TED WHITAKER,
Grievant,

v. **Docket No. 99-BOD-231**

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,
Respondents.

D E C I S I O N

Grievant, Ted Whitaker, grieves the decision of West Liberty State College ("WLSC") to not renew his temporary teaching contract of employment. The first, undated Statement of Grievance explained:

> My immediate supervisor, Mr. Nick Baker, has failled (sic) to give me a written evaluation of my work performance. He has recommended to the Dean of Natural Sciences, Dr. Andrew Cook[,] that I not be given a contract to teach at WLSC for AY 1999-2000.(sic) without revealing to me the reasons for his decision. I have requested these reasons from him verbally and in writing. I have not received a response. . . .

No relief sought was stated. This Statement of Grievance was revised on March 2, 1999, and this Statement of Grievance says:

> I am entitled to a timely and a written review of work perform like accord (sic) to law prior to an decision about renewal. (sic) per 5300 was given a time to recovery (sic). was a mentor (sic). RELIEF SOUGHT: writen (sic) statement of criterion for the desion (sic) not to renew the contract.

A Level I Decision was issued by Dr. Charles N. Baker, Grievant's immediate supervisor, on March 12, 1999. Grievant was informed he would be evaluated at the same time as all other faculty, and Dr. Baker was recommending Grievant's non-renewal of his contract for the 1999-2000 academic year.[1] A Level II hearing was held on April 14, 1999, and a Level

[1]No information was given about this evaluation, and Grievant made no further request for this evaluation during the Level IV hearing. It is assumed this evaluation was performed.

II Decision denying the grievance was issued on April 19, 1999. Level III was waived. Grievant appealed to Level IV, and a hearing was held on October 28, 1999, in the Grievance Board's Wheeling office.

At that hearing, Grievant stated the only issues he wished to pursue were detrimental reliance, and whether WLSC violated his rights when it issued him a temporary contract for a non-temporary position.[2] The relief sought was changed to reinstatement to a teaching position for the 1999-2000 academic year, and "all salary and benefits to which he is entitled." Respondent objected to this major change in the requested relief, and the undersigned Administrative Law Judge took the issue under advisement to be resolved later.[3] This case became mature for decision on November 24, 1999, after receipt of the parties' proposed findings of fact and conclusions of law.[4]

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, who has a PhD in chemistry, applied for an advertised position at WLSC. He was selected from a small pool of candidates.

2. On August 25, 1998, Grievant signed a teaching contract "in accordance with the provisions of Policy Bulletin No. 36" which stated the appointment was,

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[2]All other issues were abandoned, including the class action aspect of the grievance filed at Level IV.

[3]It is not necessary to resolve this issue due to the decision in this grievance.

[4]Grievant was represented by Attorney William Fahey, and Respondent was represented by Kristi Rogucki, Assistant Attorney General.

"TEMPORARY: AN APPOINTMENT FOR PERIODS AND PURPOSES SPECIFIED". This contract additionally stated: "This appointment commences AUGUST 16, 1998, ends MAY 16, 1999." Resp. Ex. No. 1, at Level II.

3. During Grievant's hiring interview, it was made clear to him that his contract would be temporary, and there were no guarantees or assurances that another contract would be offered the following or subsequent years.

4. WLSC has many tenured faculty, and because of this fact routinely fills full-time teaching positions with temporary faculty members. WLSC has also recently hired only temporary faculty in order to maintain flexibility in scheduling, as the needs of its student body are changing, and there have been dramatic changes in enrollment needs in recent years. The request for certain courses, particularly in the sciences, has decreased substantially.

5. Dr. Norman Clampett, a colleague of Grievant's, told him that temporary contracts were routinely renewed. This colleague does not have any supervisory authority over Grievant.

6. In January, Dr. Baker talked to Grievant about teaching the Summer Semester. Grievant did not want to do this, but eventually verbally agreed to do so. A contract was never signed, and this is required, as the Summer Semester is completely separate from the regular academic year.

7. In early February, Dr. Baker informed Grievant his services would not be needed after the 1998-1999 academic year.

8. Grievant's name appeared on a provisional Summer Semester schedule, but not on the official Summer Semester schedule. Grievant was not hired to teach during the Summer Semester.

9. Grievant's name appeared on a provisional Fall Semester schedule, but not on the official Fall Semester schedule. Grievant did not receive a contract for the 1999-2000 academic year.

10. In April 1999, WLSC advertised for a faculty member in organic and biochemistry. This advertisement was either the same or substantially similar to the one that resulted in Grievant's temporary employment.

11. Grievant applied for the position for the 1999-2000 academic year, but was not hired.

Issues and Arguments

Grievant argues the statements of Dr. Clampett, the discussion of teaching the Summer Semester and his placement on the Fall schedule induced him to believe he would be retained the following academic year. Grievant agrees no one in a position of authority told him his contract was other than a nine month academic year contract, and he agrees no promises of continued employment were stated. He does however argue these promises were implied through the discussions of the Summer Semester and questions about what his wife did for a living.

Grievant also argues it is illegal for WLSC to hire temporary faculty to fill full-time positions, and argues there is no provision for these types of contracts in the statutes governing higher education. Grievant maintains the use of these types of appointments robs temporary faculty of their due process rights and an opportunity to improve their

teaching abilities. Grievant also argues the regulations governing temporary positions in Policy Bulletin 36 were violated as Grievant's contract falls outside the exceptions for temporary contracts.

Respondent notes the Grievance Board does not have the necessary subject matter jurisdiction to declare Policy Bulletin Series 36 invalid. Respondent also asserts Grievant's temporary contract falls within the conditions for these contracts stated in Policy Bulletin Series 36. Respondent maintains Grievant was clearly informed about his contract, and what the expectations were for renewal.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

The issues and arguments will be discussed separately.

A. Subject Matter Jurisdiction

This agency has previously noted that "[a]s an administrative agency, the West Virginia Education and State Employees Grievance Board does not have jurisdiction to declare an administrative rule promulgated through the legislative rule-making process invalid or unconstitutional. Boyles v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-027 (July 15, 1998); Wilson v. W. Va. Dep't of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dep't of Transp., Docket No. 89-DOH-605

(May 22, 1990)." Elswick v. Boone County Bd. of Educ., Docket No. 98-03-395 (Jan. 29, 1999).

In this incidence, the policy at issue, Policy 36, is a Procedural Rule which has not been "promulgated through the legislative rule-making process." Thus, the standard of review is somewhat different. It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA-420 (May 7, 1998). See generally Blankenship, supra; Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993). Thus, WLSC's and the Board of Director's interpretation of its policy is entitled to deference by this Grievance Board, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Dyer, supra.

In these circumstances, the undersigned administrative law judge must defer to WLSC's and the Board of Director's interpretation of this policy. Grievant has not demonstrated that such interpretation is clearly wrong and/or arbitrary and capricious. Additionally, the interpretation is not contrary to the plain meaning of the language. See Blankenship, supra. However, the undersigned Administrative Law Judge can and will examine the rules and regulations contained in Policy 36 to see if they were properly applied to Grievant.

B. Temporary Contract

The hiring of temporary faculty is governed by Policy Bulletin Series 36. Section 3 states that faculty fall into three categories: tenured, tenure-track, and temporary. Section 3.2.3 defines temporary positions as:

> Temporary: Those faculty members who have not been appointed in a tenure-track, or tenured status. Their appointment may be full-time or part-time. Temporary faculty shall also include academic professionals, whose primary duties are non-instructional, but who hold a secondary appointment that is instructional in character. No number of temporary appointments shall create any presumption of a right to appointment as tenure-track or tenured faculty.

Section 3.7 states "[t]emporary full-time faculty appointments may be used only if one or more of the following conditions prevail." The condition at issue in this grievance is Section 3.7.4 which states:

> The position is temporary to meet transient instructional needs, to maintain sufficient instructional flexibility in order to respond to changing demands for courses taught, or to meet other institutional needs. The appointee is to be so notified at the time of the appointment. Such appointments are outside tenure-track status, are subject to annual renewal, and may not exceed six years.

Section 3.8 states, "[a]ppointment or reappointment to a temporary faculty position shall create no right or expectation of continued appointment beyond the one year period

of appointment or reappointment." Section 4.2 further clarifies this issue and states, "[a]ll temporary appointments, as defined in Section 3 of these rules shall be neither tenured nor tenured-track, but shall be appointments only for the periods and for the purposes specified, with no other interest or right obtained by the person appointed by virtue of such appointment."

The West Virginia Supreme Court of Appeals has indicated that "West Virginia has set out a very specific system of procedural protections that apply to different carefully defined categories of college employees." State ex rel. Tuck v. Cole, 182 W. Va. 178, 181, 386 S.E.2d 835 (1989)(citing W. Va. Code §§ 18-26-1 et seq. [1969, rep. 1989] and W. Va. Bd. Regents, Policy Bulletin Series 36 (March 5, 1981)). The West Virginia Supreme Court of Appeals also noted in Tuck that administrators and "[t]emporary (non-tenure-track) faculty members . . . have only the rights attendant to their current contracts." In such cases, an employer may refuse to renew these types of employee contracts 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 due process of law." Smith v, Bd. of Directors/Fairmont State College, Docket No. 97-BOD-238 (Sept. 11, 1997). "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. Bd. of Directors/ W. Va. State College, 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. See Smith, supra; Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997).

Here, Grievant was allowed to serve the full term of his contract and was advised well in advance that his contract 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 WLSC. Smith, supra.

Grievant argues the term, "transient instructional needs", is being "perverted" to apply to a permanent position. He maintains the courses to be taught have not changed, and the sole reason for this pattern is "to deprive new educators of all statutory protections." No specific violation of a Code Section is cited or referred to in this allegation.

While it is true that temporary faculty have few rights, and tenured and tenure-track faculty have many, temporary faculty are told this when they are hired. By signing the contract they have agreed to be employed in this capacity with the inherent limitations. Grievant agrees he was informed the contract was temporary, and no one forced him to sign his contract to become a temporary faculty member at WLSC.

Dr. McCullough also explained the pool of candidates was very small when Grievant applied, and with a small pool of candidates, it is often difficult to find a match or fit between the institution's instructional needs and the applicant's abilities. WLSC then selects the best applicant from the pool. At the time Grievant was hired, WLSC would have preferred someone with teaching experience which Grievant did not have. Since this was not an option, Grievant was selected.

Grievant's view of Section 3.7.4 is too narrow and fails to consider the entire section. It focuses only on "transient instructional needs". The complete Section states: "The

position is temporary to meet transient instructional needs, to maintain sufficient instructional flexibility in order to respond to changing demands for courses taught, or to meet other institutional needs." (Emphasis added.) Clearly there are three reasons for a temporary appointment. Dr. McCullough testified that WLSC had a high number of tenured faculty and used temporary faculty to provide instructional flexibility. He discussed the changing demands for courses taught, and also noted enrollment in science courses was limited.

Grievant has failed to show that his temporary position falls outside the conditions identified in Section 3.7.4 of Policy Bulletin Series 36. The use of temporary faculty was discussed and accepted in Tuck, supra. The use of temporary faculty allows the colleges and universities of West Virginia to meet the needs of their students, while providing flexibility in courses taught and maintaining the ability to change with students' demands and requirements.

C. Detrimental Reliance

It is clear Grievant's argument of detrimental reliance must fail. He was never told anything other than his contract was a temporary one, and was clearly informed that there were no assurances or guarantees for a subsequent contract. The contract states on its face that it was temporary and was to last the nine months of the academic year. Grievant even agrees that no one promised him otherwise, but instead tries to rely on the statements of a colleague, vague references to his wife's employment, and discussions of possible class assignments for the following year. Grievant was informed in February that his services would not be required after the 1998-1999 academic year. This is sufficient notice, and more than Grievant was entitled to. Indeed, Grievant received notice of the termination of his contract when he signed it and during the application process.

"Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence." Syl. Pt. 3, Adkins v. Inco Alloys Int'l Inc., 187 W.Va. 219, 417 S.E.2d 910 (1992). See Syl. Pt. 2, Helmick v. Broll, 150 W.Va. 285, 144 S.E.2d 779 (1965) Grievant has failed to show that his belief of continued employment was more than "an abstract need or desire" or "a unilateral expectation", and as such he can not demonstrate by clear and convincing evidence that he had any reason to expect he would be employed for the 1999-2000 academic year. Bd. of Regents v. Roth, 408 U.S. 564 (1972); See Perry v. Sinderman, 408 U.S. 593 (1972).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981).

3. Where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA-420 (May 7, 1998). See generally Blankenship, supra; Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

4. Grievant has not shown WLSC's and the Board of Director's interpretation of its policy is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Thus, it is entitled to deference by this Grievance Board. Dyer, supra. See Blankenship, supra.

5. Grievant's appointment as a temporary faculty member was "only for the periods and for the purposes specified, with no other interest or right obtained by the person appointed." Policy Bulletin Series 36.

6. Grievant's employment with WLSC met the conditions identified in Policy Bulletin Series 36, Section 3.7.4.

7. Grievant has proven no right to continued employment with WLSC, nor has he established Respondent violated any statute, policy, rule, regulation, or written agreement applicable to his employment. See W. Va. Code § 18-29-2(a). He has identified no statute, rule, policy, regulation or written agreement which granted him any right to continued employment once his contract expired. See Smith v, Bd. of

Directors/Fairmont State College, Docket No. 97-BOD-238 (Sept. 11, 1997); Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997).

8. WLSC did not engage in any behavior that would or should have caused Grievant to believe his contract for the following academic year would be renewed.

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. Any 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS
Administrative Law Judge

Dated: January 11, 2000