THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WAYNE VAN ELLIS,
Grievant,

v. **Docket No. 2021-2416-WVU**

WEST VRIGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Wayne Van Ellis, an Assistant Director in the division of Information Technology Services filed a level one grievance against the Respondent, West Virginia University, dated May 10, 2021, after receiving notice that his employment would not be renewed after June 30, 2021. Grievant seeks reappointment. A level one conference was held on May 24, 2021. The grievance was denied by West Virginia University Grievance Administrator, Sue Keller, by level one decision dated June 16, 2021. A level two mediation session was held on August 9, 2021. A level three evidentiary hearing was held on October 29, 2021, before the undersigned at the Westover office of the Grievance Board. Grievant appeared *pro se*. Respondent appeared by its counsel Samuel R. Spatafore, Assistant Attorney General. This case became mature for consideration upon receipt of the last of the parties' fact/law proposals on December 8, 2021.

Synopsis

Grievant was employed by West Virginia University as an Assistant Director in the division of Information Technology Services. Grievant was employed pursuant to an annual contract. Grievant was employed and paid for the entirety of his most recent annual contract for the 2020-2021 academic year. The clear language of Grievant's annual contracts established that Grievant had no right or entitlement to a new annual

contract, and Respondent had no duty or obligation 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. Grievant also failed to establish his claim of discrimination. 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 as an Assistant Director in the division of Information Technology Services.

2. Grievant was hired by an offer letter dated January 8, 2019, with an end date of June 30, 2019. Grievant was informed that his employment was at the will and pleasure of the Associate Provost and Director. The letter noted that Grievant's performance would be evaluated for the purpose of determining whether this basic agreement is to be extended.

3. After the end date of his initial offer letter, Grievant was employed by an annual contract with a start date of July 1, 2020, and an end date of June 30, 2021.

4. Both of Grievant's contracts stated, "This notice or appointment serves as an administrative appointment stating your position, salary, and term of employment . . . Your appointment 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 Exhibits No. 2 and No.

5. On April 30, 2021, Grievant was issued a Notice of Non-renewal and was notified that his last day would be June 30, 2021, the last day of his annual contract.

6. On July 23, 2020, Director Brian Kraus issued Grievant and two other division leaders a "Letter of Expectations" which was offered as a constructive means to address workplace expectations.

7. Director Kraus sets out in letter that "The expected behavior going forward is that you will focus on the issue at hand and answer questions clearly and concisely considering both sides and employ restraint your immediate responses and engagement with others. . . The expected behavior going forward is for you to maintain composure utilizing appropriate tone and volume. If you are unable to do this, then you need to remove yourself from the conversation until you regain composure and the ability to be professional. . . . As leaders in this organization, it is imperative that personal representatives do not interfere with the important work required for your respective teams. Demonstrated negative behavior between the leaders in the teams transcends throughout your teams damaging morals and will no longer be tolerated."

8. The parties came an agreement to improve their workplace interactions on or about October 28, 2020. In addition, they agreed to resolve conflict in a professional manner and t o seek prompt resolution of any disputes.

9. Grievant was notified by letter dated April 30, 2021, that his appointment as Assistant Director ending on June 30, 2021, would not be renewed.

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 argued at level one and level three that the offer letter indicated that his employment could only be terminated for performance issues. Grievant further asserted that the decision to not renew his contract was the product of discrimination. Respondent argued that nonrenewal is a contract issue relating to Grievant's most recent appointment

beginning July 1, 2020. Grievant continued to work through June 30, 2021, after which date he possessed no right to continued employment at West Virginia University.

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 asserted that the language of his offer letter that his performance would be evaluated in determining if his contract would be extended created a property right. The level one administrator and the undersigned acknowledge that the language could be the cause of confusion; however, the letter is clear that Grievant's employment was at-will. This at-will status of Grievant's employment would continue for a term ending as noted on the contract. Grievant's interpretation of the language of the offer letter would be to require that the nonrenewal be for cause, contrary to his employment status. Grievant was not dismissed for cause, performance or otherwise, as he was allowed to serve the full term of his contract. Grievant's property rights in his employment ended when his appointment expired on June 30, 2021. Grievant did not prove that he had acquired a property interest in continued employment beyond the expiration of his

contract. The decision by Respondent concerning the nonrenewal of Grievant's contract for no reason or any reason cannot be viewed as arbitrary by the undersigned.[1]

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant failed to make a record or offer any evidence that would establish that they were treated any differently than similarly-situated employee. The record supports

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[1] An 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. 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)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996);" *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

a finding that the employment of one of the other employees sent a "Letter of Expectation" was not renewed. Grievant did not prove his allegation of discrimination. Grievant was not the only employee that was not renewed in the division of Information Technology Services for the 2021-2022 academic term. In short, under the above statutory definition. Grievant did not prove that he was treated differently from a similary-situated employee.

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. Grievant failed to prove by a preponderance of the evidence that the action by Respondent was arbitrary and capricious.

4. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant failed to prove by a preponderance of the evidence that he was the victim of discrimination.

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 (2018).

Date: January 25, 2022

Ronald L. Reece
Administrative Law Judge