**ALTON WAYNE SMITH,**

**Grievant,**

**v.** **DOCKET NO. 97-BOD-238**

**BOARD OF DIRECTORS/**

**FAIRMONT STATE COLLEGE**

## DECISION

Grievant, Alton Wayne Smith, instituted this grievance pursuant to the provisions of W. Va. Code §§ 18-29-1, et seq., alleging as follows:

> Teaching contract non renewal. I believe my contract was non-renewal [sic] because I wrote the (1) Grievance Board concerning problems at the Fairmont State College Electronic Facilities at Byrd Aerospace Center [and] (2) I wrote the F.A.A. in regards to improper operations of a school under F.A.A. 147 and Appendix “B”, F.A.A. 147.

Although not clearly specified, it appears the Grievant wishes to be granted a renewal of his teaching contract which expired at the conclusion of the spring semester of the 1995-1996 school year. After denials at the lower levels, this matter was appealed to level four on May 9, 1997. After a continuance for good cause shown, a level four hearing was held in the Grievance Board's offices in Morgantown, West Virginia, on July 23, 1997. This matter became mature upon receipt of the parties' proposed written submissions on August 11, 1997.

The following factual findings are appropriately made from the record as a whole, including all testimony and evidence submitted at levels two and four.

## Findings of Fact

1. On August 16, 1996, Grievant signed a Faculty Appointment with Fairmont State College (“FSC”) to serve in the position of “Temporary Instructor of Avionics” from August 15, 1996, until the “conclusion of Spring Semester 1997.” L II, Adm. Ex. 2. 2. Beginning in the fall semester of 1996, numerous difficulties with Grievant's performance as an instructor developed. Pieter Blood,

Interim Director of the National Aerospace Education Center ("NAEC"), testified that, after receiving numerous complaints about Grievant from staff and faculty, he met with Grievant on a number of occasions to try to correct the problems.

3. As early as January 11, 1997, Mr. Blood recommended to Dr. Leonard Colelli, Chairperson of FSC's Division of Technology, that Grievant's contract not be renewed for the following academic year, due to numerous problems with his performance. L IV, Resp. Ex. 7.

4. On March 10, 1997, Dr. Colelli made a formal recommendation to the Vice President for Academic Affairs that Grievant's teaching contract not be renewed. L II, Adm. Ex. 6.

5. A meeting was held on March 26, 1997, and individuals present were Grievant, Pieter Blood, and Dr. Colelli. Grievant was orally informed at this meeting that his contract as Temporary Instructor of Avionics would not be renewed for the 1997-1998 school year. He was "informed that his student evaluations, peer evaluations, and academic administrator evaluation indicated a history of poor performance." L II, Adm. Ex. 5. He was formally notified in a written letter from FSC's President, dated March 26, 1997, that his appointment would not be renewed for the 1997-1998 academic year and would terminate on May 10, 1997, at the conclusion of the spring semester. L II, Adm. Ex. 3.

6. Grievant contacted the Federal Aviation Administration (FAA) about alleged violations at the NAEC, specifically by a letter to Mr. James Pool, a regional FAA certification inspector in Charleston. The date of the letter is unknown, because it was not introduced into evidence.

7. Grievant attempted to initiate a grievance at level four of the grievance procedure,which was received in the Grievance Board's office in Charleston, West Virginia, on March 26, 1997, the date of Grievant's meeting with Mr. Blood and Dr. Colelli. (See footnote 1) L II, Gr. Ex. 4.

8. Mr. Blood and Dr. Colelli had no knowledge of Grievant's contacts with the FAA or the Grievance Board until Grievant informed them of the same at the March 26, 1997, meeting. The non-renewal decision was related only to problems with his performance.

## Discussion

In non-disciplinary matters, the grievant must prove his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). In addition, he must prove his employer violated some statute, policy, rule, regulation or written agreement applicable to his employment situation. Code § 18-29-2(a).

Grievant's chief allegation appears to be one of reprisal, in that he alleges his contract was not renewed due to his actions with regard to reporting the NAEC's activities to the Grievance Board and the FAA. Reprisal is defined by Code § 18-29-2(p) as "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 address it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

> (1) that he engaged in protected activity, e.g., filing a grievance;
>
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees, Docket No. 94-BOT-088 (Sept. 19, 1994). Of course, if a grievant makes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its actions. Conner, supra. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-46 (Sept. 29, 1989).

Consistent with the foregoing standards, the undersigned finds that Grievant has failed to establish a prima facie case of retaliation. Mr. Blood and Dr. Colelli testified adamantly that they knew nothing of Grievant's contact with the Grievance Board or the FAA until they were informed of this by the grievant. When Grievant mentioned this at the March 26 meeting, the decision to not renew Grievant's contract had already been made. Moreover, Grievant's contact with the Grievance Board was received at its Charleston office on March 26, indicating that it was mailed sometime within two

or three days prior to that date, so it is highly unlikely that anyone at FSC could have known about it prior to the meeting. As the record shows, recommendations to not renew Grievant's contract had previously been made on January 11, 1997, and March 10, 1997, well before he had any contact with the Grievance Board or the FAA. The record is inundated with documentation of Grievant's performance problems, much of which dates back to months before he was actually informed of the decision regarding non-renewal. A prima facie case is one which “will prevail untilcontradicted and overcome by other evidence.” Black's Law Dictionary 825 (6th ed. 1991). Grievant's evidence does not establish that any agent of his employer had actual or constructive knowledge of his activities, nor that there was any connection between Grievant's conduct and the decision to not renew his contract.

Not only has Grievant failed to make a case of retaliation or reprisal, he has not established any other basis of entitlement to continued employment with FSC. There is no dispute that the contract signed by Grievant designated him as a temporary employee only for the academic year. Regulations governing the hiring of faculty within the State College System provide for temporary appointments, which are neither tenured nor probationary, and are “only for the periods and for the purposes specified, with no other interest or right obtained by the person appointed.” 131 C.S.R. 36 § 4.2. H. Dean Peters, Vice President of Academic Affairs, explained at level four that Grievant's appointment as a temporary instructor was made pursuant to the same regulations, designating when temporary appointments may be used. In Grievant's case, “[t]he appointment [was] for the purpose of filling an essential teaching post immediately, pending a permanent appointment through a regular search and screening process. Such appointments . . . may not exceed three years and are subject to annual renewal.” Id. at § 3.7.3. Grievant has not disputed Respondent's interpretation of these regulations.

“Temporary (non-tenure-track) faculty members . . . have only the rights attendant to their current contracts.” State ex rel. Tuck v. Cole, 182 W. Va. 178, 181 (1989). In such cases, an employer may refuse to renew the employee's contract without giving a reason and without providing a hearing. Id. at 180. 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 dueprocess of law. “For [an] employee to possess a property interest in his employment he must have a sufficient expectancy of continued employment derived from state law, rules or understandings. . . . [t]he expectation must be more than unilateral.” Scragg v. W. Va. Board of Directors, Docket No. 93-BOD-436R at 2 (Jan. 30,

1996) (citations omitted). In Scragg, the grievant proved he had a property interest, because there was an expectation on the part of both parties that his employment contract would not be terminated prior to the end of the contract term.

Grievant has made no allegation in this case that he had any property interest in continued employment with FSC, nor has he argued any violations of due process. He also has not alleged any violation of the terms of the contract itself or of any law, policy or regulation governing the appointment. In fact, FSC went to great lengths to document the numerous reasons for not renewing Grievant's contract, which was neither necessary or required. Grievant was allowed to serve the full term of his contract and was advised well in advance that it would not be renewed. He was not entitled to any reason for the non-renewal decision, and he has not established any basis for entitlement to continued employment with FSC.

In accordance with the foregoing findings and discussion, the following conclusions of law are made in this matter.

## Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. Reprisal is defined by Code § 18-29-2(p) as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itselfor any lawful attempt to address it.” A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon-Nezhad v. W. Va. Bd. of Trustees, Docket No. 94-BOT-088 (Sept. 19, 1994).

3. Grievant did not establish a prima facie case of reprisal.

4. Grievant's appointment as Temporary Instructor of Avionics was “only for the periods and for the purposes specified, with no other interest or right obtained by the person appointed.” 131 C.S.R. 36 § 4.2.

5. Grievant has proven no right to continued employment with Fairmont State College, nor has he established that Respondent violated any statute, policy, rule, regulation or written agreement applicable to his employment. See Code § 18-29-2(a).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred, 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.

**DATE: September 11, 1997** _____ **V.**

**DENISE MANNING**

**Administrative Law Judge**

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*Footnote: 1*

*A copy of this grievance was not introduced, but the undersigned has deduced from the record that it related to Grievant's complaints about how the NAEC was being operated.*