THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANA STOKER COCHRAN,
Grievant,

v. **Docket No. 2010-1197-BSC**

BLUEFIELD STATE COLLEGE,
Respondent.

DECISION

This grievance was filed by Grievant, Dana Stoker Cochran, on March 5, 2010, against Respondent, Bluefield State College ("BSC"). Grievant states that BSC's reason for not renewing her employment contract as Visiting Assistant Professor of English was without foundation and invalid. Grievant seeks renewal of her employment contract for the Fall 2010 semester, continuing until she has obtained a doctorate degree.

A level one conference was held on July 8, 2010. The grievance was denied at level one on July 10, 2010. A level two mediation was held on November 5, 2010. A level three hearing was held on February 18, 2011 in Beckley, WV. Grievant appeared *pro se*, and Respondent was represented by James "Jake" Wegman, Esq., Assistant Attorney General. This matter became mature for decision on March 28, 2011, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts that BSC's decision not to renew her contract as Visiting Assistant Professor of English was unjust, invalid and without merit. Although, Grievant does not dispute the temporary nature of her visiting position, nor does she dispute that a visiting position carries no expectation of renewal. Grievant asserts statements and actions by

BSC led her to believe the position would be renewed while she was pursuing a doctorate degree. Respondent argues that it was under no obligation to renew a visiting instructor's temporary contract upon expiration. Respondent also asserted that its decision not to renew the temporary contract was not arbitrary and capricious and was based upon justifiable financial reasons. Grievant has failed to meet her burden of proof. This grievance is DENIED.

Findings of Fact

1. Grievant was employed by Respondent as a non-tenured track Visiting Assistant Professor of English.

2. Grievant was initially offered employment as a Visiting Assistant Professor of English for the 2008 fall semester.

3. Grievant renewed her contract for the fiscal year 2009-2010 with the stated end date of May 14, 2010.

4. The renewal contract stated that Grievant held "term" employee status.[1]

5. By email dated February 8, 2010, Grievant was informed by Dr. Tamara L. Ferguson, Dean of the School of Arts and Sciences, that her contract would not be renewed for the following year. In an attempt to explain that the decision was financially based and that her job performance had been excellent, the email erroneously indicated that Grievant's salary was paid by Title III funds.[2]

6. By email dated February 15, 2010, Dean Ferguson clarified her February 8,

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[1]Grievant's Exhibit No. 6

[2]Grievant's Exhibit No. 4

2010 email by informing Grievant that her position was funded by the College Fund, not Title III funds. The email also stated that professors funded by Title III were being shifted from Title III funding to the College Fund.[3]

7. By letter dated March 8, 2010, Dr. Felicia Wooten Williams informed provost Dr. Don Smith, "...funds for the Title III positions expire on September 12, 2012. Please make arrangements to end the positions and/or transition these positions to other sources of funds."[4]

8. Grievant does not dispute that she was hired in a non-tenured track position which carries no expectation of renewal as stated in West Virginia Higher Education Policy Commission Procedural Rule and Bluefield State College's Board of Governors Policy No. 19.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, West Virginia Public Employees Grievance Board Procedural Rule, 156 C.S.R. 1 § 3. "The 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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

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[3] *Id.*

[4] Respondent's Exhibit No. 3

"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, 180, 386 S.E.2d 835, 837 (1989). "Temporary (non-tenure-track) faculty members . . . have only the rights attendant to their current contracts." *Tuck*, 182 W.Va. at 181, 386 S.E.2d at 838.

In *Tuck*, the employee had a temporary faculty contract that the College did not extend. In rejecting the employee's claim that he had a property right to his job, the Court stated that the employee's "property right in employment ended when his contract with the College ended . . . ." *Id*. For a property right to exist, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Tuck*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, "the employer may refuse to renew." *Id*.

In *Whitaker v. Board of Directors/ West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), the employee grieved West Liberty State College's decision to not renew his temporary teaching contract of employment. The *Whitaker* grievant had signed a teaching contract that specified his teaching appointment was temporary. Grievant, in the present case, signed a faculty contract that specified her appointment status was term. West Virginia Higher Education Policy Commission Procedural Rule, 133 C.S.R. 9 § 3.2.5 states that a "term" faculty member is appointed as instructional faculty for a specified term as defined by the institution. The Procedural Rule continues to verify that no number of term appointments create any presumption of a right to appointment as tenured-track or

tenured faculty.[5] Furthermore, Grievant's contract clearly stated a start and end date, the end date being May 14, 2010. In *Whitaker*, the ALJ stated, "[f]or [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 understanding . . . [t]he expectation must be more than unilateral." *Id*. (citations omitted). By signing the contract they have agreed to be employed in this capacity with the inherent limitations." *Id*. *See also Kloc v. Bd. of Trustees/WVU*, Docket No. 96-BOT-507 (Aug.20, 1997); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept.11, 1997).

The *Whitaker* grievant also claimed that he had a property right in his position due to the reliance he placed on various statements of college officials that led the grievant to believe his contract would be renewed. In rejecting this detrimental reliance argument, the ALJ noted that the *Whitaker* grievant's "contract states on its face that it was temporary and was to last the nine months of the academic year." *Whitaker*, *supra*. Therefore, "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 practices, such claim must be established by clear and convincing evidence." *Id*. *citing Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). The ALJ finally determined that grievant 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 cannot demonstrate by clear and convincing evidence that he had any reason to expect he would be employed for the 1999-2000

[5]Respondent's Exhibit No. 1

academic year." *Id*.

Grievant testified that she relied upon a verbal conversation with provost Dr. Don Smith as commitment from Respondent for the continued employment of Grievant. Grievant testified that Dr. Smith led her to believe her position as Visiting Assistant Professor of English would continue as long as Grievant fulfilled the requirements of receiving good evaluations and pursuing her PhD. Grievant has received good evaluations and is actively pursuing her PhD. Dr. Smith was not called as a witness at the level three hearing. No evidence was introduced to show contractual stipulations or expressed communication supporting the contention that the term position would continue as long as Grievant fulfilled the previously stated requirements. Grievant has failed to establish by clear and convincing evidence that her belief of continued employment was more than a unilateral expectation.

Grievant also argues that Respondent's nonrenewal of her employment contract was invalid and without merit. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is

recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Shelia Johnson, BSC Vice President of Finance and Administration, testified at the level three hearing that Respondent has been experiencing budget cuts. Vice President Johnson testified that Respondent's budget must be frugal in the current bad economy. Some of the staff and faculty positions for Respondent are funded by Title III funds. Because the funds for the Title III funded positions expire in September 2012, Respondent has to make arrangements to end or transition the positions currently funded by Title III to other sources of funds.[6] The sole full-time Foreign Language Professor at BSC was one of the positions previously funded by Title III funds. Respondent chose to reallocate funding from its College Fund to cover the funds necessary to avoid laying off the only full-time Foreign Language Professor. This reallocation of funding resulted in a shortage of funds to cover all the positions previously funded by the College Fund. Ultimately, the shortage of funds resulted in Grievant's visiting term contract not being renewed.

In summation, Grievant has not established that Respondent's decision not to renew

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[6]Respondent's Exhibit No. 3

her term contract was contrary to law. Furthermore, Respondent's decision not to renew Grievant's term contract was not arbitrary and capricious. Accordingly, this grievance is DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, West Virginia Public Employees Grievance Board Procedural Rule, 156 C.S.R. 1 § 3. "The 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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. For an employee to possess a property right in her employment, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *State ex rel. Tuck v. Cole*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, "the employer may refuse to renew." *Id*.

3. "[W]here 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 practices, such claim must be established by clear and convincing evidence." *Whitaker citing Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992).

4. Grievant has not established, by clear and convincing evidence, that she has more than a unilateral expectation in her continued employment with BSC.

5. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. Grievant has not established, by a preponderance of the evidence, that Respondent's decision not to renew her term contract was contrary to law or that it 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: April 12, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge