needs someone in the position who will work with her. Regardless of who was at fault, Ms. Santiago and Grievant had a communication problem which affected Ms. Santiago's ability to work with Grievant and accomplish her goals for the department. Ms. Santiago needed someone in the position she could work with and trusted, and Grievant's performance had not been stellar. While Grievant disagreed with Ms. Santiago's conclusions regarding Grievant's efforts to keep Ms. Santiago informed, Grievant's observations were insufficient for the undersigned to reach a conclusion that the decision not to renew Grievant's contract was in disregard of the facts. Grievant did not demonstrate that any factors which were intended to be considered were not relied on, or that it was unreasonable under these circumstances for Respondent to choose not to renew Grievant's contract.

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). This same standard applies to higher education employees in non-classified, faculty equivalent, at-will positions.

2. Grievant's property rights in her employment ended when her contract expired. Respondent was not required to renew Grievant's employment contract.

3. Grievant must prove by a preponderance of the evidence that Respondent's non-retention decision was either arbitrary and capricious or violated one of the substantive and procedural requirements set forth in the policies which it promulgated. *Shade, supra.*; *Smith v. Higher Educ. Policy Comm'n/Fairmont State College*, Docket No. 02-HEPC-144 (Dec. 18, 2002).

4. Grievant did not demonstrate that the failure to renew her contract was arbitrary and capricious, or violated any substantive of procedural requirements.

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).

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**BRENDA L. GOULD**  
**Deputy Chief Administrative Law Judge**

**Date: April 16, 2018**