KATHRYN CHEZIK, PAMELA GARDNER, SUSAN SULLIVAN,

KAREN McCOMAS and ROBERT OLSON

v. Docket No. 93-BOT-126/130

MARSHALL UNIVERSITY

DECISION

Grievant Olson is a Professor, Grievants Chezik and Gardner are Associate Professors, and Grievants Sullivan and McComas are Assistant Professors. They are employed in the Communication Disorders Department (CDD) at Marshall University (MU). All five initiated grievances at Level I February 17, 1993, alleging,

> On May 21, 1991, Alan Gould, Interim President of Marshall University, approved adjustments to our salaries which were to begin in September 1991 and be phased in over a two year period. The first year of that agreement was implemented for the 1991-92 academic year. However, the second phase of that agreement, which should have begun on September 1, 1992, has not been implemented. (See footnote 1)

The grievants' supervisor was without authority to grant relief and the grievances were consolidated and denied at Level II following a hearing held March 3, 1993. (See footnote 2) By letter dated March 25, 1993,MU President J. Wade Gilley concurred with the Level II findings and by letter dated April 5, 1993, the grievants were notified that the University of West Virginia Board of Trustees (BOT) (See footnote 3) , at Level III, declined to consider the matter. Appeal to Level IV was made April 15, 1993, where a hearing was held August 23, 1993. Grievant Gardner submitted proposed findings of fact and conclusions of law on September 21, 1993. The University and the remaining grievants declined to submit proposals. (See footnote 4)

I.

Much of the factual background of the case is not in dispute. Communications Disorders is a relatively new graduate-level department at MU. It appears that its primary goal is to produce hearing,

vision, and speech pathologists. (See footnote 5) Since its inception in 1976, the department has experienced ongoing problems in recruiting qualified instructors, mainly due to inadequate funds allocated for salaries. The need for new qualified instructors hasbeen a problem of significant import since the department could not achieve accreditation from the American Speech, Language and Hearing Association (ASLHA) without adequate staff. (See footnote 6)

In 1990, then-MU President Dale Nitzchke decided to initiate a number of reforms in the department aimed at obtaining accreditation. Included in the reforms were the addition of two teaching positions, significant equipment purchases and modernization of the department's physical plant. President Nitzchke also made a commitment to the department that funds sufficient to attract qualified instructors would be allocated to the two new positions. Upon being advised of the additional positions, Dean of the College of Liberal Arts Deryl Leaming and Grievant Chezik, who was then serving as Chair of CDD, began recruiting efforts. It quickly became apparent that their preferred applicants would not accept salaries which were slightly less than those of the then-current CDD staff. Dean Leaming, Ms. Chezik and President Nitzchke were also aware that higher, market-competitive salaries for the new-hires would cause significant dissension among the tenured staff members.

In August 1990, Mr. Nitzchke resigned and BOT appointed MU Vice-President for Academic Affairs Alan Gould to serve in the position of President of MU for one year. It was understood by Mr. Gould and generally known at MU that at the end of his contract, he would not be a candidate for the position and that a replacementwould be appointed. (See footnote 7) President Gould was very aware of the problems of the CDD through his previous service in several administrative posts with authority over the department.

The department's problems became more acute with the announcement by ASLHA, in late 1990, that, effective December 31, 1993, it would not grant professional certificates to graduates in the communication disorders field unless they had attended schools which had met its accreditation standards. (See footnote 8) President Gould, Dean Fleaming and Grievant Gardner, who by then had been appointed Acting Chair of CDD, had ongoing discussions regarding the need to implement the initiatives begun by President Nitzchke. MU also hired Dr. Harold Luper, a consultant on accreditation strategies, to advise as to what changes were needed within the department to achieve accreditation. Dr. Luper subsequently reported that significant purchases of equipment and the

appointment of several new instructors were necessary. He apparently advised that unless the instructors were hired there could be no accreditation. In short, by Spring 1991, it was clear to all concerned that the department would cease to exist without additional staff and that prospective applicants would not accept the salaries permitted by the department's budget.

President Gould, Grievant Gardner and Mr. Leaming had numerous discussions centered on ways to raise the starting salaries for new-hires in the department and at the same time make provisions to increase the amounts paid to existing staff. That MU was suffering serious financial problems at the time and that other departments would not be receiving salary increases were major concerns in the discussions. Also of importance was President Gould's "interim" status and his reluctance to "bind" the future President.

By May 1991, President Gould, Grievant Gardner and Dean Leaming had agreed that the entry level salaries for new-hires in the department could be raised to a level sufficient to attract the needed instructors and that the salaries of existing staff would be adjusted proportionately or "equalized" over the course of several years. In a May 8, 1991 memorandum to Dean Leaming, Grievant Gardner set forth proposed salaries for three prospective Assistant Professors (See footnote 9) and noted that "These salaries would be contingent on the salary adjustments for current [CCD] faculty." The memorandum also listed the proposed salaries for the five grievants. (See footnote 10) According to Mr. Gould's testimony at Levels II and IV, he filed the memo after attaching a "post-it note" on which he wrote that the proposals were "subject to future funds available, market conditions and approval of new President" and writing on the memo itself that the salary increases for existing staff were "approved per four year period subject to approval of guidelines developed by dean."

On or about May 10, 1991, President Gould and Dean Leaming discussed at length the implementation of Grievant Gardner's proposals. During their discussion, President Gould advised the dean that he could proceed to make offers to the prospective Assistant Professors at the figures quoted in Grievant Gardner's May 8, 1991 memo, and that the raises for current CDD staff, as set forth therein, would be "phased in" over a four year period. The parties disagree as to whether President Gould, during the meeting, advised that this plan was contingent upon the conditions he had made on his "post-it note." Dean Leaming subsequently advised Grievant Gardner of the substance of the meeting.

On May 21, 1991, Grievant Gardner met with President Gould and strongly urged that the four

year period be reduced to two. Ms. Gardner presented the President a chart detailing the proposedincreases for each grievant. One portion of the chart merely iterated the information in her May 8 memo on the grievants' current salaries and the amount they would earn once the proposed increases were fully implemented. Another section contained the salaries each would receive if 50%, 75%, 78% or 80% of the increases were awarded. A final section projected the salaries if 80% of the increase was awarded the Assistant Professors (Grievants Sullivan and McComas) and 50% of the increase was afforded the remaining three. Again, the parties disagree on whether Mr. Gould conditioned his acceptance of the proposal but do not dispute that he circled that portion of the chart reflecting the amounts each grievant would ultimately receive; made the notation "2nd yr." next to those figures; circled the "50%-80%" calculations; and made the notation "1st yr." alongside those figures. It is also uncontested that President Gould then wrote "approved" and affixed his initials and date on the document.

In a June 12, 1991 memorandum to Herb Karlet, MU's Vice President for Finance, the President advised,

> Herb, as you know, the Department of Communication Disorders is having difficulty attracting qualified faculty for their program due to starting salaries offered. Pam Gardner states that accreditation can no longer be delayed if the program is to survive. Certification standards of the American Speech Language-Hearing Association specify that students who apply for certification after December 31, 1993, must have initiated as well as completed all graduate work in an accredited program. Higher salaries are, therefore, a necessity.
>
> When new faculty are employed at higher amounts, problems arise with continuing faculty whose salaries are then out of sync. I have, therefore, approved on May 10 Pam Gardner's request for upgrading salaries to amountsindicated in attached memo. Pam on May 21, 1991, met again with me pleading the case for the continuing faculty. Rather than a four year adjustment period, I approved adjustments of 50% for Assistant Professors and 20% for Associate Professors/Professors during year 1991-92. The remaining upgrades will be done in 1992-93.

In a June 18, 1991 memo to Mr. Karlet, President Gould noted that his June 12 correspondence had been in error and that he had approved the "50-80" figures instead of the "20-50" calculations.

The department was successful in hiring three new Assistant Professors and ultimately obtained accreditation. Effective August 1, 1991, J. Wade Gilley was appointed President of MU. At the beginning of the 1991-92 school term, the grievants received the "1st year" salary increases per the

calculations submitted by Ms. Gardner on May 21, 1991. On or about September 30, 1991 Grievant Gardner, Ms. Chezik and Mr. Gould met with President Gilley to explain the reasons for the salary increases. During the meeting, President Gilley expressed great dissatisfaction with Mr. Gould's approval of the pay raises (See footnote 11) and directed him to prepare a written explanation for the action. In an October 15, 1991 memo, Mr. Gould detailed his reasons for approving the increases and other budget expenditures for the Communication Disorders department. The crux of the memo was that the accreditation and continued operation of the department was dependent upon the expenditures. No mention was made in the memo of any conditions imposed upon the award of the salary increases.

At some point, Mr. Gould advised the new president that there had been conditions imposed on the raises. Faced with a projected budget deficit of 1.8 to 2.5 million dollars for fiscal year 1992-93 and apparently concluding that he was not legally bound by any agreement reached with Mr. Gould, President Gilley decided not to award the second phase of the salary increases. To some extent, he also considered that the 1991-92 raises had become known to other members of MU's teaching staff and that considerable negative publicity regarding the matter had been generated. (See footnote 12)

The grievants received contracts for the 1992-93 school year which did not include the scheduled increases. Each sent a memo to President Gilley noting that the salary reflected on their contract was in error. In her August 25, 1992, memo to President Gilley, Grievant Gardner attached the May 21, 1991 chart and advised that Mr. Gould had made a commitment on the raises. In a September 23, 1992 letter to Grievant Gardner, President Gilley advised that he had continued the 1991-92 raises but was holding the 1992-93 raises in abeyance pending review of a compensation task force which would be looking at other "compensation issues currently pending on campus." After subsequent meetings with President Gilley, during which he refused to implement the second part of the raises, the grievants filed the present action. (See footnote 13)

II.

The grievants assert that they reached a legally binding agreement with MU, through its statutorily-authorized agent, President Gould, on May 21, 1991 and that MU breached that agreement. They maintain that the consideration for the contract lies in their enduring the disparity between their salaries and those of the newly-hired Assistant Professors. The grievants further assert

that there were no conditions imposed on their agreement and that the university has otherwise failed to justify its breach. They seek, as relief, the enforcement of the agreement and back wages. MU asserts that Mr. Gould was an "interim" president and as such had no authority to bind future "permanent" presidents. It is assumed that by so arguing, the university maintains that any agreement reached was void from its inception. Alternatively, MU argues that to the extent Mr. Gould had the authority to enter into a binding agreement with the grievants, he imposed the aforementioned conditions upon it which, once materialized, excused the nonperformance. (See footnote 14) For the reasonshereinafter discussed, the undersigned concludes that the grievants must prevail.

III.

The record does not support the university's assertion that Mr. Gould conditioned his approval of the raises. (See footnote 15) Indeed, the record gives rise to a strong inference that the conditions "originated" only after the grievants filed their protest over the university's refusal to implement the second year increases. Mr. Gould, during his extensive testimony at Levels II and IV, was equivocal and unconvincing in his assertions that the grievants knew or should have known that the conditions set forth in his "post-it" sticker and other notations were part of the agreement. Significantly, while Mr. Gould testified that during his tenure as President he frequently reminded staff, including the grievants, that he considered his authority limited in a great many respects, at no time did he state that he advised the grievants that his acceptance of Grievant Gardner's May 21, 1991 proposal was conditional. Instead, he testified consistently that he, Ms. Gardner, and Dean Leaming merely discussed all aspects of the proposal, including the financial ramifications, the possibility that a future president might not be as supportive of the action, and that it would generate unrest among other members of the MU teaching staff.

Ms. Gardner, however, was unequivocal in her testimony that no mention was ever made of the conditions until the commencement of the Level II hearing and the remaining grievants were adamant that she never reported to them that President Gould imposed any such conditions on the agreement. Dean Leaming's testimony regarding the negotiations preceding the May 21, 1991 meeting and the substance of that meeting substantially corroborates that of Ms. Gardner. (See footnote 16) Further, it is telling that in his June 12, 1991 memo to Mr. Karlet, President Gould made no mention of the conditions, although he was fully aware that this notification to MU's chief financial officer was the

final step in the implementation of the raises. That he did not include the conditions in his extensive October 15, 1991 justification to President Gilley, is also supportive of the finding that there were none.

Of lesser importance but nonetheless significant, is that MU failed to even produce the "post-it" note where the conditions were recorded or demonstrate that anyone other than Mr. Gould ever saw it. Moreover, even if it were accepted that Mr. Gould ever reduced the alleged conditions to writing, the record supports and MUconcedes that he made no notations on the May 21, 1991 chart other than those previously discussed. This document is the most reliable documentary evidence of record as to the parties' intentions and Mr. Gould fully acknowledged that he made only the referenced notations. (See footnote 17) Accordingly, it is concluded that on May 21, 1991, Grievant Gardner, acting on her behalf and on behalf of the other grievants, reached an agreement with Mr. Gould whereby they would receive the raises set forth in Ms. Gardner's chart over a period of two years. It is further concluded that there were no conditions placed on the agreement. The question of whether the agreement was an enforceable one remains.

Mr. Gould's "one-year" status at the time he accepted the grievants' terms is not a bar to the enforcement of the agreement. A university president in West Virginia derives his authority from statute and regulations of the BOT. W.Va. Code §18B-1-9 provides,

> Except as is otherwise provided by law or rule, the president or other administrative head of each state institution of higher education shall exercise all the duties and powers conferred by law in the government of the institution under such person's management and control and, subject to review by the appropriate governing board, shall have the authority and responsibility for overseeing the routine matters of theinstitution, which include, but are not limited to, travel approval, sabbaticals, budget oversight and special student fees.

W.Va. Code §18B-1-7, in pertinent part, provides,

> Each [governing board] shall delegate, as far as is lawful, efficient and fiscally responsible and within prescribed standards and limitations, such part of its power and control over financial, educational and administrative affairs of each state institution of higher education to the president or other administrative head of those institutions.

MU cites no policy, regulation of the BOT, provision of Mr. Gould's employment contract, or other authority which placed restrictions or "prescribed limitations" on his power to enter into contracts

governing the terms of an instructor's employment. In the absence of such evidence it must be concluded that, pursuant to the above statutory language, he had such authority. Mr. Gould, during his Level IV testimony, even conceded that, while he had made a decision of his own volition not to implement major initiatives during his tenure, he nevertheless considered himself a "fully authorized" president. (See footnote 18) It is telling and perhaps even dispositive of this assertion that President Gilley apparently considered himself bound by that portion of the agreement which provided the 1991-92 raises. Finally, since the contention that Mr. Gould, by entering into the agreement with the grievants, was committing an unauthorized and therefore ultra vires act is essentially an affirmative defense, the burden of establishing the limitations was upon MU. See First Peoples Sav. and Loan Ass'n v.Cogdell, 261 S.E.2d 259 (N.C. App. 1980). The university failed to carry this burden. (See footnote 19)

As a general rule, contracts between a college and its employees are governed by the ordinary rules of contract, except as restricted by constitution or statute. Oconee County v. Rowland, 129 S.E.2d 373 (Ga. 1962); McCoy v. Southern W.Va. Community College, Docket No. 90-BOD-099 (Nov. 9, 1990). MU does not cite and the undersigned is unaware of any provision of the West Virginia Constitution which has bearing on the present dispute. Further, no statutes which address the contractual relationship between universities and its teaching staff are found. (See footnote 20) Accordingly, resort to several contract principles is in order.

Consideration is a requirement for all contracts, including those covering terms of employment. First Nat. Bank of Gallipolis v. Marietta Mfg. Co., 153 S.E.2d 172 (W.Va. 1967). It appears, however, that in cases involving promises made within the context of an employer-employee relationship, courts have taken a liberalapproach to the requirement. Further, it appears that, once found, courts are disinclined to examine closely the adequacy of the consideration. It is enough that the parties, at the time the bargain was made, considered it adequate. Brewer v. First Nat. Bank of Danville, 120 S.E.2d 273 (Va. 1961). In Mankin v. Bryant, 56 S.E.2d 447 (Ga. 1949), it was held that consideration could be found in "any benefit accruing to [the promisor] or any loss, trouble, disadvantage undergone by, or charge imposed upon him to whom [the promise] is made." In Brewer, the Court went further and held that a "slight advantage to one party or trifling inconvenience to the other is sufficient to support a promise." Applying these holdings to the present case, it is clear that MU's commitment to provide the raises in question were supported by adequate consideration on the

grievants' part.

As previously discussed, the salaries awarded the newly-hired Assistant Professors were disproportionate to the salaries of the grievants. The record also reflects that President Gould fully realized the effect that the higher salaries would have on the morale of the tenured teachers and that during at least part of his discussions with Dean Leaming and Grievant Gardner, he was seeking to "negotiate" a way to reward the grievants for enduring the inequity. It is concluded that the inequity was, at the very least, an "inconvenience" to the grievants and that their agreement to endure the disparity was sufficient consideration to support Mr. Gould's promise to "cure" the inequity over a period of two years.

It is also concluded that the continued service of the grievants and their "forbearance" of the new-hires' salaries constituted a distinct advantage to MU. The record supports that prior to 1991, the CDD, despite the low salaries of its staff, was a highly-ranked department at MU and that the grievants' dedication to high standards was a major factor in that ranking. MU would have gained little by attracting new instructors and disregarding the grievants' considerable years of service. That CDD ultimately obtained accreditation is also supportive of the conclusion that MU benefited by the agreement.

Moreover, the grievants would have had a legal cause of action had there been no provisions for increases in their salaries made at the time the new instructors were hired. W.Va. Code §18-29-2(m) permits university employees to grieve "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Further, forbearance to exercise a legal claim is deemed valid consideration as long as the claim has some foundation in fact. See Steber v. Combs, 5 S.E.2d 420 (W.Va. 1939). (See footnote 21) While the record does not reveal that the grievants threatened such action or made it an explicit part of their negotiations with President Gould, it does suggest that the partiescontemplated that there would be some form of protest made if the inequity in salaries was not addressed. At the very least, that the grievants had the right to grieve the inequity adds support to the conclusion that MU received benefits from the agreement reached.

Further, notwithstanding the foregoing conclusions regarding the grievants' forbearance of legal claims and the inequity in salaries, it appears that their agreement to continue working for MU was, in and of itself, the necessary consideration for the agreement. The discussions between the grievants

and President Gould and the agreement reached can be characterized simply as negotiations for and a bargain reached on the terms of the grievants' contracts for the 1991-92 and 1992-93 school years. The record reflects that all of MU's teaching staff are issued contracts of employment which cover a given school year and that in May 1991, the grievants' contracts for the 1990-91 year expired. There is support for the conclusion that the grievants' demands for higher salaries for the next two years and President Gould's assent thereto were all that was required for a binding agreement.

In Knapp v. Imperial Oil and Gas Products Co., 130 F2d 1 (4th Cir. 1942), the employer asserted that a promise to an employee to provide him a bonus was without consideration because the employee was already under contract to provide the services which would have entitled him to the bonus. The Court found that the employee's continuation of services was adequate consideration for the promise and noted that this conclusion was consistent with Thomas v. Mott,82 S.E. 325 (W.Va. 1914). The same reasoning would apply to the present case.

Finally, to the extent that MU, by offering evidence as to the fiscal restraints facing President Gilley, the university was attempting to not only demonstrate that one of Mr. Gould's "conditions" had materialized but also to excuse its breach on the grounds that the raises were financially burdensome, this defense is also rejected. It is well-settled that in breach of contract claims, assertions that the terms became monetarily oppressive to the breaching party are not proper considerations. See, e.g., Magnus v. Halltown Paper Bd. Co., 100 S.E.2d 201 (W.Va. 1957). (See footnote 22) In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1) The grievants, the teaching staff of MU's Communications Disorders Department, reached an agreement on May 21, 1991, with then-MU President Alan Gould whereby the department would hire new instructors at salaries that were disproportionate to the grievants' salaries and years of service; the grievants would continue to work for MU and forbear the inequity for two years; and MU would provide salary increases for the grievants proportionate to the salaries of the new-hires, the first half of which would beimplemented at the beginning of the 1991-92 school year and the second half of which would be awarded at the beginning of the 1992-93 year. There were no other conditions placed on the agreement.

2) MU awarded the first part of the increases. Newly-appointed MU President J. Wade Gilley declined to implement the second part.

CONCLUSIONS OF LAW

1) A party in breach of an agreement who asserts the affirmative defense that it was without authority to enter into the agreement, has the burden of demonstrating the lack of authority. MU presented no evidence whatsoever that President Gould was without authority to enter into the May 21, 1991 agreement with the grievants or that his assent to the terms therein were not binding on future presidents.

2) In that the grievants agreed to continue working for MU during the period covered by the agreement; endured the inequity between their salaries and those of the newly hired Assistant Professors; and did not file a legal claim based on the disparity, there was consideration on their part for the agreement. The agreement provided advantage to MU in that the university received the continued services of the grievants and ultimately obtained accreditation of the Communication Disorders Department.

3) MU has failed to establish legal justification for its failure to fulfill its obligations under the agreement.

Accordingly, the grievance is **GRANTED** and Marshall University is hereby **ORDERED** to award the grievants the increases in salary provided for in the referenced agreement which were to become effective the beginning of the 1992-93 school year and compensate them for any loss of wages they may have incurred as a result of Marshall University's breach of said agreement.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Cabell County 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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: May 19, 1994

Footnote: 1This is a"condensed" statement of the claim. The grievances were filed separately but worded essentially the same.

Footnote: 2The transcript of this proceeding and attached exhibits are part of the record herein.

Footnote: 3BOT is the governing board of the state's two universities per W.Va. Code §18B-2-1.

Footnote: 4Grievant Gardner was represented by James St Clair, Esq. The University appeared by Brentz Thompson, Senior Assistant Attorney General. The remaining grievants, who appeared pro se, were advised that they could submit proposals but that Mr. St Clair's brief would necessarily address their positions as well as grievant Gardner's. Mr. St Clair acknowledged that this was so. It is assumed that since Mr. Thompson outlined the University's legal position at hearing, he saw no reason to present further argument. The University's assertions in the matter, as hereinafter stated, are, therefore, drawn from Mr. Thompson's opening remarks at the hearing.

Footnote: 5This is an inference drawn from the testimony of several witnesses at the Level II hearing. Little direct evidence was presented regarding the function and scope of the department.

Footnote: 6It appears that ASLHA is the only association that establishes accreditation standards for departments in the communication disorder field.

Footnote: 7Apparently, Mr. Nitzchke's resignation was sudden and BOT was not then prepared to conduct extensive recruitment efforts. Whether, by virtue of his "temporary" appointment, Mr. Gould enjoyed all the privileges and powers of the post, is a point of contention between the parties.

Footnote: 8The record suggests that graduates could obtain employment in the field without the certification but that their prospects would be severely restricted.

Footnote: 9A resignation within the department necessitated a search for three rather than two new instructors.

Footnote: 10According to the memo, applicant Margaret Rotter would be hired as an Assistant Professor at an annual salary of $37,400.00; Applicant Shaheen Awan would be appointed to an Assistant Professor post at a salary of $35,700.00; and a third applicant, Sheila Welch, would also be hired as an Assistant Professor at a salary between $31,500.00 and $38,500.00, depending on the length of her employment term. Grievant Olson's $46,099.00 salary was to be increased to $67,413.00; Grievant Chezik's $40,040.00 salary would be raised to $61,284.00; Grievant Gardner would advance from $33,843.00 to $51,556.00; and Grievants Sullivan and McComas would move from $24,660.00 to $34,000.00. While the record reflects thatthe grievants' raises were proportionate to the increases in the base salaries for the new hires, it is difficult to discern the precise correlation between the two. Also, it appears that the increases for both

groups were based, to some extent, on the degree level the individual had achieved. In any event, the amounts of the increases and the method by which they were calculated are essentially irrelevant to the inquiry.

Footnote: 11By all accounts, President Gilley was "outraged" and demonstrated his dissatisfaction by shouting at Mr. Gould.

Footnote: 12Apparently, most of the publicity came from the Parthenon, MU's student newspaper. The record is unclear as to how the raises were disclosed to the newspaper or other teaching staff members.

Footnote: 13As previously noted, the grievances were filed February 17, 1993. It is assumed that the filing was made shortly after thegrievants' final informal discussions with President Gould. In any event, MU has made no assertion that the complaint was not timely filed and any consideration of such a claim is not cognizable at Level IV. See W.Va. Code §18-29-3(a) (1992).

Footnote: 14As previously noted, MU did not submit a brief. Its arguments, as set forth here, are inferred from remarks made by counsel in opening statements at the hearings held at Levels II and IV. Since those remarks were rather ambiguous on several key issues, the undersigned, to a large extent, has had to assume what the university's responses would be to the grievants' more specific arguments.

Footnote: 15Since the evidence on this issue was clear and convincing, the undersigned, at the completion of the Level IV hearing, found as fact that no conditions were imposed. A thorough review of the record merely confirms that finding.

Footnote: 16Dean Leaming testified at the Level II hearing and, because he was relocating to another state, provided Level IV testimony in the form of a deposition taken on July 7, 1993. At the Level IV hearing there was discussion between counsel to the effect that Mr. Leaming, at the Level II hearing, had agreed with Mr. Gould's recollection of the meeting and then recanted that testimony during his deposition. A careful review of the deposition and the transcript of the Level II hearing reveals only minor discrepancies. Overall, he was quite consistent in his assertions that he never heard Mr. Gould condition his acceptance of Ms. Gardner's proposal.

Footnote: 17It is recognized that, since this document is not by its terms a written contract, and the grievants are seeking enforcement of an agreement which covers a period greater than one year, W.Va. Code 55-1-1, West Virginia's codification of the Statute of Frauds, is most likely implicated. Since such an assertion is an affirmative defense, see First Peoples Sav. and Loan Ass'n v. Cogdell, infra, and was not raised by MU, the undersigned declines to give the issue extensive treatment. It is simply concluded that the document initialed and dated by President Gould is sufficient for the requirement in the statute that there must be "some memorandum or note thereof" in writing and "signed by the party to be charged."

Footnote: 18Supportive of this view is that during his year as President, Mr. Gould approved the onset of construction of a new MU football stadium, a project which was to span a period of five years.

Footnote: 19It is also noted that this issue arose several times during the Level IV hearing, particularly on those occasions when Mr. Gould's status was characterized as "interim" or "temporary" by counsel for MU. It is assumed that had there been regulations or contract provisions which placed limitations on Mr. Gould's authority, they would have been cited and/or produced at that time.

Footnote: 20The salaries of higher education professional personnel are addressed generally in W.Va. Code §§18B-8-1 et seq. There are no specific provisions therein which place restrictions on the contractual relationships between those employees and the institution. Interestingly, Code §18B-8-5 explicitly authorizes the types of raises in issue by providing that higher education institutions may award "salary adjustments that rectify inequities or accommodate competitive market conditions in specific areas of specialty."

Footnote: 21It is noted that a claim that the disparity constituted favoritism would most likely be rejected, at least at Level IV of the grievance procedure. See Redden v. W.Va. State Tax Dept., Docket No. 89-T-339 (Feb. 22, 1991). This conclusion, however, is based only upon a review of a record which obviously was not developed on this issue.

Footnote: 22This is not to say that MU's financial difficulties were contrived. It is accepted that President Gilley did not act out of any personal animosity toward the grievants but was genuinely concerned over MU's budget and the inequities created between thee grievants and other members of its teaching staff.