

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Mollie B. Jarrell,
Petitioner Below, Petitioner**

vs.) **No. 101403** (Kanawha County 09-AA-181)

**New River Community and Technical College
Respondent Below, Respondent**

FILED

September 23, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Mollie B. Jarrell, an attorney proceeding in her own interest, appeals the circuit court's final order affirming the October 7, 2009. Decision of the West Virginia Public Employees Grievance Board which denied her grievance over the non-renewal of her one-year contract as a non-tenure track visiting instructor at Respondent New River Community and Technical College (hereinafter "NRCTC"). The instant appeal was timely filed by the *pro se* petitioner with the entire record being designated on appeal. The Court has carefully reviewed the written arguments contained in the *pro se* petition and the response thereto, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition, response and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

After the previous instructor suddenly ceased employment, NRCTC hired petitioner as a non-tenure track visiting instructor in its Legal Assisting and Law Enforcement (hereinafter "Legal Studies") program. Petitioner's visiting instructor contract had a start date of August 20, 2007, and an end date of May 15, 2008. While NRCTC has approximately four campuses throughout southern West Virginia, petitioner worked out of the Nicholas County campus.

On December 3, 2007, the then-Dean of the Nicholas County campus wrote a letter on petitioner's behalf so that she could obtain a home mortgage loan. The letter stated the following:

Ms. Jarrell is employed as an Assistant Professor of Criminal Justice and Legal Assisting studies at the Nicholas County Campus of [NRCTC]. All faculty members, regardless of rank or longevity, are employed by year-to-year contracts. The Contract period runs from August 15 (or as near that date as possible) to May 15 (or, again, as near to that date as possible).

Faculty contracts are only valid for the academic year and therefore are issued annually. As the Dean of the Nicholas County Campus, it is my intent to continue Ms. Jarrell's employment in the years to come.

However, the decision whether to renew petitioner's one-year contract as a visiting instructor did not belong to the Dean of the Nicholas County campus; rather, NRCTC policy provides that the president of NRCTC has "final institutional-level authority and responsibility for every personnel action." In addition, "[n]on-tenure track appointments are outside the tenure-track status and are subject to annual renewal."

On or about April 25, 2008, in an incident petitioner considers important, the NRCTC faculty senate held a meeting on the failure of the NRCTC's vice president and chief academic officer, Dr. Harry Faulk, to follow NRCTC policies in regard to a student dropping a course after the requisite time frame. Apparently, Dr. Faulk permitted at least one student to take a course at a later date where the student was confused about the content the course would cover. The faculty senate believed this was contrary to NRCTC policy, and at the senate meeting, petitioner asked Dr. Faulk several questions about what he did. She also asked Dr. Faulk to leave the meeting, so the faculty senate could deliberate and vote. The faculty senate voted to send Dr. Faulk and the NRCTC's president, Dr. Ted Spring, a letter voicing its displeasure at Dr. Faulk's permitting the student to take the course at a later date.

Petitioner was also involved with creating course schedules for Legal Studies courses for the Fall 2008 term. She was consulted by NRCTC's Nicholas County campus dean about textbook selection for the 2008-2009 school year. However, NRCTC decided not to renew petitioner's one-year contract as a visiting Legal Studies instructor because of low enrollment, the ability to fulfill her role by internet and video conferencing, and the use of adjunct faculty. Petitioner was also notified that "[s]hould a vacancy become available in the future in your field of expertise, the notification will be posted on our college website."

NRCTC ultimately decided not to post a permanent vacancy in Legal Studies, but if it did, “[t]here was no guarantee that [petitioner] would have been the successful candidate.”

Petitioner filed a grievance challenging NRCTC’s non-renewal of her one-year contract as a non-tenure track visiting instructor. Her grievance was denied at Level One. Mediation was attempted at Level Two. When the grievance reached Level Three, three days of hearings were conducted. Petitioner and NRCTC submitted their final proposed findings of fact and conclusions of law on or about July 24, 2009. In its decision issued on October 7, 2009, the West Virginia Public Employees Grievance Board (hereinafter “the Grievance Board”), through ALJ Barney, determined that “[petitioner] has not established, by clear and convincing evidence, that she has more than a unilateral expectation in her continued employment at NRCTC.” The Board further determined that “[petitioner] has not established retaliation by a preponderance of the evidence” and that “[petitioner] has not established, by a preponderance of the evidence, that [NRCTC]’s decision to not renew her contract was contrary to law.” Accordingly, the Grievance Board denied petitioner’s grievance. When she appealed, the circuit court affirmed.

On appeal to this Court, petitioner raises the following issues: (1) Whether the Grievance Board misinterpreted the law when it held that NRCTC policy provides that the president of NRCTC has “final institutional-level authority and responsibility for every personnel action”; (2) Whether petitioner had a reasonable expectation of continued employment when she was hired as a non-tenure track visiting instructor in NRCTC’s Legal Studies program; (3) Whether NRCTC’s non-renewal of petitioner’s one-year contract as a visiting instructor in Legal Studies was retaliation for her questioning of Dr. Faulk at the faulty senate meeting concerning his failure to follow NRCTC policies in regard to a student dropping a course after the requisite time frame; (4) Whether NRCTC discriminated against petitioner when NRCTC decided not to renew her one-year contract as a visiting Legal Studies instructor; and (5) Whether low enrollment constituted a mere pretext for the retaliatory and discriminatory reasons it had in not renewing petitioner’s one-year contract as a visiting Legal Studies instructor.

In its Decision denying petitioner’s grievance, the Grievance Board noted that before her predecessor suddenly ceased his employment, he received a reappointment as a Legal Studies faculty member. The Board further found, however, that petitioner was not similarly situated to her predecessor because unlike her predecessor, petitioner did not perform computer-related duties. The circuit court made a similar finding and noted that it must give deference to the Grievance Board’s factual findings. *See* Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996) (“[F]indings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.”). On the related issue of whether low enrollment constituted a mere pretext for discriminating

against petitioner, the Grievance Board accepted that low enrollment was a valid concern. The Board found that testimony revealed that the decision not to post a Legal Studies position at NRCTC's Nicholas County campus was based upon enrollment and because other instructors and video-based instruction could be used for Legal Studies instruction. The circuit court agreed with the Board's assessment, noting that NRCTC supplied evidence that petitioner's contract was not renewed based upon low enrollment and because of NRCTC's desire to fulfill student teaching needs through other modes of instruction. Thus, petitioner's discrimination claim, and her argument that low enrollment was a mere pretext, both lack substantial merit.

Petitioner further argues that her contract was not renewed as retaliation for her questioning of NRCTC's vice president at a faculty senate meeting. However, the Grievance Board found that petitioner's involvement in the faculty senate meeting was *de minimus*. See *Chitwood v. Feaster*, 468 F.2d 359, 360-1 (4th Cir. 1972) (“[B]ickering and running disputes with the department heads” do not come within First Amendment protection.). Furthermore, it was NRCTC's president, not its vice president, who made the decision not to post a vacancy in Legal Studies. The Grievance Board found that NRCTC's president did not attend the faculty senate meeting in question. Thus, the Grievance Board did not clearly err in finding that petitioner did not establish retaliation by a preponderance of the evidence.

Furthermore, the Grievance Board found that petitioner did not establish that she had more than a unilateral expectation in her continued employment. The circuit court agreed with the Board's conclusion, finding that NRCTC's decision not to reappoint petitioner to a visiting instructor position was a day-to-day personnel decision that NRCTC's president could make without violating whatever contract rights petitioner had. Petitioner did not have a reasonable expectation of continued employment when she was hired as a non-tenure track visiting instructor with an one-year contract. The circuit court correctly affirmed the Grievance Board's decision denying petitioner's grievance.

For the foregoing reasons, we find no error in the decision of the circuit court and the Final Order affirming the Decision of the Grievance Board denying petitioner's grievance is affirmed.

Affirmed.

ISSUED: September 23, 2011

CONCURRED IN BY:

Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISQUALIFIED:

Chief Justice Margaret L. Workman