

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ALFRED KASPROWICZ,
Grievant,**

v.

Docket No. 2020-0368-CONS

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, Alfred Kasprowicz, was employed by Respondent, pursuant to an annual contract, as Director of the Carruth Center at West Virginia University. Grievant's annual contract was not renewed and he filed this grievance. For relief, Grievant seeks open disclosure and discussion of all aspects of the investigatory process; further review of all parties necessary to appropriately address the scope of the existing workforce dynamic; full and open disclosure of the results and recommendations of the investigation to all relevant parties involved. Grievant filed a second grievance on the same day and requested an open and full discussion of the factors contributing to his non-renewal of appointment and extension of the limited term appointment.

A level three evidentiary hearing was conducted before the undersigned on September 11, 2020, by video conferencing from the Grievance Board's Charleston, West Virginia, office. Grievant appeared *pro se*. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. Respondent filed fact/law proposals on October 23, 2020. Grievant filed his fact/law proposals on November 12, 2020.

Respondent's objection to this late filing is noted for the record and is overruled by the undersigned.

Synopsis

Grievant asserts that he was entitled to an extension of his employment as the Director of the Carruth Center for Psychological and Psychiatric Services at West Virginia University. Grievant was employed pursuant to an annual contract. Respondent asserts that Grievant had no right nor entitlement to a new annual contract and Respondent had no duty or responsibility to renew Grievant's annual contract. Grievant was unable to produce any evidence of any right or expectation of continued employment. Grievant did not meet his burden of proof to show any entitlement or right to have his contract renewed. In addition, the remedies requested by Grievant are beyond the authority of the Grievance Board to provide. 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 West Virginia University, pursuant to an annual contract, as the Director of the Carruth Center for Psychological and Psychiatric Services.
2. Grievant's annual contract stated: "Your 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." Grievant's Exhibit No. 1.
3. In compliance with the directive of Dean Corey Farris, in May 2019, Grievant requested assistance from Virginia Nardi, Senior Employee Relations Specialist, as to

how to approach a review of circumstances concerning professional conduct among his coworkers.

4. Grievant's correspondence with Ms. Nardi expresses concerns regarding conflict between Carruth Center employees and the Clinical Director.

5. Grievant notified employees in the Counseling Center of the investigation before the investigation started. Employees in the Counseling Center kept calling Ms. Nardi and telling her that Grievant told them to contact her. Grievant put the employees on notice that claims were made against the other director in the Counseling Center, Ms. Tian Hawkins.

6. Upon completion of the investigation, Grievant met with Ms. Nardi and Dean Farris on June 20, 2019. Ms. Nardi reported that there was no substantiation of the claims related to the Clinical Director, but there was evidence of a conflict between Grievant and coworkers at the Counseling Center. Dean Farris advised that improvement must be made in the Counseling Center's environment before the fall semester.

7. By memorandum dated July 29, 2019, Dean Farris issued Grievant a "Notice of Non-renewal of Appointment & Limited Term Appointment."

8. Grievant's appointment was renewed for only a four-month limited term, through November 30, 2019, dependent upon continued professionalism and cooperation with West Virginia University.

9. Grievant was responsible to ensure that all students received the necessary mental health care in a timely manner.

10. Addressing the mental health needs of students in a timely and proper manner is a key role of Grievant's position. Dean Farris believed that, based upon undisputed facts, this aspect of Grievant's responsibilities was badly failing.

11. After Grievant was removed from the director's position, the wait times with students no longer were an issue.

Discussion

The non-renewal of an annual contract is not a disciplinary action; therefore, the grievant has the burden of proving his complaint by a preponderance of the evidence. *P.E. v. Marshall Univ.*, Docket No. 06-HE-216 (Mar. 5, 2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Considerable discretion is accorded to academic administrators in making personnel decisions regarding such matters as faculty retention or promotion. See generally *Siu v. Johnson*, 784 F.2d 238 (4th Cir. 1984); *Smith v. Univ. of N. Carolina*, 632 F.2d 316 (4th Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Moreover, in applying the arbitrary and capricious standard of review to academic matters, such as promotion, tenure and nonretention of faculty status, the Grievance Board has recognized that the decisional, subjective process by which such status is

awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. *Gruen v. Bd. of Directors*, Docket No. 95-BOD-281 (Mar. 6, 1997); *Gomez-Avila v. W. Va. Bd. of Trustees*, Docket No. 94-BOT-524 (Mar. 14, 1995); *Carpenter v. Bd. of Trustees*, Docket No. 93-BOT-220 (Mar. 18, 1994); *Cohen v. W. Va. Univ.*, Docket No. BOR1-86-247-2 (July 7, 1987). See *Siu, supra*; *Kauffman v. Shepherd College*, Docket No. BOR1-86-216-2 (Nov. 5, 1986).

Grievant repeated his concerns before the undersigned that the rationale for the non-renewal of his contract was nonexistent and was without detail that would lead to a meaningful evaluation.¹ Grievant argues that in the absence of a clear explanation as to the reason for his non-renewal in the midst of an investigation of the workplace, supports the conclusion that his initiation of the Human Resource inquiry was a substantial factor in bringing about the action of his non-renewal. Grievant conflates the non-renewal to an investigation by Human Resources, which Grievant requested, to address the professional conduct and concerns of Carruth Center employees. Grievant indicates that he was never interviewed nor given the chance to address concerns related to his performance. Grievant asks for an open disclosure of the investigatory process and additional information related to the non-renewal of his employment. Respondent counters that the Grievance Board has long held that employers are not required to provide employees working under an annual contract a reason for non-renewal.

¹ Grievant's proposals make the allegation of retaliation and an allegation of an effort to contravene a substantial public policy. These were merely allegations and no proof supporting these allegations can be found in the record. Accordingly, they will not be addressed.

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, *i.e.*, the employee's "property right in employment ends when his contract with the College ends" *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 181, 386 S.E.2d 835, 838 (1989). In such cases, an employer may refuse to renew these types of employee contracts without giving a reason and without providing a hearing. *Schade v. W. Va. Univ.*, Docket No. 2011-0591-WVU (Dec. 21, 2011). "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 supra*.

Grievant's focus is not on an entitlement or expectation of continued employment with West Virginia University. Grievant's employment was not terminated, rather his annual contract expired and was not renewed. Under these undisputed circumstances, Grievant is not entitled to a reason or a review of the decision not to renew his contract. Grievant failed to prove by a preponderance of the evidence an entitlement to a reopening of a human resource investigation or to a reason why his contract of employment was not renewed. When there is no case in controversy, the Grievance Board will not issue advisory opinions. See *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The non-renewal of an annual contract is not a disciplinary action; therefore, the grievant has the burden of proving his complaint by a preponderance of the evidence. *P.E. v. Marshall Univ.*, Docket No. 06-HE-216 (Mar. 5, 2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. 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, *i.e.*, the employee's "property right in employment ends when his contract with the College ends" *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 181, 386 S.E.2d 835, 838 (1989). In such cases, an employer may refuse to renew these types of employee contracts without giving a reason and without providing a hearing. *Schade v. W. Va. Univ.*, Docket No. 2011-0591-WVU (Dec. 21, 2011). "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 supra*.

3. Grievant did not meet his burden of proof to show any entitlement or right to have his contract renewed.

4. When there is no case in controversy, the Grievance Board will not issue advisory opinions. See *Brackman v. Div. of Corr./Anthony Corr. Center*, Docket No. 02-CORR-104 (Feb. 20, 2003). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009).

5. The remedies requested by Grievant are beyond the authority of the Grievance Board to provide.

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: December 8, 2020

Ronald L. Reece
Administrative Law Judge