MACK SAMPLES

v. Docket No. 94-BOD-564

BOARD OF DIRECTORS/GLENVILLE STATE COLLEGE

D E C I S I O N

Grievant Mack Samples, through counsel, filed a grievance after Respondent Glenville State College's (GSC) president, William Simmons, notified him that his appointment as Dean of Records and Admissions (DRA) would end, effective August 31, 1994. Grievant offers a number of theories in support of his claim that he is entitled to reinstatement, e.g., that the termination was a contravention of public policy and was other wise improper due to the fact that GSC unilaterally altered his employment status to that of a classified employee, a factor which prohibits his dismissal except for cause. GSC alleges the grievance was not timely filed and also moves for dismissal on the basis of Grievant's "at-will" employment status. The case became mature for decision on June 26, 1995, the agreed-upon final day for the parties to complete a responsive briefing schedule.

Background

It is not necessary to set forth all of the particulars of Grievant's twenty-one year tenure as DRA at GSC. However, the evidence shows that from at least 1983 through 1989, Grievant had been issued an annual letter of appointment as a "non-classified major administrator" for the next academic year. Beginning in 1991, Grievant was offered a "will and pleasure" contract appointing him as DRA for the next academic year. This "Notice of Appointment" clearly states that either party can terminate the employment relationship upon thirty days written

notice.

In recent years, what had once been a harmonious relation ship between Grievant and Dr. Simmons broke down altogether, due, in part, to Grievant's public expression of disapproval of some of Dr. Simmons' practices on campus. It appears from the record that Dr. Simmons had, in 1993, counseled Grievant to seek new employment. Eventually, the situation prompted Dr. Simmons to remove Grievant from employment and to eliminate the DRA office and actually create a new position to perform the records and admissions functions.

On July 6, 1993, Grievant was offered what was to become his last employment contract, an appointment as DRA for the period of July 1, 1993 through June 30, 1994, at a salary of $44,700. He accepted the appointment "per the conditions outlined above" on the notice/contract by signing the document. Again, Grievant's appointment notice specifically stated, "This is an administrative appointment to serve at the will and pleasure of the President, and the appointment can be terminated by either party on thirty (30) days written notice."

Subsequently, GSC did not offer Grievant a new year-long appointment or contract. Instead, by letter dated June 27, 1994, Dr. Simmons notified Grievant that his employment would be terminated thirty days from the expiration of his present contract, that is, on August 31, 1994. Thereafter, by letter dated July 8, 1994, GSC's Vice President and Academic Dean, James Peterson, advised Grievant that it would be in the best interests of GSC that Grievant cease performing his duties after July 14, 1994, although compensation would be provided through August 31, 1994.

By letter dated July 21, 1994, Grievant grieved his termi

nation and his status as an "at-will" employee. A level two hearing was conducted September 1, 1994, and a decision denying the grievance was rendered on September 6, 1994. Grievant filed an action in circuit court, possibly on September 14, 1994, seeking a declaration that he was a classified employee, not an at-will employee, and an injunction compelling reinstatement. On or about September 16, 1994, Grievant appealed the grievance to level four, where hearing was conducted on February 8, 1995.1

1The record in this case is quite extensive and includes the transcript and exhibits of the hearings at level one and two, as well as the record adduced in the circuit court proceedings. Notably, the Court declined to grant injunctive relief, but retained jurisdiction on the declaratory judgement portion of the petition, holding it in "abeyance" and denying GSC's motion to dismiss on the basis of Grievant's failure to exhaust his administrative remedies. Finally, the record is

(Footnote Continued)

Discussion

A. Timeliness Issue

GSC argues that this case should be dismissed on the basis of being untimely filed. The grievance statute for higher education personnel, W.Va. Code 18-29-4(a)(1), requires that grievance proceedings be initiated within fifteen days following "the occurrence of the event upon which the grievance is based, . . . the date on which the event became known to the grievant or . . . the most recent occurrence of a continuing practice giving rise to a grievance[.]"

Grievant admits he was notified by Dr. Simmons on June 27,

1994, that his contract would not be renewed and that he would be terminated effective August 31, 1994.2 However, Grievant did not initiate a grievance regarding his non-renewal until July 21, 1994, exceeding by two days the allowable fifteen work days in which to initiate a grievance. Grievant's essential claim that the grievable event regarding his termination was Dr. Peterson's July 8, 1994 letter must be rejected.

Dr. Simmons' June 27, 1994 letter unequivocally stated Grievant's contract would not be renewed, and Dr. Peterson's letter of July 7, 1994 merely restated these circumstances, but

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(Footnote Continued)

replete with numerous documents filed by the parties, such as motions, responses, and proposed fact stipulations. Grievant did not file a brief, although GSC did file its brief on the designated day.

2See Grievant's "Amended Grievance," (facsimile transmission of November 4, 1994) at Section 1-i (the document does not contain page numbering).

exercised an option set forth in Dr. Simmons' letter to release Grievant from his duties earlier, retaining the same thirty-day period of compensation. Grievant filed the within action in protest of his termination at GSC, and made no claim regarding the mere loss of several last days of actual work, from July 14 through August 31, 1994, the true subject of Dr. Peterson's letter. Dr. Simmons' letter is the operable one which termi nated Grievant's employment.3

In the event of a contract non-renewal, the grievable event is the date the employee is notified his employment will not be

renewed. Gerfufsen v. W.Va. Bd. of Directors, Docket No. 93-BOD-303 (Oct. 8, 1993). Therefore, it is held that the grievance is not timely filed as a matter of law. In addition, Grievant has not prevailed on the merits of his case.

B. Merits of the Case.

As GSC has correctly stated, West Virginia is an "at will" employment state. See Williams v. Brown, 437 S.E.2d 775 (W.Va. 1993); Suter v. Harsco Corp., 403 S.E.2d 751 (W.Va. 1991); Harless v. First National Bank in Fairmont, 246 S.E.2d 270 (W.Va. 1978); Wright v. Standard Ultramarine Color, 90 S.E.2d

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3Grievant's response to the timeliness issue in his "Memorandum in Support of Amended Grievance," filed on or about January 24, 1995, is also unpersuasive. In that document, Grievant essentially argued that GSC's alleged two-year misclassification of him consituted a "continuing practice" under Code 18-29-4, and that a level one grievance was therefore timely filed on July 21, 1994, following Dr. Peterson's July 8, 1994 letter advising him not to report to work after July 14, 1994.

459 (W.Va. 1955). Moreover, the Grievance Board has held that, even in the context of government employment, "[u]nless the employment is for a fixed term, the well established common law rule is that either party can terminate employment at will with or without cause." Setzer v. W.Va. Dept. of Public Safety, Docket No. 89-DPS-476 (Nov. 24, 1989). Additionally, "[a]n employee serving at-will has little protection from even arbi trary dismissals and no rights with respect to management changes in the terms and conditions of employment." Carson v.

W.Va. Bd. of Directors/Fairmont State Coll., Docket No. 90-BOD-176 (Nov. 30, 1990), at 4.

It has also been held that the only exceptions to the general at-will rule are based in either contractual or statuto ry provisions which alter the at-will employment relationship, or involve dismissals shown to be motivated by reasons in substantial contravention of public policy. See Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994); Parker v. W.Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). Grievant's allegations that the circumstances of his contract non-renewal fall within these exceptions are without merit.

In the Wilhelm case, the employer argued that the grievant was an at-will employee and moved for the dismissal of his grievance protesting his termination. The administrative law judge held, "[u]nless an at-will employee alleges a substantial contravention of public policy, such as exercising certain constitutional rights, his termination cannot be challenged through the grievance procedure." Wilhelm at 13. Consequently, the Wilhelm grievance was dismissed because the grievant's status as an at-will employee was unrefuted, and because no substantial contravention of public policy was implicated or demonstrated.

In this case, Grievant claims his at-will status had been unilaterally altered by GSC at least two years ago. In Grievant's view, he was therefore misclassified and should have been reclassified as a "classified" employee, an employee who cannot be terminated except for cause. He further argues that GSC's failure to reclassify him was a contravention of public policy regarding the classified system for higher education

employees.

In support of this claim, Grievant relies on W.Va. Code 18B-9-2(b) and its definition of "nonclassified employee," as follows: "an individual who is responsible for policy formation at the institutional level or reports directly to the president . . . ." Grievant claims he had not met either of these crite ria for over two years. He asserts that he no longer reported to GSC's president and had been stripped of the policy-making responsibilities of a nonclassified administrator. The record falls short of supporting Grievant's contentions in this regard. At the onset, it hardly seems possible that Grievant, an articulate, intelligent and mature man, would tolerate such a diminishment of his administrative status at GSC for approxi mately two years and not raise any complaint until his employ ment was terminated. Notwithstanding that factor, Grievant met the criteria for a nonclassified employee. While GSC admits that Grievant, at the time of his contract non-renewal, did not report directly to GSC's president, it points out that, under Code 18B-9-2(b), employees can also be deemed nonclassified if they are "responsible for policy formulation at the institution al level." It is difficult to believe that Grievant, serving as GSC's DRA, was not responsible for some policy formulation at GSC.4

In any event, another factor impacts upon Grievant's argument. On December 21, 1993, the State College System Board of Directors (BOD) filed an emergency legislative rule, effec tive that date, clarifying the long-standing practice regarding nonclassified employees. Among other things, nonclassified positions are defined as those "responsible for institutional policy formation and reports directly to the president of the

institution, or other persons designated by the president." (Emphasis added.) This same language is present in Legislative Rule Title 131, Series 62, effective March 28, 1994. In short,

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4Dr. Peterson agreed that Grievant had not been "invited" in 1992 to continue on either GSC's "college board" or its "college council." Dr. Peterson further explained that these groups were advisory only, not policy making, and due to their large memberships in recent years, many members were excluded in an attempt to make the groups more efficient. T2.26-27. This explanation is credible and reasonable. In addition, the record establishes that Grievant had been named to a specific committee (Undergraduate Program Committee) in February 1993, in conjunction with GSC's eighteen-month reorganization study, and that he had been a member of a policy-making committee regarding suspension and academic probation during the time in issue. Grievant's allegations that he had no policy making responsibilities or functions after 1992 are simply not true.

a nonclassified employee can be one who serves in any position designated by the president of the institution. As clearly reflected in Grievant's pertinent employment contracts, GSC's president had clearly designated Grievant as a nonclassified employee for several years. Thus, Grievant's attempt to disavow his at-will contract is not supported by the record.5

Grievant also argued he "rightfully gained a vested proper ty interest" in his continued employment due to his twenty-one year tenure at GSC, because he "faithfully performed" the DRA duties in an "exceptional manner" and "in consideration that he is fifty-five years' old." Under those circumstances, Grievant

claims, he was at least entitled to a pretermination hearing and full disclosure of the reasons for his termination. Unfortu nately for Grievant, he had no property interest in continued employment, despite his tenure, his job performance or his age. Again, GSC argues correctly that any inquiry into claims of a due process deprivation in the area of higher education employment begins with Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). These cases

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5Grievant also presented an argument that his termination was contrary to public policy in that it was motivated by his public expressions of disapproval of Dr. Simmons' management. He claims his termination had a "chilling effect" upon GSC's faculty. In other words, Grievant attempted to liken himself, a college administrator, to college faculty who enjoy "academic freedom" to express political views which may be contrary to management philosophy or practice. Grievant was not a faculty member at GSC and can make no claim to a right of academic freedom. Thus, his argument in this vein is rejected.
establish the parameters within which public employees gain entitlement to a constitutionally protected property interest in continued employment. The cases do not guarantee continued employment; rather, they merely detail when procedural due process is required before an employee is terminated. In short, an employee's expectation to continued employment must be grounded in employment rights set forth in rules, statutes, practices, etc. No statute, rule or practice grants any partic ular property interest to nonclassified employees or administra

tors in West Virginia's public institutions of higher education. In a claim similar to Grievant's, a college administrator contended he was in a protected class of employees that could be discharged only after a hearing and for cause. State ex rel Tuck v. Cole, 386 S.E.2d 835 (W.Va. 1989). Following an exten sive discussion of property interests, the Court declared that an employee without a property interest in his job may have his contract non-renewed by his employer "without a hearing and without giving any reason." The Court stated that "[t]he statutes and regulations are silent about procedural and sub stantive rights of college administrators," but that it was clear the plaintiff was an administrator and thus had no "objec tive expectancy" that his employment would necessarily be continued beyond any current contract. Id. at 838. Thus, the college was permitted to terminate the administrator and was not required to state any reasons for the action. The Grievance Board has followed the reasoning in Tuck and has determined that a higher education employee with an administrative contract had no property interests in that administrative position and filled such a position at the will and pleasure of the institution's president. Carson v. W.Va. Bd. of Directors, supra.

Grievant's last contract with GSC clearly stated his employment was an "administrative appointment" predicated upon the "will and pleasure" of the president. The position was also referred to in the contract as an "executive officer of the college." The position's term ran only through June 30, 1994. Whether Grievant considered himself a "classified" employee or a "nonclassified" employee, he had no property interest in contin ued employment. The terms of the appointment in his last contract are clear and unambiguous. Accordingly, GSC was not

obligated to provide a pretermination hearing or to offer any reason for the non-renewal of Grievant's contract.6

In addition to the foregoing, the following findings of fact and conclusions of law are appropriate.

Findings of Fact

1. Prior to July 14, 1994, Grievant had served as GSC's Dean of Records and Admissions (DRA) for over twenty years.

6Grievant's claim that he obtained a property interest two years ago when he allegedly became a classified employee, if true, is decidedly untimely. If somehow Grievant did obtain a property interest in continued employment which overrode his specific administrative at-will employment two years ago, then any claim regarding that change in status, relative to his specific contract, arose when he was given a contract that was inconsistent with his supposed status, at the latest, July 6, 1993. Grievant's failure to grieve an altered employment status when it allegedly occurred places him well outside of the fifteen-day period in which to file a grievance on the claim.

2. As DRA, Grievant was a nonclassified, at-will employee and a major administrator with institutional-wide, policy-making responsibilities.

3. For the last several years, Grievant's annual employ ment contract expressly stated that he served at the will and pleasure of GSC's president, and that the employment was termi nable by either party at any time upon thirty days' written notice. Grievant signed such a contract in June 1993 (1993-94 school year).

4. Although Grievant no longer reported directly to GSC's

president and no longer served on as many advisory committees as he had in the past, Grievant nevertheless functioned as a policy maker within GSC from 1992 through June 1994.

5. By letter dated June 27, 1994, GSC's president in formed Grievant that his employment would be terminated thirty days from the expiration of his 1993-94 contract, that is, on August 31, 1994.

6. GSC's vice president wrote Grievant on July 8, 1994, and requested that he cease performing any duties after July 14, although he would be compensated through August 31, 1994.

7. On July 21, 1994, Grievant initiated the within grievance, in which he protested his termination and sought reasons for the dismissal and reinstatement.

8. With respect to the filing of the grievance, GSC raised a timeliness issue at level two.

Conclusions of Law

1. Under W.Va. Code 18-29-4(a)(1), Grievant failed to initiate a timely level one grievance within fifteen days of the time he was initially notified that his employment contract would not be renewed. See Gerfufsen v. W.Va. Bd. of Directors, Docket No. 93-BOD-303 (Oct. 8, 1993).

2. Grievant, as a nonclassified employee in higher education, served at the will and pleasure of the college's president, Thomas v. W.Va. Bd. of Trustees/Marshall Univ., Docket No. 92-BOT-443 (Feb. 14, 1995), and had no property interest in continued employment.

3. Despite some lessening of Grievant's college-wide advisory functions during the past two years, the record fails to establish that Grievant was anything other than an at-will employee at Glenville State College, subject to the mutual

termination of a one-year employment contract by either employer or employee at any time upon thirty days' written notice.

4. Grievant failed to show a violation of any law, statute, policy or regulation in conjunction with the non-renew al of his employment contract at Glenville State College.

5. Grievant's allegations that circumstances surrounding GSC's non-renewal of his employment contract somehow rose to the level of a "substantial contravention of public policy" is not supported by the record. See Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994).

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: July 28, 1995