DR. MANUAL A. VELEZ,

Grievant,

v. **DOCKET NO. 97-BOD-100**

BOARD OF DIRECTORS/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant Dr. Manual A. Velez, a full-time faculty member, filed a grievance on or about January 17, 1997, alleging Respondent Board of Directors, West Liberty State College ("WLSC") had violated a mutual oral agreement which had allowed him to engage in a part-time private dental practice, when it restructured his schedule to comply with a requirement of the West Virginia Board of Dental Examiners that the supervising dentist be available for additional clinical hours, thus decreasing the hours available for a private practice. As relief, he requested that WLSC be required to comply with the agreement, and allow him a minimum of twelve hours per week per semester for his part-time dental practice. To accomplish this, he noted that WLSC would have to hire an additional part-time dentist and other personnel to staff the clinic. (See footnote 1) The following findings of fact have been made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant has been employed since July 1989 as a Clinical Dentist and faculty member at West Liberty State College ("WLSC"), in the dental hygiene program.

2. When Grievant accepted his employment it was understood that he could maintain a private dental practice, so long as it did not interfere with his obligations to WLSC.

3. No agreement was reached by Grievant and WLSC as to how many hours per week Grievant could practice dentistry. Grievant decided 12 hours was appropriate, and has been able to devote 12 hours per week per semester, between the hours of 8 a.m. and 5 p.m., to a private dental practice since he began his employment at WLSC. He has worked in his private dental practice up to

15 hours per week. WLSC was not aware of how many hours Grievant was spending in his private practice.

4. WLSC is willing to work with Grievant to prepare a schedule which will allow him to devote up to 12 hours per week between the hours of 8 a.m. to 5 p.m. to his private dental practice. Grievant finds this unacceptable because he wants WLSC to agree to allow him to devote 12 hours per week between the hours of 8 a.m. to 5 p.m. to his private dental practice.

5. Nothing prevents Grievant from scheduling patients for his private practice on week- ends and evenings. He chooses not to do so.

6. Grievant is a full-time faculty member. Full-time faculty "shall render full-time service to the institution to which appointed. Outside activities shall not be restricted unless such activities or employment interfere with the adequate performance of academic duties. The institutionexpects its faculty to give full professional effort to assignments of teaching, research and service." 131 C.S.R. 36 § 4.3.1.

7. The Commission on Dental Accreditation sent a team to WLSC in September 1996. The Commission recommended that the supervising dentist become more actively involved in the activities of the clinic. WLSC responded to this recommendation by scheduling Grievant to be in the clinic on a regular basis for instructional purposes. In the past, Grievant had had to be on campus while dental hygiene students were working on patients in the clinic, but he was not regularly scheduled to appear in the clinic. In the past, WLSC had not required Grievant to be on site when students were working on other students in the clinic, but has also changed this practice based upon the Commission's recommendation.

8. Grievant signs a new contract of employment each year.

9. WLSC is not preventing Grievant from maintaining a private dental practice.

10. Grievant took a pay cut when he left a job in New Jersey in 1989 to accept his appointment at WLSC, and supplemented his income with his private dental practice to make up the difference. Grievant was paid a salary of $38,000.00 for a nine month appointment, when he accepted his position at WLSC. He told then-President Clyde Campbell he would have to make at least $50,000.00. His salary at WLSC for the 1996-97 school year was $52,854.00, for a nine month appointment.

Discussion

The burden of proof is upon Grievant to establish his allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987). Grievant alleged he had a contract with WLSC which allowed him to maintain a private dentalpractice, and stated he would not have moved his family to West Virginia if he had known he would not be able to maintain his income through a private practice. Grievant admitted there was no meeting of the minds as to how many hours he could devote to his private practice. Level II transcript, p. 152. He unilaterally decided that 12 hours was needed, and argues that because he has always been allowed 12 hours for his private practice, WLSC is now bound by its acceptance of this number of hours in the past to continue to allow him up to 12 hours.

The law obviously does not support Grievant's position. "The burden of proving oral modification of a written contract is on the party seeking to establish the modification, and that party must demonstrate by clear and positive evidence that the minds of the parties definitely met on the alteration. Combs v. McLynn, 419 S.E.2d 903 (W. Va. 1992)." Wells v. Kanawha County Bd. of Educ., Docket No. 94-20-149 (July 26, 1994). (Emphasis added). Grievant's unilateral decision that he should be allowed to practice 12 hours during week-days does not amount to an oral agreement. The fact that he was allowed this much time for several years, does not mean that WLSC has become obligated to provide this time to Grievant in perpetuity. By Grievant's own testimony, he was well aware that his duties to the college came first, and he could maintain a private practice only so long as it did not interfere with that obligation. Level II transcript, p. 151.

Unlike the case of Graf v. W. Va. Univ., 189 W. Va. 214 (1992), WLSC is not attempting to make Grievant cease his private practice. WLSC admits Grievant's private practice benefits the college and its students, and has made numerous efforts while this grievance has proceeded to come to an accommodation of Grievant's needs. WLSC has hired additional faculty who are able to cover some of the clinical hours so that Grievant may continue to practice during the week, and has worked with Grievant to try to develop a schedule in an effort to accommodate him. WLSC has alsosuggested, however, that Grievant could maintain evening and week-end office hours, without interfering with his obligations to WLSC.

Grievant stated he maintains office hours in his private dental practice on Saturdays and after 5 p.m., but stated that not everyone can come during those hours, so he provides week-day hours as

well. However, he has in the past provided Saturday and after 5 p.m. services only 3 to 4 hours a week or less. When asked why he could not accommodate his employer's needs by adjusting the hours of his private practice, he responded:

> Well, because, because the, the, uh, reason that we had, it just, they agreed to twelve hours, so it was, it was to me to decide what hours to schedule and, uh, you know, that was, that's the whole basis for this grievance.

Level II transcript, p. 257. He also opined that he had an ethical obligation to provide week-day hours, and made reference to emergencies. How Grievant has ever been able to respond to dental emergencies given his duties at WLSC is unclear. It would appear that an emergency has always had to wait until Grievant's classes or clinical obligations were completed, or be referred to someone else, and that would continue to be the case.

Clearly, Grievant simply does not want to work on Saturdays or evenings. WLSC is not preventing him from maintaining a private practice. Although no evidence was presented on the subject, the undersigned cannot imagine that Grievant could not find more than enough patients willing to fill Saturday and evening appointments. No one at WLSC ever agreed to allow Grievant to maintain his private practice 12 hours a week between the hours of 8 a.m. and 5 p.m., nor is it required to do so. Even if it were required to do so, Grievant has not placed any evidence into the record that he has ever been denied the ability to maintain 12 hours in his private practice during these hours. Finally, Grievant placed no evidence into the record to support his conclusion that 12hours per week in his private practice was necessary to maintain a particular level of income. Significantly, Grievant is now paid more in his job at WLSC alone than he told President Campbell he would need to make to be able to afford the move. There is no basis to this grievance.

Grievant also argued that Respondent had increased his duties over those he had been assigned when he originally accepted the appointment. Grievant's duties are and always have been to teach and supervise the clinic on a **full-time basis**. The fact that he **may** have to devote more hours to his full-time job does not change his position. The evidence does not support a finding that he works more than 40 hours a week in his position at WLSC.

Finally, Grievant alleged he was threatened by WLSC President Ronald Zacchari that if he filed a grievance, they "would go at it." W. Va. Code § 18-29-2(p) defines reprisal as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." Grievant has not alleged that this threat came

to fruition; therefore, it does not fall within the definition of reprisal. Other witnesses testified they did not perceive President Zacchari's statements to Grievant as a threat. Grievant did, however, perceive it as such. President Zacchari is cautioned that it is inappropriate to threaten employees that undesirable consequences will accompany the filing of a grievance, and he should choose his words more carefully so that employees do not perceive that they are being threatened. Grievant was not dissuaded from filing a grievance, and no relief shall be fashioned. (See footnote 2) The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to establish his allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987).
2. Grievant failed to prove he had a contract with WLSC guaranteeing him 12 hours per week per semester between the hours of 8 a.m. and 5 p.m. to maintain a private dental practice.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 31, 1997

Footnote: 1

Grievant's immediate supervisor was unable to grant the requested relief, and Grievant appealed to Level II. Three days of

hearing were held at Level II, on January 29 and 30, and February 5, 1997, and a Level II decision denying the grievance was issued February 12, 1997. Grievant waived Level III, appealing the Level II decision to Level IV on February 18, 1997. A Level IV hearing was held before Administrative Law Judge James D. Terry on July 30, 1997, and this matter became mature for decision upon receipt of Respondent's written argument on August 15, 1997. This matter was subsequently assigned to the undersigned for administrative reasons.

Footnote: 2

In an unusual move, Respondent's counsel requested at the Level IV hearing that the Administrative Law Judge require Grievant to pay witness fees to the persons he had subpoenaed. The witnesses appeared at the hearing, gave testimony, and then requested their fees. The Grievance Board's Procedural Rule 4.5 provides that the person requesting that a subpoena be issued state, in writing, when making the request, that he will accept "responsibility for service and costs (including applicable witness and mileage fees) incurred relative thereto." Grievant is responsible for payment of witness fees, including mileage, and should pay his witnesses. The undersigned is disturbed bythe interest of Respondent in seeing that Grievant incur the expense of paying witness fees. It is up to witnesses to demand payment of the fees due to them. If witness fees are not paid with service of the subpoena, or other arrangements for payment are not agreed to, a subpoena simply has not been properly served, and it is the witness' choice how to deal with this. It is not the role of Respondent or its counsel to request such payment.