WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SYED KAIFEE FAREED,
Grievant,

v. **Docket No. 2010-1475-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Syed Kaifee Fareed, filed this grievance at level one on May 19, 2010, when he was notified that his residency contract with West Virginia University would not be renewed for a second year. Grievant seeks the "issuance of one year internship certificate. Renewal of contract. Grievant reserves the right to supplement this statement in the future."

Following a conference at level one on May 28, 2010, the grievance was denied on July 8, 2010, by Sue Keller, Respondent's Chief Grievance Administrator. Level two mediation was conducted on September 17, 2010. Appeal to level three was perfected on September 30, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on April 4, 2011, at the Grievance Board's Westover office. Grievant appeared at the hearing *pro se.* Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. The matter became mature for consideration following receipt of Respondent's Proposed Findings of Fact and Conclusions of Law on May 3, 2011. Grievant did not file proposals.

Synopsis

Grievant asserts he was entitled to three years of employment in the Internal Medicine Residency Program at the West Virginia University School of Medicine. Grievant

was unable to produce any evidence of a three-year contract or a guarantee of continued employment. Respondent counters that Grievant's contract was not renewed because his performance was unacceptably deficient in medical knowledge, clinical judgment, and patient care. Grievant did not meet his burden of proof to show any entitlement or right to have his contract renewed for a second year, or that Respondent's decision was arbitrary and capricious. This grievance is denied.

The following findings of fact are based upon the record of this grievance.

Findings of Fact

1. Grievant graduated from Quid-a-Azam Medical College in Bhawalpur, Pakistan in 1988. He completed two residency programs in Karachi, Pakistan; a six-month program in general surgery in 1989, and an Opthalmology residency from September 1989 to September 1990.

2. In 2009, the Department of Radiology was engaged in recruiting Grievant's wife. As an incentive for her to accept employment at West Virginia University ("WVU"), the Department agreed to provide funding for Grievant's assignment in the Internal Medicine Residency Program at the WVU School of Medicine. Grievant assumed his duties as a first year resident ("PGY1") effective July 1, 2009.

3. Internal Medicine Residency is a three-year program which encompasses the following content areas: Cardiology; Endocrinology; Gastroenterology; General Internal Medicine; Geriatrics; Hematology/Oncology; Infectious Diseases; Nephrology; Neurology; Pulmonology; and Rheumatology. Participants are categorized as interns during the first year, and residents the remaining two years.

4. Prior to awarding certification, both the American Board of Internal Medicine

("ABIM") and the Accreditation Council for Graduate Medical Education ("ACGME") require documentation that the resident is competent in: patient care (medical interviewing, physical examination and procedural skills); medical knowledge; practice-based learning and improvement; interpersonal and communication skills; professionalism; and systems-based practice.

5. Grievant signed a one-year "Residency Agreement" that began on July 1, 2009, and ended on June 30, 2010. The contract stated, in pertinent part, the following:

> "It is understood and agreed that the term of this Residency Agreement shall not exceed one (1) year. The Hospital may choose to offer and the Resident Physician may choose to accept a Residency Agreements for additional terms throughout the course of the Resident's Physician's Residency or Fellowship training. It is understood and agreed that a new Residency Agreement must be entered into for each year and signed and dated within thirty (30) days of initial date applicable residency year. WVUH and or WVU does not represent, warrant or guarantee that it will offer to renew a Residency Agreement with the Resident Physician for any additional term, nor is it obligated to renew or extend this Agreement for any additional terms."

6. Interns and residents are assigned month-long rotations in various specialities and settings during this phase of their medical education. Faculty members evaluate the residents at the end of the rotation, rating their performance on a scale from unsatisfactory up to superior. Comments expressing the rater's overall impression of the resident's clinical competence are requested. Interns are also subject to peer reviews in which the same evaluation forms are used.

7. The WVU Internal Medicine Residency Program Academic Discipline and Dismissal Policy provides that a resident may be placed on probation after documented counseling if he or she is not performing at an adequate level of competence. If at the end of the initial period of probation, the resident's performance remains unsatisfactory,

probation may be extended or the resident may be suspended or dismissed from the program.

8. In late June 2009, Grievant was notified that Internal Medicine orientation was scheduled to begin at 8:00 a.m. on June 29, 2009. When Grievant had not arrived by 8:25, Sheri Campbell, Internal Medicine Residency Coordinator, attempted to contact Grievant by cell phone and pager, before she called the main desk at the hotel where he was staying and asked to be connected to his room. When asked why he was not at orientation Grievant claimed that he did not know about the orientation. He eventually arrived at 9:30 a.m.

9. Beginning July 1, 2009, Grievant was assigned to Nephrology consultation. His faculty evaluations for that rotation noted that Grievant "obviously needs to learn at this time about the system of patient care. He had a difficult month with nephrology consults, but his medical knowledge was good. Had difficulty gathering information with the electronic medical chart." Respondent's Exhibit 8, level one.

10. In August, Grievant was assigned to Medical Group Practice ("MGP") where he worked only fifteen days, taking vacation the remainder of the month. His ratings were lower than those of July, and he continued to experience difficulty with the Merlin software program used by WVU Hospitals for patient care. Faculty who worked with him in August stated that "overall, I thought Grievant was not quite at the overall level needed/expected to successfully function in our system." Another commented that Grievant "needs to improve with history taking and presenting the same in an organized manner. Examination skills need to improve. Satisfactory knowledge base. Also needs to improve on time management and show eagerness/improve attitude and enthusiasm for learning medicine."

Respondent's Exhibit 8, level one.

11. In September, Grievant was assigned to Infectious Diseases consultation. Although one faculty member found Grievant's performance to be "not too bad," another rated him "exceptionally weak," noting:

> [Grievant] had many difficulties in patient care. He has been away a long time from clinical medicine and his background is in ophthalmology. He had difficulty gathering information from patients with complex medical problems. His workups were inadequate. His ability to integrate clinical information was limited. He told me that he had shorter training in Merlin. I could not give him more patients because he was unable to function independently. His medical knowledge was below average but he was interested in learning. He has some problems with tardiness. He told me that he lives 30 minutes away. He was counseled regarding this. [Grievant] did not perform adequately. He will need additional help in reviewing records of patients with complex issues and learning to integrate information. He needs to expand his knowledge base. He will also need to learn to accept feedback and make improvements. He will benefit from more training with Merlin.

Respondent's Exhibit 8, level one.

12. By letter dated September 29, 2009, Dr. Nuss notified Grievant that the Program Directors of the Department of Medicine had reviewed his performance, and concerns were raised regarding whether he had attained satisfactory achievement in the areas of patient care; systems-based practice; professionalism; interpersonal and communication skills; and, practice-based learning and improvement. Grievant was provided with a remediation plan which included assigned faculty/resident mentors and additional reading.

13. Grievant's performance on the 2009 Internal Medicine In-Training Examination was 39% correct responses, placing him in the second percentile. Most interns ranked at or about the 50th percentile.

14. In January 2010, Grievant was assigned to Med 5 (wards) where he was

primarily responsible for patient care. He completed the rotation with additional supervision. One evaluator stated that Grievant:

> Means well but needs very close supervision by resident. Has been out of internal medicine for a long time. Some large deficits exist that will need to be improved. Does want to get better and did demonstrate some improvements through the month. Needs to give more concise presentations, but did improve some. The resident had to help him a lot in this area in terms of knowing the details of the patients PMH. Is a nice guy who tries hard to get better . . . there are large deficits that will need to be corrected before he can move up to a junior resident level.

Respondent's Exhibit 8, level one.

15. Memorializing a meeting with Grievant and Dr. Tony Parravani on January 11, 2010, Dr. Nuss noted to Grievant by letter that same date that:

> Dr. Parravani and I shared at the end of the meeting that you continued to be ranked well below average in comparison to other interns in our training program. We did agree you have been working exceptionally hard to improve your areas of deficiency and that in talking with faculty that have been supervising you, there has been some improvement from 3 months ago.
>
> At the conclusion of the meeting, I explained that you would continue to be on probation and have to (at a minimum) repeat your intern year in order to gain the competency level to function as a PGY2 resident. Your first ward month was pushed back to January 2010 because of your weaknesses in many of the core competencies. Although you are improving, you are clearly lagging behind all the other interns in our program areas.
>
> Lastly, I also shared with you that the Education Committee for the Dept of Medicine would be convening in February 2010 to review all the residents in the program to see if they should be promoted to the next year, and to see if any intern or resident should be recommended for 'non-renewal' of their contract. This committee makes recommendations to me and the Chair of Medicine who have the final authority in this decision.

Respondent's Exhibit 8, level one.

16. On February 11, 2010, Dr. Timothy Jackson expressed his concern regarding Grievant to Dr. Anthony Parravani:

> Jonathan asked that I communicate with you concerning our intern, Dr. Fareed and the issues are as follows:
>
> 1) He has been late or absent on a number of occasions. Admittedly the weather has been bad but none of our other residents have failed to show up for call or picking up night float. He failed to come in on 2-6-8 a Saturday when the team was on call for the day. He did not come in on the 7th for rounds but since he was not in on the 6th it is not surprising. On the 9th, the team took night float and he arrived after 8 am and matter of factly asked the resident which patients have been assigned to me. Also, on the 11th, with more snow, he did make it in (reportedly) by driving his wife's 4 wheel drive automobile. My question is why was that not used the other days.
>
> 2) He is extremely confident of his knowledge base but when probed he is deficient in basic medical knowledge and management issues. He is slow, but I might also be with the computer. Slowness is ok if it gets the work done but I am not sure he does that.
>
> 3) His communication skills are such that I am not sure he listens to my instructions hears them or possibly does not understand the instructions. I do not know if this is arrogance on his part or a defense mechanism to nod his head so that he does not appear deficient or that he does not listen and does not care.
>
> 4) He has a tremendous culture gap, which is far worse than I have noticed with other residents with similar background. My sense is that it is due to his age since he is being ordered around by younger people and he resents it.
>
> 5) The biggest issue is that I am not sure this man knows what to do with patient's care. I do have an excellent resident who may take care of more than he should but I feel that he is doing this to make sure it is done correctly and in a timely manner. [Grievant] does not know what he does not know. This is dangerous. If one understands that one is an intern and that they are early in their career, I have no problem with them asking questions and getting help. If there is confusion on his part or ignorance that is what the resident and I need to address. My concern is that he thinks he is ok and needs no help. This is arrogance and is the problem.

Respondent's Exhibit 8, level one.

17. By letter dated February 18, 2010, Dr. Nuss advised Grievant that the Department of Medicine at WVU had determined to not promote Grievant to the second year residency program. It was noted by Dr. Nuss that Grievant lacked the ability to

manage an average intern's patient load after completion of seven months of internship. In addition, faculty and senior resident colleagues did not feel Grievant had the skill set necessary to succeed as a second-year resident.

18. On February 22, 2010, Dr. Nuss removed Grievant from the inpatient medical ward service rotation. This was due to Grievant's failure to follow proper procedure by informing the chief resident that he would be absent from work. In addition, Dr. Nuss cited doctors' concerns about Grievant's patient care as well.

19. At the conclusion of the February rotation Dr. Jackson rated Grievant at the lowest possible score on all seven factors. He explained that Grievant is:

> unprepared to be an internist and worse he has no interest in improving. Why he is in the program is unclear to me but he acted as if he did not need to improve or care. Since he did neither improve or care he missed multiple days, forced the resident to do his work and in general was a burden on our service. He should be removed from any clinical duties since he is a danger to patients if he acts without supervision. If [Grievant] wanted to be an internist he would have been far more energized in reading, asking questions, etc. Instead he was consistently passive as if he did not care.

Respondent's Exhibit 8, level one.

20. Grievant was assigned to Emergency Medicine in March 2010. On March 15, Dr. Jack Ditty advised Dr. Nuss that in mid-cycle he found Grievant:

> to be very far behind his colleagues in terms of medical knowledge and practical knowledge about working within our system. At first I thought it might be a language barrier issue, but it seems to be much deeper than that. Even when his history and physical exam were correct, he did not have appropriate ideas for a differential diagnosis or management plan for the patient. He tries hard and seems interested in learning, but he is not ready to make independent decisions about patient care, in my opinion.

Respondent's Exhibit 8, level one.

21. At Grievant's request he was placed in an Intensive Care Unit for his April rotation. Assigned to the Cardiac Care Unit, Grievant mishandled a patient who was admitted with heart failure, and Dr. Wissam Gharib, head of the unit, would no longer accept Grievant in the unit. Grievant was removed, effective April 9, 2010, and reassigned to Dermatology. There he was rated as "marginal" in competence. Dr. Roxann Powers found that Grievant:

> demonstrates good knowledge base in some areas, but significant lack of understanding in others. Whereas he can answer questions, he sometimes does not seem to grasp the larger picture.
>
> One example was his presentation of a patient seen in dermatology clinic who is being followed for possible mycosis fungodes. [Grievant] mentioned an additional history of a pigmented nevus of Reed (which I did not recall); Review of the electronic medical record found that he was referencing another patient with the same name but a different medical record number and birth date. When presented with this information [Grievant] replied that perhaps the patient had changed his number or birth date.
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> The reference used for [Grievant's] oral presentation about a medication used in dermatology was from Wikipedia. I advised him about this being a bad resource after which he re-did his handout using another reference.

Respondent's Exhibit 8, level one.

22. On April 29, 2010, Dr. Nuss advised Grievant that, based on a recommendation from the Department of Medicine's Academic and Professional Standards committee, his contract would not be renewed for the 2010-2011 academic year. Respondent's Exhibit 2, level one.

23. Due to patient safety concerns, Grievant was removed from all clinical duty and assigned to Radiology for his May and June rotations.

24. WVU has no duty nor requirement to offer a second year appointment to any resident, regardless of their performance ratings.

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).

At level three, Grievant obtained subpoenas for Dr. Shelley Nuss, Dr. Timothy Jackson, Dr. Joel Yednock, Dr. Jack Ditty, and a subpoena duces tecum for Dr. Norman Ferrari. However, Grievant failed to read the cover letter explaining that he was responsible for service of the subpoenas. Dr. Nuss was the sole witness for Respondent at level three. It was explained to Grievant that the undersigned would reschedule the hearing in order to give Grievant sufficient time to serve his requested subpoenas. Grievant declined this offer and proceeded with the level three hearing. It should noted in this case Grievant was advised at level one of the need to develop the record of his case with evidence relevant to the matter.

In any event, Grievant did offer exhibits, presented complaints, observations, and allegations, including the following:

● His wife left a job with a $400,000 baseline salary to work at WVU for $245,000 as part of a deal in which he would be offered a position in internal medicine for which the Department of Radiology agreed to pay him $60,000 a year. He stated that the arrangement was a very confidential agreement between the departments, but that the majority of the people in internal medicine were aware of his situation upon his arrival, placing him in an awkward and difficult situation.

● In September, he was fasting for Ramadan and fighting jet lag, having returned from visiting his mother in Pakistan.

● He was targeted for failure as established by the fact that many faculty members were precluded from evaluating him. Specifically, in April only five of twelve individuals

filed evaluations, Grievant believes that they were chosen, and the rotation was fixed to arrange this.

● He was placed in Dermatology against his wishes as Dr. Gharib's sister is a resident in that department, and most of the people were aware that he had been removed from the Cardiac Care Unit at her brother's request.

● He was told he would need to repeat the entire year so late it was impossible for him and his wife to find jobs at the same hospital.

● Dr. Nuss hampered his learning process by assigning him to radiation rotation for two consecutive months, when he could have worked in palliative care, sports medicine or rheumatology.

● Interns of his own ethnicity and religion had not been given an opportunity to evaluate him.

● Grievant opined that his performance had been satisfactory, or better. He claimed to have identified an issue previously overlooked on a cardiac patient in April, and suggested that Dr. Gharib removed him to protect the resident who should have noted it.

● Dr. Nuss stopped him from helping poor and needy patients financially. When they could not afford co-payments, he covered it. He states that Dr. Pelligrino advised him that his intent to pay for a CAT scan for a patient could lead to complications, and Dr. Nuss advised him that it would get him and the hospital in trouble.

● He did not come to work when he suffered from conjunctivitis and during bad weather because he claimed his supervising resident told him not to risk his life and stay home.

● Grievant opined that Dr. Nuss has a deep-rooted hatred against him, and that he was set up to fail.

WVU asserts that Grievant was not renewed for his second year of residency because his performance was so weak in medical knowledge, clinical judgment, and patient care that he was globally incompetent to proceed to the second year of the program. In fact, Dr. Nuss indicated that in her ten years experience as head of the residency program, Grievant was by far the most incompetent and worst performing resident that she had ever supervised.

Continued employment as a resident is contingent upon satisfactory educational progress demonstrated during the various rotations and the promotion to the next level of residency. After reviewing Grievant's performance for March and April, the Academic and Professional Standards Committee members determined that not only had Grievant failed to meet the established criteria for promotion, but that his performance was so poor that repeating the first year was no longer an option. The committee noted significant ongoing issues with Grievant's performance primarily in the areas of patient care and medical knowledge. Despite faculty and resident mentoring on a regular basis, additional readings on various topics, regular core conference attendance, and almost one-on-one supervision when on wards, Grievant's deficiencies were not improving.

Without repeating PGY1 or promotion to PGY2, Grievant's continuation in the Internal Medicine Residency Program was necessarily ended. The undersigned concludes that, based upon the record of this grievance, the Respondent's decision to not renew the contract of employment of Grievant cannot be viewed as arbitrary and capricious, or an abuse of its broad discretion.

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).

2. 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).

3. Grievant failed to prove by a preponderance of the evidence that WVU's decision to not renew his residency contract was arbitrary and capricious.

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 (2008).

Date: June 24, 2011

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Ronald L. Reece
Administrative Law Judge