

MARTHA FEKETE, et al.

v. Docket No. 95-BOT-484

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

DECISION

Grievants, eleven faculty and staff employees assigned to the College of Mineral and Energy Resources (COMER) at West Virginia University (Respondent), filed a level one grievance on April 18, 1995, in which they complained that the decision to merge COMER with the College of Engineering (COE), without input from employees and students, was a violation of the West Virginia University Policies and Procedures for Program Change (Policy Change Document), past WVU practice, and widely recognized practice within academia. For relief, Grievants requested “an opportunity to take part in a participatory process of systematic planning and program evaluation consistent with WVU policy and past practice, a process in which a merger of the two colleges could be carefully considered.” Following denials at levels one and two, the matter was advanced to level four on November 6, 1995. A supplementary hearing was conducted on April 23, 1996, and the matter became mature for decision with the filing of post-hearing submission by June 3, 1996.

Although the record indicates that a merger had been discussed earlier, matters leading to this grievance originated on December 5, 1994, when R. Larry Grayson, Dean of COMER, issued a five-page memorandum to faculty, staff, administrators, student officers, the COMER Executive Council, Visiting Committee and External Constituents, in which he advised “Dean Desmond of the College of Engineering and I have recently approached and received permission from Provost LaBelle to proceed with the formation of a new College of Engineering and Energy.” Dean Grayson discussed organizational streamlining, the reduction and elimination of academic programs due to budget cuts and their likely future impact on COMER. He opined that trying to keep the college separate was not “wise business,” and that it was important to pursue the formation of a new, larger college which

would retain the essence of their mission. He continued:

This new college is envisioned by me, Dean Desmond, and Provost LaBelle as a respectful merger of COMER and COE, possibly into a divisional structure, with each division having a head to represent the faculty, staff and students. We have discussed the need for certain principles to guide and govern the merger during some transition period, but we also feel that the new entity should evolve from a facilitated planning effort by the faculty, staff and students of both colleges working under such guidelines. To this end, Dean Desmond and I, with the encouragement of the Provost, will solicit faculty, staff, student, alumni, and visiting committee volunteers from each college to serve on a College of Engineering and Energy Task Force. Provost LaBelle will interact with the Task Force as work progresses

A second memorandum from Dean Grayson, dated December 9, 1994, directed to faculty, staff, administrators, and student officers, stated "I wish to afford you an opportunity to discuss the merger and the process by which we shall get there as well as ask any questions you wish about either topic"

Other memoranda pertinent herein include that from Provost LaBelle to Deans Desmond and Grayson, dated December 8, 1994, stating:

I am in receipt of your memoranda of December 5, 1994 regarding the proposal to merge the college of Mineral and Energy Resources and the College of Engineering into the College of Engineering and Energy. I am supportive of this initiative as an extension of the Board of Trustee initiatives of several years ago, and am writing to request that you recommend to me a slate of faculty, staff, students and professionals from the community to act as a task force for planning and implementation of such a unit. . . .

On December 13, 1994, Provost LaBelle addressed the eighteen member COE/COMER Task Force, including Grievant Jackson, in pertinent part:

As you are aware, Deans Desmond and Grayson recently announced an initiative to combine the College of Mineral and Energy Resources and the College of Engineering. The proposal was endorsed by President Bucklew and me . . . the charge of the task force is ' . . . to provide a set of guidelines for the merger and define: the new College's mission; governance and administrative

structure; policies on resource management; and curricular and related programmatic offerings.' In carrying out this charge, it is important that the task force concentrate its efforts on promoting financial and organizational efficiencies as well as positioning the faculty, staff and students to create new opportunities for enhancing research, teaching and service.

This memorandum was also copied to the COE and COMER faculty, staff, and students, and the COE and COMER Visiting Committees.

On May 4, 1995, Provost LaBelle recommended to WVU President Neil Bucklew the merger of COMER and COE. On June 2, 1995, the Board of Trustees approved the merger, effective July 1, 1995.

The essence of Grievants' complaint is that they were not involved in the decision to merge the two colleges. They argue that the failure to solicit faculty and staff input prior to making this decision was a violation of WVU's "Policies and Procedures for Program Change." Grievants cite numerous phrases from this document which they allege is supportive of their position, including "all program changes must be predicated upon participatory planning." Grievants argue that Respondent has violated its own Policy when it failed to include them in this decision-making process. Although the merger was already implemented by the date of the level four hearing, Grievants renewed their original request for relief, but added as an alternative, that WVU be found in violation of its own policy, and that it be ordered to publicly apologize to Grievants for said flagrant violation.

Respondent argues that a University Task Force, consisting of faculty, staff, and students, initiated by President Bucklew in the 1993-94 academic year to provide a planning document for WVU for the year 2000, discussed the possibility of a merger. Implementation of the merger was accelerated when the deans of COMER and COE both submitted their resignations in Fall 1994, to be effective July 1, 1995. Respondent characterizes the merger as an administrative reorganization and not a program change governed by the Program Change Document, inasmuch as it was not intended to affect curriculum, staff or faculty positions, or student programs. Respondent further notes that the task force, which originally included Grievant Marie Jackson, facilitated implementation of the merger, which was formally approved by the Board of Trustees. Respondent asserts that the Program Change Document is not a rule which binds WVU as properly promulgated rules bind administrative agencies. Rather, the document is characterized as "merely an internal WVU document adopted by the President."

Discussion

The Program Change Document provides that program changes may originate at the program level, with a Dean or Director, by the Vice President or President, or the Board of Regents (Trustees). In all cases, "faculty, staff, students, and administrators should participate in the decision for change." Further, "[a]ffected personnel will be informed of the recommendation and be given an opportunity to offer further information which might influence the outcome." The record herein contains numerous documents which establish that faculty, staff, students, and administrators, were notified of the recommendation and participated in the process prior to approval of the merger by the Board of Trustees.

The Program Change Document does not require that each employee be consulted or participate in the process. Although Grievants perceive the decision to merge was made without the mandatory participation, the evidence establishes that, notwithstanding ambiguous wording in memoranda, the merger was not approved until June 1995, and that faculty and staff, including one of the Grievants, were provided the opportunity to submit their comments. Apparently Grievants did not participate to the degree they would have liked; however, that factor does not establish a violation of policy.

Even if it should be determined that a violation occurred, Grievants do not request any viable relief. As previously noted, the merger has been approved by the Board of Trustees since the filing of this grievance at level one. Grievants' request that they be given an opportunity to take part in the process is for all practical purposes moot. The level two evaluator found that "hypothetically, . . . the University could initiate a participatory planning process re-opening the question [of merger and] forward the results of such a planning process to the Board of Trustees with a request that the Board re-address its own decision on this merger." However, there is no reason to believe that the outcome would differ in any respect, and to order such would be an exercise in futility. Moot issues, the decision of which would avail nothing in the determination of controverted rights, are not cognizable in the grievance procedure. Taylor v. Monongalia County Dept. of Health, Docket No. 90-MCHD-545 (July 31, 1991). The Grievance Board has previously held that Grievants' alternative request for relief, a public apology, is not available as relief. Maxey v. W.Va. Dept. of Health and Human Resources/Div. Of Human Services, Docket No. 92- HHR-504 (Feb. 4, 1993); Helvey v. Workers' Compensation Fund, Docket No. 91-WCF-034 (March 30, 1992).

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievants are employed as faculty and staff at West Virginia University and were assigned to the College of Mineral and Energy Resources (COMER) at the time the grievance was initially filed.

2. By memorandum dated December 5, 1994, R. Larry Grayson, Dean of COMER, advised faculty, staff, administrators, and others of a proposed merger of COMER with the College of Engineering.

3. Faculty and staff were kept apprised of the merger process and were invited to participate in the process by serving on committees or in others ways, such as attending a general meeting held on January 9, 1995. 4. On June 2, 1995, the Board of Trustees approved the merger of COMER and the College of Engineering, effective July 1, 1995.

Conclusions of Law

1. Grievants have failed to prove by a preponderance of the evidence that Respondent did not inform them of the recommendation to merge, did not provide an opportunity for them to offer information which might influence the outcome, or otherwise acted contrary to the Programs Change Document.

2. Subsequent to approval of the merger by the Board of Trustees, Grievants' request that they be given an opportunity to participate in planning the merger is moot.

3. A public apology is not an appropriate form of relief and will not be granted by the Grievance Board.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the circuit court of Kanawha County or in the circuit court of Monongalia 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.

DATE: August 20, 1996 _____

Sue Keller

Senior Administrative Law Judge