

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MICHAEL EUGENE REILLY,
Grievant,**

v.

Docket No. 2018-2004-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, Michael Eugene Reilly, filed this action on March 28, 2018, against his employer, West Virginia University, directly to Level Three. His Statement of Grievance reads:

On 3/14/18, I was terminated from WVU EHS due to ethical conflicts I expressed to management regarding assignments at WVU's farms and vivisection laboratories. My job involved conducting noise and air monitoring for employees working at WVU. I am a vegan and expressed that due to moral and ethical objections, I would not participate in activities where animals are being subjected to exploitation and murder. I requested for my beliefs to be accommodated by management, and was immediately dismissed for gross misconduct where they identified (in writing) my moral beliefs as reason to terminate my contract. I met with WVU HR on 3/12/18 and argued that my title VII rights were not being considered and that WVU did not reasonably accommodate my beliefs that are grounded on sincere moral/ethical beliefs. Additionally, I believe that my termination was grounded on religious discrimination, as the law forbids firing an individual for observing their beliefs, whether their beliefs are grounded through traditional, organized religion, or through sincerely held religious, ethical and/or moral beliefs.

Relief Sought: Position reinstatement and payment for lost wages.

A Level Three evidentiary hearing was conducted before the undersigned on August 13, 2018, at the Grievance Board's Westover office. Grievant appeared in person, *pro se*.

Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on September 28, 2018.

Synopsis

Grievant was employed as an Industrial Specialist in Environmental Health and Safety at West Virginia University. Grievant was an at-will employee whose position was terminated eight months into his most recent annual appointment. Grievant's appointment stated his employment was at-will and that termination of his appointment could occur if he failed to perform his duties and responsibilities as assigned. During the first fifteen months of this employment, Grievant performed the duties of his position without any issues. In February 2018, Grievant refused to perform assigned duties and was terminated for insubordination. Grievant asserts that he is a vegan and that he has moral and ethical objections to working at WVU's farms or laboratories. Grievant was aware at the beginning of his employment that WVU is an Agricultural University with many farms and laboratories. Respondent demonstrated that Grievant did not fulfill the duties of his administrative position at the level expected of him by his supervisor. This is sufficient under the terms of the annual appointment to justify termination of the appointment before its ending date, for this otherwise at-will employee. The record did not support a finding that Grievant's conduct was protected under the religious discrimination provision in Title VII. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed by WVU as an Industrial Hygiene Specialist in Environmental Health and Safety. Grievant was responsible for noise and air sampling, mold and water sampling and air quality throughout WVU's Morgantown campus and regional campuses.

3. Grievant was first hired in December 2016 pursuant to a Notice of Appointment with an end date of June 2017. The Notice of Appointment provided that Grievant would be provided with a copy of his job description on his first day of work and would be responsible for reading and understanding his position. The Notice of Appointment indicated that responsibilities would include those duties set forth in the description, and other duties and responsibilities as may be assigned by the Assistant Director.

4. Gayle Fratto, Assistant Director, WVU Environmental Health and Safety, indicated that he interviewed Grievant for the position. Grievant did not mention, at any time, his vegan lifestyle and issues working on farms, in laboratories or around animals. Grievant did not deny this representation of the facts.

5. Mr. Fratto explained that WVU is an Agricultural University and that anywhere from half of Grievant's job duties included work around animals, including on farms and in labs on the main campus and on regional campuses.

6. The first bullet point listed under "Duties and Responsibilities" on the job description states that the position must work on "our farms and any other areas being operated by the University." Respondent's Exhibit 3.

7. Grievant acknowledged that he completed a WVU Medical Surveillance Form in January 2017, during his first full month in the position, recognizing that he would be working in labs.

8. Grievant did not state any issues working around animals, on farms or in labs during the first term of his annual appointment. From December 2016 to June 30, 2017, Grievant completed all assigned tasks at various locations across campus, including labs, without any issues.

9. Grievant signed a new Notice of Appointment with a start date of July 1, 2017, and an end date of June 30, 2018. Grievant did not discuss any vegan concerns and did not state that he could not work around animals prior to signing the new Notice of Appointment.

10. From July 2017 until February 2018, Grievant continued to perform the duties and responsibilities of his position pursuant to his job description and as assigned by Assistant Director Fratto.

11. In February 2018 Grievant refused to participate in the Stewartstown farm assessment, as well as the Health Science Center noise exposure surveys. Both assignments were routine duties included in his job description.

12. Assistant Director Fratto met with Grievant on February 21, 22 and 23 to discuss the assignments and Grievant's refusal to perform the duties. Thereafter, Grievant sent Mr. Fratto an email in which he informed him that he would not perform assigned duties. Grievant further informed Mr. Fratto that he understood the implications of his decision and anticipated Mr. Fratto's likely actions.

13. Both Director Principe and Mr. Fratto indicated that this was the first time that Grievant expressed his disagreement with working around animals and inability to work on farms and labs. It was at this time that Grievant informed his supervisor that it also bothered him to work at WVU's Evansdale Crossing because he could smell food from the barbeque restaurant.

14. On March 6, 2018, Grievant was issued an Intent to Terminate letter for refusing to accept and complete assignments at the Stewartstown farm and Health Science Center. After a predetermination meeting, Grievant was issued a Termination Letter on March 13, 2018.

15. Grievant asserts that he is an individual that practices ethical veganism, i.e., a commitment to non-violence in one's daily life, where one abstains from the use of animal products and embraces the philosophy that rejects the commodification of animals and advocates that all sentient beings share a basic right to not be treated as the property of others. Grievant believes that all sentient beings have souls and finds the exploitation and killing of sentient beings by humans unethical, immoral and antithetical to his core values.

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 renewed Grievant's annual appointment, and then, eight months into 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, "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, 2018, dependent upon his continued performance of the duties and responsibilities of his position pursuant to his job description and as assigned by Assistant Director Fratto. 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). 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 terminated Grievant’s employment for failure to perform his duties as required. The record demonstrated that Grievant refused to perform and failed to perform assigned duties and responsibilities. Assistant Director Fratto met with Grievant on February 21, 22 and 23 to discuss the assignments and Grievant’s refusal to perform the duties. Thereafter, Grievant sent Mr. Fratto an email in which he informed him that he would not perform assigned duties. Grievant further informed Mr. Fratto that he understood the implications of his decision and anticipated Mr. Fratto’s likely actions. Both Director Principe and Mr. Fratto indicated that this was the first time that Grievant expressed his disagreement with working around animals and inability to work on farms and labs.

Grievant was hired into a high level administrative position. Respondent demonstrated that ultimately, during the final year of his appointment, Grievant did not fulfill the obligations of the position as expected of him by his supervisor. This is sufficient under the terms of the appointment to justify the termination of the annual appointment before its ending date, for this otherwise at-will employee.

Finally, Grievant relies upon religious accommodation requirements in federal civil rights law as a defense to his actions. This Grievance Board does not have primary jurisdiction to adjudicate disputes that arise under Title VII of the federal Civil Rights Act of 1964, or the West Virginia Human Rights Act, *Harrison County Bd. of Educ. v. Carson-Leggett*, 195 W. Va. 196, 466 S.E.2d 447 (1995); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). However, this Grievance Board does have jurisdiction to rule upon Grievant's Title VII defense to the charge of insubordination because he is alleging a "violation, missapplication or misinterpretation" of a statute under which he works, within the definition of "grievance" in the statutory grievance procedure for employees. See *Rodak v. W. Va. Dep't of Tax & Revenue*, Docket No 96-T&R-536 (June 23, 1997); *Bellinger v. W. Va. Dep't of Public Safety*, Docket No. 95-DPS-119 (Aug. 15, 1995). While such a ruling may be dispositive of the issues raised in this grievance, it has no preclusive effect on Grievant's rights to pursue remedies available through the courts under Title VII or the WVHRA. See generally *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

Title VII of the federal Civil Rights Act of 1964, as amended, prohibits an employer from discharging or otherwise discriminating against an employee on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The statute imposes an affirmative duty on employers to reasonably accommodate the religious observances and practices of its employees, unless the employer can demonstrate that such an accommodation would cause undue hardship on the conduct of its business. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

Grievant asserts that his practice constitutes a moral and ethical belief which is sincerely held with the strength of traditional religious views in accordance with *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970). Grievant cites 29 U.S.C. § 1605.1, which states, “whether or not a practice or belief is religious is not an issue . . . the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of religious views” (*Id.*).

Grievant asserts that WVU had a duty to accommodate his vegan beliefs and, therefore, wrongly terminated him for failing to perform assigned duties. Respondent counters that up to 50% of Grievant’s job duties include work around animals on farms and labs. Grievant did not notify Respondent of his vegan beliefs and issues working on farms and labs during his interview for the position, prior to accepting the position and signing his first annual appointment, or prior to accepting his second annual appointment in July 2017. The record did establish that it would be an undue hardship on Respondent to assign all farm, lab, and animal related tasks to other Industrial Hygiene Specialists. The record also supported a finding that there are emergencies that need attended to immediately, and it would be impossible to ensure that Grievant stay isolated from animals.

The fact that Grievant did not initially identify his vegan beliefs is not significant. At no point in the short negotiations over accommodating Grievant’s ethical veganism did he affirmatively waive his right to raise a religious objection. In any event, the vegan basis for Grievant’s refusal to perform his assignments was clearly established by the time WVU decided to terminate his employment.

Grievant cites to the United States District Court Southern District of Ohio Western Division stating that it is plausible that the plaintiff could subscribe to veganism with a sincerity equaling that of traditional religious view.¹ However, this was in the context of addressing a motion to dismiss, and, admittedly, at an early stage of litigation. The District Court was simply ruling on the sufficiency of the Complaint, which the Court found adequately alleged beliefs that are sincerely held so as to merit legal protection. No additional authority was provided. The undersigned concludes that the view that veganism does not qualify as a religion, but rather is no more than a dietary preference or social philosophy is a question for state or federal court. The undersigned finds that Grievant's refusal to perform certain assignments around animals, based upon his vegan beliefs, cannot be viewed, under the circumstances presented, as conduct which is protected under the religious discrimination provision of Title VII.

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, 181, 386 S.E.2d 835 (1989).

2. 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

¹*Chenzira v. Cincinnati Children's Hospital*, No. 1:11-CV-00917 (S.D. Ohio 2012).

administrative contract, stating his position, salary, and term of employment.” *Cook v. W. Va. Univ.*, Docket No. 05-HE-352 (May 22, 2006).

3. Grievant had an expectation of continued employment through at least June 30, 2018, 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).

4. Respondent demonstrated that Grievant did not fulfill the duties of his administrative position at the level expected of him by his supervisor. This is sufficient under the terms of his appointment to justify termination of the annual appointment before its ending date, for this otherwise at-will employee.

5. Grievant’s refusal to perform certain assignments around animals, based upon his vegan beliefs, cannot be viewed, under the circumstances presented, as conduct which is protected under the religious discrimination provision of Title VII.

6. Record demonstrated that up to 50% of Grievant’s job duties include work around animals on farms and labs. The record established that it would be an undue hardship on Respondent to assign all farm, lab, and animal related tasks to other Industrial Hygiene Specialists. The record also supported a finding that there are emergencies that need attended to immediately, and it would be impossible to ensure that Grievant stay isolated from animals.

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, 2018).

Date: October 24, 2018

Ronald L. Reece
Administrative Law Judge