THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES L. WERNTZ III,

Grievant,

v. **Docket No. 2018-1265-WVU**

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Charles Werntz III, was employed by Respondent, West Virginia University (WVU). On May 31, 2018, Grievant filed this grievance against Respondent stating, "Access to WVU email was blocked immediately upon notification of contract non-renewal for administrative reasons. I remain on contract (non-renewal is not for cause, no allegation of email misuse) with assigned work. In addition to violating the verbal agreement from the notification of non-renewal meeting, this is contrary to WVU Policy and Health Sciences Center email policy. There has been no progress from repeated inquiries and attempted discussions about this specific matter with various levels of supervisors and management to date." For relief, Grievant seeks to "[r]estore access to WVU email for the remainder of my time on contract, providing a MINIMUM of 2 weeks access to allow an orderly transfer off the email system."

A level one conference was held on June 12, 2018. A level one decision was rendered on July 3, 2018, denying the grievance. Grievant appealed to level two on July 16, 2018, and a mediation session was held on October 16, 2018. Grievant appealed to level three of the grievance process on January 29, 2019, and changed the statement of grievance to the following: "After denying email access contrary to WVU policy, a

settlement had WVU providing email to/from select senders and with a list of non-work-related keywords. The University provided a small fraction of the agreed upon emails and was unable/unwilling to complete the task. (original grievance text on attached sheet). Grievant changed relief sought as follows: "The University has proved unable to fulfill its obligations under the agreement of 11/18/2018. To resolve this provide full access to my July 1, 2017 – June 30, 2018 email for two days (at my convenience) or download ALL emails to media so I can retrieve missing emails." A level three hearing was held on April 8, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person. Respondent appeared by Dr. Robert Gerbo and by counsel, Samuel Spatafore, Assistant Attorney General. This matter became mature for decision on May 13, 2019, upon receipt of each party's written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed as WVU faculty for over twenty years, until the non-renewal of his contract. WVU deactivated Grievant's University email account months ahead of his last workday. Grievant contends that WVU's email policy allows him account access until his last day of employment. Grievant is no longer employed by WVU, but demands access to personal emails in his WVU email account. Even though Grievant proved that WVU's email policy allowed him access to his WVU email account until his last day of employment, and that he was permitted to use the account for personal purposes, he did not prove that WVU's policy mandated that WVU allow him access to his account for personal use. 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 was employed by Respondent, West Virginia University (WVU), from June 1997 through June 2018, most recently as an Associate Professor in Occupational Medicine at the School of Public Health.

2. In 1997, Respondent assigned Grievant an email address, which was Grievant's first and only email address until his access was terminated by Respondent.

3. Grievant used his WVU email address for his personal emails and did not utilize any private email address for the duration of his employment. (Grievant's testimony)

4. Dr. Robert Gerbo is Director of Occupational Medicine in the School of Public Health and was Grievant's supervisor for clinical duties. (Dr. Gerbo's testimony)

5. Patricia Shingleton is Senior Employee Relations Specialist at WVU.

6. On March 5, 2018, Dr. Gerbo and Ms. Shingleton met with Grievant and informed him that his yearly employment contract would not be renewed for the 2018-2019 academic year.

7. On March 7, 2018, Grievant cleaned out his office and was assigned a work-at-home project for the duration of his employment term ending June 30, 2018. (Grievant's testimony and level one decision)

8. At the March 5, 2018, meeting, Dr. Gerbo informed Grievant that his WVU email account would be deactivated immediately. (Grievant's testimony)

9. WVU uniformly deactivates the university email account of an employee as soon as it determines that the employee is being non-renewed. WVU does this even if employment continues for many months thereafter. Respondent immediately deactivates out of concern for the protection of WVU patient health information in compliance with the Health Insurance Portability and Accountability Act ("HIPAA"). (Dr. Gerbo and Ms. Shingleton's testimony)

10. However, when employees are fired, they are given continued access to their university email account until their last day of employment. (Dr. Gerbo and Ms. Shingleton's testimony)

11. WVU's Electronic Mail Policy states under "official use" that "electronic mail services are University resources and are intended to be used for teaching, research, service, and administration in support of the University's mission" and provided "to students, faculty, staff, and other authorized persons who are affiliated with the University for their use when engaging in activities related to their roles in the University."

12. WVU's Electronic Mail Policy further provides under "personal use" that its email services "may be used for incidental personal purposes" within certain parameters such as to not "directly or indirectly interfere with the University operation of computing facilities or electronic mail services." (Grievant's Exhibit 1)

13. WVU's Electronic Mail Policy provides that "[t]erminating employees will have their email accounts terminated on the last day of employment" and "[a]ll personal email correspondence must be deleted prior to leaving the University." (Grievant's Exhibit 1)

14. WVU's Electronic Mail Policy provides that "[a]ccounts will be disabled when an employee leaves the university. ITS is notified when a person is leaving via a web form that is filled out by the EBO of the appropriate department which indicates the employee's last day of employment." (Grievant's Exhibit 1)

15. Ms. Shingleton's office is charged with interpreting WVU policies. (Ms. Shingleton's testimony)

16. Respondent interprets WVU's Electronic Mail Policy as applicable only to employees who are terminated/fired and not to employees whose contract is not renewed. (Ms. Shingleton's testimony)

17. On March 5, 2018, Grievant requested two weeks access to his WVU email account to complete an orderly transition off of WVU's email system. WVU denied this request.

18. Grievant continued to have access to his WVU email account until March 7, 2018.

19. Thereafter, Dr. Gerbo intermittently forwarded some of Grievant's personal emails to Grievant's new personal email account, but stopped doing so in mid-April 2018.

20. WVU's Electronic Mail Policy allows for personal use of email. (Grievant's Exhibit 1)

21. There was no accusation that any misuse occurred with Grievant's email account or that Grievant violated patient privacy rules known as HIPAA.

22. Grievant seeks access to the thousands of personal emails in his WVU email account for his use in endeavors outside of his employment with WVU.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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*.

Grievant contends that Respondent violated its email policy when it denied him continued access to his employee email account for almost four months between the date Respondent informed him it was not renewing his yearly contract and his last day of employment. Grievant asserts that the email policy allows "terminating employees" to have access to their email accounts until their last day of employment. Grievant maintains that Respondent's misinterpretation of policy resulted in his not being able to access his personal emails. Respondent counters that the section of its email policy granting employees the right to access their email account until their last day of employment is only applicable to employees who have been dismissed, not those who have been non-renewed. Respondent contends that it has broad leeway in interpreting its policies and that the phrase "terminating employees" in the deactivation section of its email policy is ambiguous enough that it can interpret the policy as permitting only fired employees to access a WVU email account until their last day of employment, allowing it to deactivate other employees' accounts sooner. Grievant asserts that Respondent is blatantly

misinterpreting the plain language of its email policy in equating “terminating employees” with “fired employees”.

An agency's interpretation of the provisions of its own internal policy is entitled to some deference by this Grievance Board, unless the interpretation is contrary to the plain meaning of the language, or is inherently unreasonable. *See Dyer v. Lincoln County Bd. of Educ*., Docket No. 95-22-494 (June 28, 1996). However, the West Virginia Supreme Court of Appeals has held that "[w]hile long-standing interpretation of its own rules by an administrative body or municipal agency is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous. Syl. Pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)." Syl. Pt. 2, *Habursky v. Recht*, 180 W. Va. 128, 375 S.E.2d 760 (1988). Thus, WVU’s interpretation of its email policy is entitled to deference, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. *Dyer, supra*. In this matter, the plain language of WVU’s email policy is clear and unambiguous; therefore, it is not subject to interpretation.

“Ambiguity is a term connoting doubtfulness, doubleness of meaning or indistinctness or uncertainty of an expression used in a written instrument. It has been declared that courts may not find ambiguity in statutory language which laymen are readily able to comprehend; nor is it permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words. As stated in the early case of *McClain Adm'r. v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L.R.A. 634, HN4 ‘Where the language is unambiguous, no ambiguity can be authorized by interpretation.’ Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of

resolving an ambiguity, not for the purpose of creating it." *Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970). In view of the foregoing undisputed legal principles, the undersigned will examine the policy under consideration.

WVU's Electronic Mail Policy states that "[t]erminating employees will have their email accounts terminated on the last day of employment." The root word of "terminating" is "terminate". "Terminate" can mean either "to bring or come to an end". MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 823 (2007). "Bring" is synonymous with "to cause", and thus entails someone or thing acting upon another. MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 92 (2007). "Come to an end" is an effect. While "terminate" can be a cause and effect, the use of "or" in the definition implies that "terminate" does not have to mean both. Further, WVU's policy does not state that WVU must be the one doing the termination, i.e. firing or dismissing. WVU implies that an employee only becomes a "terminating employee" when WVU fires the employee. However, a plain reading of the definition of "terminate" allows for an employee to "come to the end" of his employment, and thereby become a "terminating employee", through a variety of mechanisms, including WVU terminating an employee by not renewing his contract or through an employee self-terminating, i.e. resigning.

In assessing the definition of a word, context is crucial. Nothing in the context of WVU's Electronic Mail Policy implies that it is only applicable to employees who are fired. The policy's "Scope" states that "[t]his policy applies to all University staff, faculty, administrators, officers and students (collectively, "users"), including those on the regional campuses and Extended Learning sites." Under "Account Deletion", the policy states that accounts may be deleted for various reasons, including "[a]ccounts will be disabled when

an employee leaves the university." Further, under a strictly grammatical reading, "terminating employee" can be rephrased as "an employee who terminates/ends his employment," and is broadly worded to include an ending of employment for various reasons.

Respondent maintains that it uniformly cuts off email access immediately for non-renewed employees, even though they may continue their employment for months thereafter. Respondent contends that HIPAA required it to cut off Grievant's email access once he was non-renewed, implying that this concern did not prevent it from allowing fired employees to maintain access until the last day of employment. Grievant continued his employment with WVU for nearly four months after his non-renewal and was involved in a work-at-home project for WVU. It seems arbitrary that WVU would interpret its email policy as granting fired employees continued access to sensitive HIPAA information that it refused non-renewed employees.

Grievant maintains that the parties reached a settlement agreement at level two of the grievance process, obligating Respondent to provide Grievant his personal emails. The undersigned does not have jurisdiction to enforce settlement agreements. W. VA. CODE § 6C-2-4(b)(2) provides that agreements reached in settlement of grievances "are binding and enforceable in this state by a writ of mandamus." However, there is no evidence that parties reached a settlement agreement either at level two or thereafter, as the agreement submitted into evidence by Grievant was signed only by him, and not by Respondent. Further, had the parties reached an agreement at level two, an order of dismissal would have been issued instead of an order of unsuccessful mediation.

Even though WVU's email policy clearly allowed Grievant continued access to his WVU email account until his last day of employment, the undersigned must nevertheless determine whether Grievant suffered any grievable harm as a result of being denied access. WVU's Electronic Mail Policy states under "official use" that "electronic mail services are University resources and are intended to be used for teaching, research, service, and administration in support of the University's mission" and provided "to students, faculty, staff, and other authorized persons who are affiliated with the University for their use when engaging in activities related to their roles in the University." WVU's Electronic Mail Policy further provides under "personal use" that its email services "may be used for incidental personal purposes" within certain parameters, such that this use does not "directly or indirectly interfere with the University operation of computing facilities or electronic mail services."

While Grievant proved that he was permitted under this policy to use his WVU email account for personal purposes, he did not prove that this required WVU to provide him access to his WVU email account for personal use. WVU's email policy clearly states that email is intended for use in support of WVU's mission and that any incidental use for personal purposes cannot even indirectly interfere with WVU's computing and email services. WVU's witnesses testified that complying with Grievant's request for his personal emails would be unduly burdensome and would necessitate that WVU sift through the thousands of emails in order to separate the personal from professional (due to HIPAA concerns) before forwarding to Grievant the numerous personal emails he had accumulated over the years. Grievant failed to prove that his request for personal emails would not unduly interfere with WVU's computing operations. Further, Grievant did not

prove that his request for personal emails had any connection to the services he provided to WVU between the cutoff of his email access on March 7, 2018, and his last day of employment on June 30, 2018, or that a proper remedy to a premature denial of access should entail requiring WVU to expend resources to provide Grievant with the personal emails he had accumulated on the university's email over his many years of employment. This grievance is therefore 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 his 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. An agency's interpretation of the provisions of its own internal policy is entitled to some deference by this Grievance Board, unless the interpretation is contrary to the plain meaning of the language, or is inherently unreasonable. *See Dyer v. Lincoln County Bd. of Educ*., Docket No. 95-22-494 (June 28, 1996).

3. While long-standing interpretation of its own rules by an administrative body or municipal agency is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous. Syl. Pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)." Syl. Pt. 2, *Habursky v. Recht*, 180 W.

Va. 128, 375 S.E.2d 760 (1988). "A corollary principle is that it is not permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words." Crockett at 719. *See also Smith v. Cabell County Bd. of Educ*., Docket No. 99-06-248 (Oct. 28, 1999).

4. "Ambiguity is a term connoting doubtfulness, doubleness of meaning or indistinctness or uncertainty of an expression used in a written instrument. It has been declared that courts may not find ambiguity in statutory language which laymen are readily able to comprehend; nor is it permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words. As stated in the early case of *McClain Adm'r. v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L.R.A. 634, HN4 'Where the language is unambiguous, no ambiguity can be authorized by interpretation.' Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it." *Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970).

6. Respondent's "interpretation of its rules is entitled to deference, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. *Dyer, supra*." Skiles v. DHHR, Docket No. 2-HHR-111 (Apr. 8, 2003)

7. Grievant did not prove that WVU's email policy mandates WVU to provide Grievant access to his WVU email account for personal use.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: June 3, 2019

_____

Joshua S. Fraenkel
Administrative Law Judge