THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DR. MARK CHATFIELD,

Grievant,

v. **Docket No. 06-HE-074**

Janis I. Reynolds

Senior Administrative Law Judge

WEST VIRGINIA STATE UNIVERSITY, (See footnote 1)

Respondent.

D E C I S I O N

Grievant, Dr. Mark Chatfield, filed this grievance against his alleged employer, the West Virginia State University ("WVSU"), on May 25, 2005, because he did not receive promotion to Full Professor. His Relief Sought was to receive this promotion.

This grievance was denied at Levels I and II. At Level III, the Hearing Examiner, Dr. Gregory Epps, raised the question of whether he had jurisdiction to hear the issue as he did not think Grievant was an employee of WVSU. (See footnote 2) This issue was briefed by the parties, and on February 17, 2006, Dr. Epps held Grievant was not an employee of WVSU and was not a state employee. As such, he was not covered by the grievance procedure,

and Dr. Epps did not have jurisdiction to hear the issue. Grievant appealed to Level IV on June 5, 2006, and a Level IV hearing was held on September 7, 2006, in the Grievance Board's Charleston office, on the jurisdictional issue. Grievant represented by Andrew Katz, Esq., and WVSU was represented by Elaine Skorich, Assistant Attorney General. This case became mature for decision on October 13, 2006, after receipt of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts he is a faculty member at WVSU, and as such he is entitled to seek promotion through the grievance process.

Respondent argues Grievant is a full-time employee of the West Virginia State University Research and Development Corporation ("RDC"), designated as a private 501(c)(3) corporation under the IRS Code. RDC manages WVSU's grant money.

Respondent established Grievant was a full-time employee of RDC, and is not an employee of WVSU.

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

Findings of Fact

1. In 1993, Grievant was hired as a temporary faculty member at WVSU. Later he became a tenured track faculty member during academic year 1998 - 1999, and he subsequently became a tenured faculty member at the Associate Professor level.

2. In May 2001, Grievant accepted a full-time position with the RDC, a private corporation, and this is the position he currently holds. Grievant

"[d]evelops, directs and maintains land-grant related research projects and activities." He also assists researchersin securing funds, and he is to report directly to the Dean and Director of the Department of Land-Grant Programs. His supervisor is Charles Byers, Executive Director of RDC. There are no teaching duties included in this job description. Resp. Nos. 3 & 8 at Level IV.

3. RDC is designated by the IRS as a 501(3)(c) a private corporation created under W. Va. Code § 18B-12-1, et seq., to work closely with WVSU. Resp. No. 11 at Level IV. See note 2. The purpose of this type of corporation is to operate as a nonprofit corporation exclusively for charitable, educational, and scientific purposes, and to contract with an institution of higher education to provide research assistance. The main focus of RDC is to simplify and expedite the acquisition and utilization of research grants for WVSU. See W. Va. Code § 18B-12-2.

4. On the W-4 IRS form completed by Grievant when be began employment with RDC in 2001, he identified his employer as West Virginia State College RDC. Grievant's salary is paid entirely by RDC from the various grants it administers. Resp. No. 7 at Level IV. On May 22, 2001, Grievant also completed a new hire reporting form which listed his employer as RDC. Resp. No. 9 at Level IV.

5. On May 21, 2001, Dr. Kathryn Harper, Dean of the School of Natural Sciences and Mathematics, wrote to then-Interim Vice President for Academic Affairs, James Rowley, and noted Grievant had agreed to serve as Director of Research with the Department of Land Grant Programs and was to begin his new duties immediately. She indicated she believed he would retain his faculty status, and she recommended his salary line be held and used to hire a full-time temporary faculty member. Grt. No. 1 at Level IV.

6. Interim Dean of Academic Affairs Rowley, replied on June 6, 2001,

stating "[w]ith this letter I indicate my strong approval of the conditions noted in your letter. Dr.Chatfield should retain his faculty status, and his salary line should be held until further notice for the Department of Biology." Grt. No. 2 at Level IV. Although President Hazo Carter was copied on these letters, there was no response from him about these recommendations. President Carter is the individual with the authority to decide these issues. Testimony Epps, at Level IV.

7. After the academic year 2001 - 2002, Grievant's name does not appear on the list of WVSU employees. Respondent. No. 6 at Level IV.

8. In both July of 2003 and July of 2004, Grievant received letters from Charles Byers, Executive Director of RDC, notifying him of his appointment as Associate Director of Cooperative Research Programs for the RDC. Grievant also received increment pay, which at that time was not given to faculty members.

9. During his employment with RDC, Grievant continued to fulfill many faculty duties, including teaching approximately one course a semester (See footnote 3) , attending faculty meetings, serving on the promotion and tenure committee, serving as the chair of the Biology Department for a brief period, and serving as a faculty advisor to a graduate student. The Chair of the Biology Department, Bonnie Dean, found Grievant's assistance invaluable, and continued to evaluate his faculty performance. She was told by Dean Harper that Grievant was not paid by WVSU.

10. While the RDC and WVSU are related in many ways, they are separate entities, and RDC is considered a private entity. Respondent. Nos. 11, 12, 13, 14, 15, 16, & 17 at Level IV. 11. Grievant applied for promotion to Full Professor during academic year 2004 - 2005. On February 21, 2005, Dean Harper wrote the Promotion and Tenure Committee noting

Grievant served as full-time faculty member until 2001, but then accepted a full-time position with RDC. She noted the Faculty Handbook required five years of full-time teaching in rank, and she interpreted full-time teaching to mean a full-time faculty appointment which Grievant did not have, as he was a full-time employee of RDC. She noted Grievant maintained "a connection with academics" and had done some teaching, but she did not find he was currently employed as a faculty member.

12. At one point in time, after Grievant accepted the RDC position, he was asked to teach and since teaching was not a duty he could perform in his current position, WVSU was required to reimburse RDC for his time. Test. Grievant, Level IV Hearing.

13. RDC, as Grievant's employer, has the right to hire, fire, and decide Grievant's compensation.

Discussion

As this grievance does not involve a disciplinary matter, Grievant would normally have 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 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "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 grievant has not met his or her burden. Id.

I.

Burden of proof

As this was an unusual case, the question of who had the burden of proof was an issue raised by the parties. The undersigned Administrative Law Judge finds Grievant has the burden of proof. The current question is Grievant's employment status, and this issue is analogous to cases that question whether an employee is at-will. In such cases, the burden is placed on grievants to demonstrate they are not at-will employees. See Eggleton v. Div. of Culture & History, Docket No. 03-C&H-237 (Nov. 24, 2003); Roberts v. Div. of Culture & History, Docket No. 95-C&H-302 (May 12, 1997). Accordingly, the burden of proof is on Grievant to establish he is an employee/faculty member of WVSU.

II.

Status of Grievant

W. Va. Code § 29-6A-2 (i) defines a grievance as:

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees. (See footnote 4) (Emphasis added).

W. Va. Code § 29-6A-2 (e) defines employee as:

> any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents or by any state institution of higher education, members of the department of public safety, any

> employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. . . .

(Emphasis added).

Napier v. Lincoln County Board of Education, Docket No. 99-22-116 (July 15, 1999) discussed the required employment relationship to be covered under the grievance procedure and stated:

> In determining whether the relationship of master and servant (or employer and employee) exists there are four elements that are considered: (1) selection and engagement of the servant, (2) payment of wages, (3) power of dismissal and (4) the power of control of the servant's action. Where all of these elements co-exist in one person alone, that person is without doubt the master of the person engaged. The first three of these elements are not essential to the relationship, and the power of control is the most significant element. The right to control and the power to discharge are the usual marks of the relationship between master and servant. If the employer has the right to supervise the work being done for him by another, the relationship of master and servant exists. Actual control, however, is not the test; it is the right to control which is determinative. Rowe v. Grapevine Corp., 193 W. Va. 274, 456 S.E.2d 1 (1995); Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990); Davis v. Fire Creek Fuel Co., 144 W. Va. 537, 109 S.E.2d 114 (1959).

Grievant attempted to prove he is a faculty member/employee of WVSU by listing the many faculty-type things he did after he took the position with RDC. Unfortunately for Grievant, these examples do not make him an employee of WVSU. The parties agree Grievant was a tenured faculty member when he left, but once he accepted the position with RDC and was paid solely by them, he was no longer an employee of WVSU. WhileWVSU and the RDC work together to promote research and obtain grants and funding, they are separate entities, and only RDC has control over Grievant. It is unfortunate

Grievant believed he was still an employee of WVSU, but this event cannot occur without action on the part of WVSU. To be an employee, the individual must be "hired." Grievant quit his position with WVSU to accept the position with RDC.

Additionally, some of Grievant's faculty-like activities appear to be appropriate in his role as Associate Director of Cooperative Research. It is also clear the chairperson and the Biology Department sincerely appreciated his excellent assistance.

Grievant also attempts to demonstrate RDC is not a private corporation, but is a part of WVSU. While the two entities are intertwined, and President Carter is the Chairman of the Board of RDC, this does not change the fact that they are two separate entities.

As Grievant is not an employee of any state agency, and not entitled to participate in the grievance process, the undersigned Administrative Law Judge is without jurisdiction to rule on the underlying issue and must dismiss this case from the dockets of the Grievance Board.

IV.

Ultra vires

Grievant points to the letters written in May 2001 to support his assertion that he is still an employee of WVSU. Any representations Grievant would continue to be an employee without some form of contract and payment would be ultra vires and not binding upon the Board. Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-09 (Mar. 24, 1998). See Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

It is well settled that representations are not binding on an agency, where the individual does not possess authority to make that determination. Blevins,

supra. "Ultravires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Res., Docket No. 99-HHR-228 (Nov. 30, 1998). See Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000). See also Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991). The statements in Dean Harper's and Interim Vice President for Academic Affairs Rowley's letters did not continue Grievant's status an employee with WVSU once he quit that position and took the position with RDC.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving he is an employee of an agency covered by the grievance procedure. See Eggleton v. Div. of Culture & History, Docket No. 03- C&H-237 (Nov. 24, 2003); Roberts v. Div. of Culture & History, Docket No. 95-C&H-302 (May 12, 1997).

2. Pursuant to W. Va. Code § 29-6A-2 (e), Grievant is not an employee of WVSU as he is not a "person hired for permanent employment. . . ."

3. For the employment relationship to be covered under the grievance procedure, the grievant needs to a relationship with a state agency which contains the following elements:

> (1) selection and engagement of the servant, (2) payment of wages, (3) power of dismissal and (4) the power of control of the servant's action. Where all of these elements co-exist in one person alone, that person is without doubt the master of the person engaged. The first three of these elements are not

> essential to the relationship, and the power of control is themost significant element. The right to control and the power to discharge are the usual marks of the relationship between master and servant. If the employer has the right to supervise the work being done for him by another, the relationship of master and servant exists. Actual control, however, is not the test; it is the right to control which is determinative. Rowe v. Grapevine Corp., 193 W. Va. 274, 456 S.E.2d 1 (1995); Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990); Davis v. Fire Creek Fuel Co., 144 W. Va. 537, 109 S.E.2d 114 (1959).

Napier v. Lincoln County Bd. of Educ., Docket No. 99-22-116 (July 15, 1999).

4. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Res., Docket No. 99- HHR-228 (Nov. 30, 1998). See Long v. Kanawha County Bd. of Educ., Docket No. 00-20- 308 (Mar. 29, 2001); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000). See also Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

5. Any representations Grievant would continue to be an employee without some form of contract and payment were ultra vires and not binding upon WVSU. Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-09 (March 24, 1998). See Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

6. Grievant has not met his burden of proof and established he is employed as a faculty member at WVSU.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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

Senior Administrative Law Judge

Date: January 4, 2007

Footnote: 1

This grievance was originally filed against West Virginia State College which is now West Virginia State University.

Footnote: 2

Dr. Epps sought assistance from Bruce Walker, General Counsel for the West Virginia Higher Education Policy Commission. Mr. Walker replied stating employees of private research corporations created under Section 501(c) of the Internal Revenue Service ("IRS") Code were not state employees, and these research corporations were not state agencies.

Footnote: 3

The undersigned Administrative Law Judge takes judicial notice that this is not a considered a full-time teaching load for a faculty member.

Footnote: 4

In July 2001, the Legislature changed W. Va. Code § 18B-2A-4(k) to mandate that "[n]otwithstanding any other provision of this code to the contrary, the procedure established in article six-a, chapter twenty-nine of this code is the exclusive mechanism for hearing prospective employee grievances and appeals." Prior to that time, higher education employees were covered under W. Va. Code § 18-29-1 et. seq. W. Va. Code § 29-6A-1 et. seq. was not amended to reflect change.