

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS EVANS,

Grievant,

v.

Docket No. 2019-1196-WVU

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Thomas Evans, was employed by Respondent, West Virginia University (WVU). On March 1, 2019, Grievant filed a level one grievance against Respondent stating, "Wrongful termination." In his level three appeal, Grievant expanded his requested relief sought to, "Reinstatement to work position with back pay."

A level one hearing was conducted on April 2, 2019. On April 24, 2019, Grievant received a level one decision. Grievant appealed to level three under W. Va. Code § 6C-2-4(c). A Transfer Order returned the grievance to level two since a decision had emanated from level one. A mediation session was held on May 30, 2019. Grievant filed another appeal to level three of the grievance process on June 4, 2019.

On July 15, 2019, WVU raised an objection to some of the level three subpoenas requested by Grievant. On July 24, 2019, WVU filed a motion to dismiss, arguing that the undersigned did not have the authority to reinstate Grievant since his contract had expired. Grievant filed a response arguing for backpay and a right to reinstatement for public policy reasons. On August 7, 2019, a telephonic hearing was held thereon. The undersigned denied WVU's motion to dismiss and granted Grievant's requested subpoenas. On September 6, 2019, the U.S. Attorney for the Northern District of West

Virginia filed a motion to quash subpoenas for out-of-state NASA employees, arguing sovereign immunity. That same day, the undersigned quashed the subpoenas issued for Preston Burch, Karen Place, Chris Scolese, Brian Roberts, and Benjamin Reed.

A level three hearing was held before the undersigned at the Grievance Board's Westover office. The hearing spanned three days: September 9, 2019; October 7, 2019; and November 14, 2019. Grievant appeared in person and by counsel Kirk Auvil of The Employment Law Center, PLLC. Respondent appeared by Dr. Fred King and counsel Samuel Spatafore, Assistant Attorney General. This matter became mature for decision on January 21, 2020. Each party submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

From 2010 to 2018, Grievant was employed by WVU in a non-tenure track position through annual contracts ending on June 30th of each year. On June 28, 2018, WVU placed Grievant on leave while it investigated allegations of misconduct against him. WVU never renewed Grievant's contract beyond June 30, 2018, but continued employing Grievant until his dismissal on February 25, 2019. Grievant implies he has a property right to continued employment based on his expectation of renewal. He contends WVU's non-retention decision was arbitrary and capricious. Grievant did not prove by clear and convincing evidence that he had a property right to continued employment. Therefore, WVU was not required to provide a reasonable basis for not retaining him. Accordingly, this 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), as a Research Associate Professor, a non-tenured track position, in the College of Engineering and Mineral Resources (CEMR), Department of Mechanical and Aerospace Engineering.

2. Grievant's employment began in 2010 pursuant to an annual contract known as a Notice of Appointment (NOA). Grievant's NOA expired each year on June 30th and was renewed seven times until June 30, 2018. The last year Grievant held an employment contract with Respondent was the 2017 - 2018 fiscal year. (Grievant's PFFCL)

3. Grievant's NOA stated that his appointment was non-tenure track and limited to "only the period and purpose specified, with no interest or right obtained by virtue of the appointment." It also provided Grievant notice that "[y]our employment is otherwise at-will, and appointment or reappointment to a non-classified position shall create no right or expectation of continued employment beyond the term of appointment established by this notice." (Respondent's Exhibit 3)

4. In his capacity as Associate Professor, Grievant was the Director of the West Virginia Robotic Technology Center (WVRTC).

5. WVRTC was established in 2009 as a WVU research grant program to support robotic space operations. WVRTC works out of the West Virginia High Technology Foundation (WVHTF) in Fairmont, West Virginia and utilizes lab and office space leased by NASA's Goddard Space Flight Center (GSFC).

6. In his dual role as Associate Professor and Director of WVRTC, Grievant managed WVRTC employees at the facility in Fairmont, as well as faculty and students on the WVU campus through a federal government contract from NASA to both WVU and the WVU Research Corporation (WVURC).

7. WVRTC's current NASA GSFC subcontract was executed between WVURC and prime contractor Alcyon Technical Services Joint Venture (ATSJV), which has a contract with NASA.

8. Grievant has served as the primary investigator/project manager on the NASA project since October 2017.

9. On June 11, 2018, Ms. Karen Place, Associate Chief of NASA GSFC, sent a letter to Ms. Kathryn Stern, Sr. Director of Contracts and Procurement at ATSJV, stating her concerns of multiple instances of workplace harassment by Grievant against WVRTC employees. (Grievant's Exhibit 3)

10. NASA GSFC's letter also notified ATSJV that, as a subcontractor to NASA, WVU is obligated [under NASA Procedural Requirement (NPR) 3713.3. Anti-Harassment Procedures] to conduct activities in a manner that assures a safe and secure work environment for everyone at GSFC funded facilities. This obligation entails promptly investigating allegations of harassing conduct. (Grievant's Exhibit 3)

11. On June 13, 2018, ATSJV sent a letter to WVU with the following concerns and instructions:

Alcyon Technical Services JV (ATSJV) is in receipt of the attached letter from Mrs. Karen Place... The letter concerns reported incidences of harassment and impropriety allegedly perpetrated by Dr. Thomas Evans during the performance of work under the ATSJV Prime Contract... in which West

Virginia University Research Corporation (WVU) is a subcontractor...

Please review and investigate each of the incidences listed in the attached letter as discretely as possible, and provide ATSJV with a detailed account of your findings as well as a corrective action plan no later than Wednesday, June 27, 2018. ...

Your response should include the allegation, the results of your internal investigation, and the corrective action plan to either correct if applicable, or prevent to a reoccurrence. ...

(Grievant's Exhibit 22)

12. Pursuant to the NASA GSFC instructions, conveyed to WVU by ATSJV, WVU activated two investigations into Grievant's conduct at WVRTC. One was performed by WVU's Internal Audit and the other by the law firm of Jackson Kelly PLLC.

(Respondent's Exhibits 5 & 6)

13. On June 29, 2018, pursuant to concerns by NASA GSFC and ATSJV that Grievant could interfere with the investigation, and as is the normal course of action in such investigations, WVU placed Grievant on a work-at-home assignment with full pay.

(Grievant's Exhibit 24)

14. The Jackson Kelly investigation included interviews with 31 witnesses and the review and analysis of over 21 documents. (Respondent's Exhibit 5)

15. On December 3, 2018, Jackson Kelly issued a 17 page report concluding that Grievant had harassed his subordinate WVRTC employees, created a hostile work environment, instructed his WVRTC employees to violate policies and protocol, and required WVRTC employees to operate a robotic arm in violation of NASA policy and protocol. (Respondent's Exhibit 5)

16. WVU's Internal Audit issued a 99-page report concluding that Grievant had committed numerous acts of financial fraud, waste, and abuse. (Respondent's Exhibit 6)

17. On January 3, 2019, Mr. Gene Cilento, Dean of CEMR, and Dr. Fred King, Vice President of Research, sent Grievant a letter of intent to terminate his employment based upon the following findings from the investigations:

Directing WVRTC employees to violate NASA policies and procedures on appropriate and safe robotic operations.

Unprofessional behavior in the workplace to WVRTC employees that created a hostile environment for those employees.

Inappropriate local mileage claims by you on multiple occurrences (July 2015 to May 2017), resulting in \$2,408.52 in misused travel mileage reimbursement.

Directing and approving the charging of unallocable transactions to WVRTC's NASA subcontract in the amount of \$9,164.97 for expenses related to a student competition for which other stipend funds had been provided to your departmental overhead account.

Financial fraud, waste, and/or abuse to over \$50,000 of transactions initiated or approved by you and funded by NASA subcontract and other grant funds to purchase excessive, underutilized, and/or unnecessary lab and computer equipment.

Misuse of NASA-funded WVRTC employees for activities not related to the NASA subcontract scope of work, including:

directing WVRTC employees to prepare and conduct presentations and demonstrations unrelated to the NASA grant during normal working hours; and

requesting WVRTC employees use annual leave to attend technical meetings at WVRTC unrelated to NASA grant activities.

(Respondent's Exhibit 7)

18. WVU held a pre-termination meeting with Grievant on January 29, 2019, and gave him until February 8, 2019, to submit additional documentation.

19. On February 25, 2019, WVU sent Grievant a letter terminating his employment effective that same day based on the information provided in the January 3, 2019 Intent to Terminate Letter. (Respondent's Exhibit 8)

Discussion

Grievant contends that WVU acted in an arbitrary and capricious manner and violated its own policies in not retaining him. Grievant implies that he has a property right to continued employment. He bases this on his expectation of renewal stemming from being renewed for seven consecutive years, as well as Dean Cilento's promise that Grievant's promotion would enable him to enter a tenure-track contract in 2018 - 2019. WVU counters that Grievant did not prove he had a property right to continued employment. WVU contends that Grievant could have also argued for reinstatement under a substantial public policy argument, but that he failed to do so.¹ In arguing that WVU violated its own policies in not retaining him, Grievant does not cite any WVU policy that was violated. Therefore, the undersigned will not address this violation of WVU policy claim any further.

As for the remaining claims, the parties disagree on the standard of proof. Grievant asserts he must only prove by a preponderance of evidence that WVU acted in an arbitrary and capricious² manner in not retaining him. WVU contends that Grievant has

¹While Grievant stated in his level three response to WVU's motion to dismiss that he had a right to continued employment under a public policy argument, he did not raise this argument at the level three hearing or in his PFFCL.

²An 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.*

a heightened burden of proving by clear and convincing evidence that he had a property interest in continued employment and that only then is WVU obligated to provide a reasonable basis for its non-retention decision.

In support of his position, Grievant cites portions of the following case law:

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). "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).

In support of its position, WVU cites portions of the following case law:

"Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies or custom and practices, such claim must be established by clear and convincing evidence." *Whitaker v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), citing *Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). See also *Jerrell v. New River Community and Technical College*, Docket No. 2008-1826-NRCTC (Oct. 7, 2009), aff'd, West Virginia Supreme Court of Appeals No. 101403 (Sept. 23, 2011) (memorandum

Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

decision). “[W]here an employee has such a property interest, the employee is entitled to nonarbitrary and noncapricious treatment by the public institution.” *W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 538, 408 S.E.2d 286, 290 (1991).

WVU’s position is the one espoused by the U.S. Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). This stance was also adopted by the West Virginia Supreme Court. “If there is a property right, the employee must be accorded due process before he can be fired. *Sindermann*, *supra*. If there is no property right, the employer may refuse to renew the employment, without a hearing and without giving any reason. *Roth*, *supra*. The principles of *Sindermann* and *Roth* have been incorporated in our jurisprudence ...”. *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 180, 386 S.E.2d 835, 837 (1989). *Tuck* cited *Roth* in stating that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Tuck*, 386 S.E.2d at 837; *quoting Roth*, 408 U.S. at 577. *Tuck* held that without a property right, “the employer may refuse to renew.” *Id.* The West Virginia Supreme Court elaborated on this right in *W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 408 S.E.2d 286 (1991), where it held:

[U]nilateral, subjective expectations on the part of an employee developed apart from any action, undertaking, or position of the employer are not sufficient to give rise to a protected property interest. There must be some undertaking by the employer which gives rise to an objective expectation on the part of the employee. *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); *see also Logan County Education Association v. Logan County Board of Education*, ___ W. Va. ___, 376 S.E.2d 340 (1988).

"West Virginia has set out a very specific system of procedural protections that apply to different carefully defined categories of college employees." *State ex rel. Tuck v.*

Cole, 182 W.Va. 178, 180, 386 S.E.2d 835, 837 (1989). "Temporary (non-tenure-track) faculty members . . . have only the rights attendant to their current contracts." *Id.*, 182 W.Va. at 181, 386 S.E.2d at 838. 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). In *Whitaker*, it noted that "[w]hile it is true that temporary faculty have few rights . . . temporary faculty are told this when they are hired. By signing the contract they have agreed to be employed in this capacity with the inherent limitations."

The Grievance Board has addressed the conflicting standards set forth in *Whitaker* and *Smith*. In *Colson*, it deemed *Smith* to be incorrect, stating:

It appears to the undersigned, however, that this case law is simply legally incorrect based on the statement of the law set forth above in *Sauvageot, supra.*, "where an employee has such a property interest, the employee is entitled to nonarbitrary and noncapricious treatment by the public institution." The undersigned reads this to mean 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.

Since Grievant claims a property interest in his employment, the clear and convincing standard of proof is applicable. However, it must first be noted that Grievant did not prove by a preponderance of evidence, or even set forth either at the level three hearing or in his PFFCL, that WVU violated some substantial public policy principle. Proving such violation would have enabled the undersigned to consider extending Grievant's employment regardless of whether Grievant proved a property right to continued employment. "[A]s a general rule, West Virginia law provides that the doctrine

of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law.” *Roach v. Reg’l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). “The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer’s motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.” Syl. Pt. 3, *Wounaris v. W. Va. State Coll.*, 214 W. Va. 241, 588 S.E.2d 406 (2003)(citing *Syllabus, Harless v. First Nat’l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)). *Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994)). “Once the plaintiff in an action for wrongful discharge based upon the contravention of a substantial public policy has established the existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.” Syl. Pt 8, *Page v. Columbia Nat. Res.*, 198 W. Va. 378, 382, 480 S.E.2d 817, 821 (1996).

While Grievant does not assert a violation of substantial public policy, he implicitly asserts a property interest in continued employment. Grievant argues that this entitles him to progressive discipline, a reasonable basis for his non-retention, consideration by WVU of the information he submitted in his defense at his pre-termination meeting, and a contract renewal. Grievant claims a property interest in continued employment through

an expectation of renewal springing from two sources: One is a promise by Dean Cilento to Grievant in October 2017, that a promotion to primary investigator/project manager would enable Grievant to enter a tenure-track contract starting in 2018 - 2019.³ The other is his renewal for seven straight years.

In conjunction with *Whitaker* and *Sauvageot*, Grievant must first prove he had a property right to continued employment. Only then does WVU have an obligation to show that it did not act in an arbitrary and capricious manner in deciding not to retain him. As previously discussed, to prove a property right in continued employment, Grievant has a heightened burden of proving his claims by clear and convincing evidence. "Clear and convincing proof" is "proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." BLACK'S LAW DICTIONARY, 251 (6th ed. 1990).

Grievant received one-year contracts with no right or entitlement to employment beyond their end date. Grievant concedes, and the evidence shows, that his contract was not renewed beyond June 30, 2018.⁴ Grievant was not under contract when he was dismissed on February 25, 2019. Grievant did not demonstrate by clear and convincing evidence that he had a property interest in his employment. Each of Grievant's yearly contracts stated that Grievant was being employed for one-year terms and only for "the period and purpose specified, with no interest or right obtained by virtue of the

³Grievant's PFFCL, pg 2.

⁴Grievant states in his PFFCL that his contract was not renewed for 2018 - 2019. However, WVU contends it was renewed for 2018 - 2019, but only provides as evidence thereof Grievant's 2017 - 2018, contract. On the other hand, while the burden of justifying termination of an existing contract is normally on the employer, WVU contends that Grievant assumed the burden of proof. Grievant's PFFCL states that he assumes the burden of proof on all claims. This assumption of the burden is consistent with the non-renewal of his contract.

appointment.” Grievant did not present any evidence that Dean Cilento had promised him a tenure-track contract for 2018 - 2019. But even if Grievant had proven this allegation, he did not present any authority for the proposition that such a promise gave him a property right to continued employment. Neither did Grievant prove that seven consecutive renewals gave him a right to continued employment. As Grievant failed to prove by clear and convincing evidence that he had a property interest in his employment, the issue of whether WVU’s actions were arbitrary and capricious is not relevant.

Because Grievant did not have a right to continued employment and was an at-will employee at the time of termination, WVU could terminate Grievant for any reason or no reason, unless motivated in disregard of some substantial public policy principle. As previously discussed, Grievant failed to prove a violation of substantial public policy. Grievant therefore is not entitled to progressive discipline.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies or custom and practices, such claim must be established by clear and convincing evidence. " *Whitaker v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), *citing Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). *See also Jerrell v. New River Community and Technical College*, Docket No. 2008-1826-NRCTC (Oct. 7, 2009), *aff'd*, West Virginia Supreme Court of Appeals No. 101403 (Sept. 23, 2011) (memorandum decision). “[W]here an employee has such a property interest, the

employee is entitled to nonarbitrary and noncapricious treatment by the public institution.”
W. Va. Univ. v. Sauvageot, 185 W. Va. 534, 538, 408 S.E.2d 286, 290 (1991).

2. The employee's "property right in employment end[s] when his contract with the College end[s]" *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 180, 386 S.E.2d 835, 837 (1989). For a property right to exist, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, 182 W.Va. at 179, 387 S.E.2d at 837 (citation omitted). Without a property right, "the employer may refuse to renew." *Id.*

[U]nilateral, subjective expectations on the part of an employee developed apart from any action, undertaking, or position of the employer are not sufficient to give rise to a protected property interest. There must be some undertaking by the employer which gives rise to an objective expectation on the part of the employee. *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); see also *Logan County Education Association v. Logan County Board of Education*, ___ W. Va. ___, 376 S.E.2d 340 (1988).

W. Va. Univ. v. Sauvageot, 185 W. Va. 534, 408 S.E.2d 286 (1991).

3. Grievant did not prove by clear and convincing evidence that he had a property right to continued employment beyond the expiration of his employment contract on June 30, 2018. Consequently, WVU could terminate Grievant for any reason or no reason, unless motivated in contravention of some substantial public policy principle.

4. Grievant did not prove by a preponderance of evidence that WVU was motivated in violation of some substantial public policy.

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: March 3, 2020

Joshua S. Fraenkel
Administrative Law Judge