HILLAR KLANDORF and RICHARD RUSSELL,

Grievants,

v. **Docket No. 97-BOT-307**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievants, Drs. Hillar Klandorf and Richard Russell, employed as Associate Professors by West Virginia University in the College of Agriculture and Forestry, Division of Animal and Veterinary Sciences (Respondent), filed a level one grievance on February 28, 1997, in which they alleged a breach of their initial employment agreements when they were denied summer employment. They request that their employment agreements be enforced, and their summer employment reinstated. Grievant's immediate supervisor lacked authority to resolve the complaint. Following a level two hearing, the grievance was denied, in part, based upon a finding that Grievants were not entitled to continued summer employment, and was granted, in part, by awarding Grievants employment for Summer 1997 only.

Grievants elected to by-pass consideration at level three as is permitted by W. Va. Code §18- 29-4(d), and advanced their complaint to level four on June 25, 1997. Following a number of continuances granted for good cause, an evidentiary hearing was conducted on February 9, 1998, at which time Grievants were represented by Joe Simoni, and Respondent was represented by Bruce R. Walker, Esq.,. The matter became mature for decision with the submission of responses to proposed findings of fact and conclusions of law on or before March 24, 1998.

Background

The facts of this matter are undisputed. By letters dated April 7, 1988, and September 27,1988, Grievants were offered appointments as Assistant Professors of Animal Science in the Division of Animal and Veterinary Sciences, College of Agriculture and Forestry, at West Virginia University (WVU). Grievants' appointments also carried the title of Assistant Animal Scientist in the West Virginia Agricultural and Forestry Experiment Station. These were nine-month, full-time, tenure track positions. Dr. Klandorf was advised that his research efforts should be in the areas of poultry nutrition

and/or physiology, and the needs of the poultry industry. Dr. Russell's research was to be directed to the nutritional physiology and needs of ruminant and non-ruminant livestock species.

The appointment letters included a statement of Grievants' academic year (nine month) salaries, and both advised that “[s]ummer employment for your first three years with WVU will be guaranteed and the initial rate will be three months at [dollars] (per month). Annual raises will determine the monthly amount in 1989 and 1990. The purpose of guaranteed summer employment is to allow you sufficient time to develop an approved research project that can either be externally funded or supported with Hatch funds, and to demonstrate satisfactory progress with your research efforts.”

Grievants worked the nine-month academic year, plus the summer term, through 1995. By letter dated April 11, 1996, Dean Rosemary R. Haggett advised Grievants in pertinent part:

Given our current budget problems and the projected shortfalls in both state and federal funds we will no longer be able to support your summer salary supplement from federal funds effective July 1, 1997. Your summer supplement for the remainder of this fiscal year (May 16-June 30, 1996) and for next fiscal year (July 1-August 15, 1996 and May 16-June 30, 1997) will be paid from federal funds. Effective July 1, 1997, funds for your summer supplement will have to be generated by external funds that you obtain.

Under the current policy outside grants may, if supported by the grant budget, provide two and one-half months of summer salarysupport, making 11.5 months of salary support possible. The compensation may be increased to 3.0 months with approval of the Office of Academic Affairs and Research.

Argument

Grievants argue that the letter of April 1996 is contrary to the terms under which they were appointed, i.e., that they would hold summer employment continuously, so long as they were working on an approved research project. Grievants testified that they were advised the summer assignment made the employment offer “as good as” a twelve month contract, and was a significant factor in their acceptance of the employment offer. Grievant Klandorf recalled that during the interview process he was advised that the summer employment would be in place so long as he was working on a Hatch project. Grievant Russell testified that he also understood that summer employment was contingent only upon his maintenance of active research. Grievants opined that their appointment

letters make the same representations that were offered verbally.

Grievants also testified that they had incurred damages as a result of this turn of events. Grievant Klandorf stated that in reliance upon the income he had bought a better house, which he was forced to sell, and his spouse was required to obtain a second job to assist with the family income. Grievant Russell recounted that the loss of income made him angry, and that he has suffered three heart attacks. He stated that his wife, who remains at home with a child who is still in elementary school, may also be forced to work outside the home, if he loses this income. During Summer 1997, Grievant Klandorf was provided partial employment, and Grievant Russell taught additional graduate courses to recover a portion of the salary they would have earned during the summer. However, Grievant Russell notes that the additional workload has effectively terminated his production of publications, which numbered approximately thirty prior to 1996. Both Grievantstestified that had the possibility of no summer employment been made known to them during the hiring process, they would have negotiated different employment terms.

In support of their claim, Grievants offered the testimony of Dr. Robert Maxwell, Dean of the College of Agriculture and Forestry from 1985-93. Dean Maxwell stated that it was necessary to hire twelve month faculty members in the College of Agriculture and Forestry, because it is not possible to suspend animal studies three months out of the year. He characterized the three month summer employment as an alternative approach to securing the necessary twelve month employees, and stated that it had been offered with the blessing of Stewart Hall. (See footnote 1)

In addition to Dean Maxwell, William Martin, Chair of the Search Committee when Grievant Klandorf was hired, testified at level two as follows:

Q. And was it your understanding that it was - - - that the guaranteed summer support would be for the first three (3) years and then after that it would depend on what they were able to generate in terms of external research or Hatch funding?

A. It was my understanding that the guarantee was for the first few years and after that time the individual would have, uh, a Hatch proposal approved and therefore funding for his summer research.

Q. So, if they didn't have an approved Hatch project, or other external research funding they wouldn't get a summer supplement after three (3) years?

A. That was my understanding.

Q. If they had it they would get the summer supplement?

A. That was my understanding.

(Level II Trans. pp. 157-158.) Elaborating somewhat on Dean Maxwell's testimony, Dr. Martin stated that faculty in Agriculture and Forestry carry a reasonably heavy teaching load during the academic year, but do not teach many classes during the summer. Therefore, those who possess research grants and Hatch projects conduct much, if not all, of their research in the summer.

Paul Lewis, Chair of the Division of Animal and Veterinary Science from 1988 through 1993, stated his understanding that Grievants' summer employment was ongoing, contingent only upon whether they had an approved project, financed by external sources or Hatch funding. Robert Dailey, Chair in 1994, testified that it was also his understanding that so long as Grievants had viable Hatch projects, they would continue to be employed during the summer months.

Respondent denies that Grievants are entitled to continued summer employment. At level two, Dean Haggett explained that the Hatch Act, enacted in 1862, established land grant universities, including WVU. As part of the legislation, the United States Department of Agriculture (USDA) is authorized to allocate funds to the land grant system, particularly to Experiment Stations, on a formula basis. Those funds relevant to the present grievance, and referred to as Hatch funds, support agricultural research and are appropriated by Congress on an annual basis. An award is made by the USDA to the land grant universities, which must then match the amount dollar for dollar. When a researcher receives approval for a proposal from the Experiment Station and the USDA, it simply means that Hatch funds may be used to pay for the research. Approval does not carry an additional award of money to the researcher or the institution, but simply licenses the institution to spend Hatch money on the project. A budget attached to the project is not necessarily funded, entirely or partially, by Hatch dollars. In addition to research projects, Hatch funding may be used for academic year salaries, to purchase feed for the animals, electricity, etc. Dean Haggett noted that the amount offunding is decreasing, and opined the funding will continue to change over time. She noted that her fiscal concerns led her to review nine-month faculty appointments, and resulted in the issuance of approximately twelve letters to individuals whose contracts had similar or identical employment arrangements as Grievants.

Nancy Lohmann, Senior Associate Provost for Academic Affairs, testified at level two that at least

since Spring 1988, then-Provost Frank Franz initiated a practice that faculty would be hired under nine-month appointments, rather than the twelve-month appointments previously granted. The basis for this practice was the fiscal obligation the twelve-month appointments represented for the institution, and a concern that faculty with the longer appointment might be less motivated to obtain external funds. Provost Franz had advised the Deans that no offer, verbal or written, could be extended without the Provost's office approval. Provost Lohmann recalled that Dean Maxwell did not agree and was not supportive of the change, but complained less about it over time. She recalled that she had reviewed, and approved, Grievants' appointment letters, and understood that if there was a funded project they would be guaranteed summer employment. Provost Lohmann continued to state her understanding that an approved Hatch project may or may not equal a funded project, depending on whether the project was approved at all levels, including the college, which must determine whether the project is appropriate for funding, and consistent with institutional goals.

Respondent asserts that the appointment letter does not guarantee summer employment beyond three years, unless Grievants obtain external funding to support such employment. Respondent argues that any oral assurance of twelve-month employment was contrary to policy and made by individuals who lacked authority to make such a promise. Citing case law and decisions of the Grievance Board, Respondent asserts that only the Provost's Office was authorized to offersummer employment to Grievants, and that any such representations by others were ultra vires acts, not binding on it as an employer.

Respondent additionally claims that Grievants are requesting speculative and declaratory relief, which the Grievance Board does not grant, in that they have not yet suffered harm, and that Grievant Russell's complaint is moot, even under his interpretation of the employment offer, because he has no approved Hatch project for Summer 1998. Finally, Respondent notes that the appointment letters specify that the appointments are contingent upon the availability of funds and valid only as long as the funding is available. In consideration of all the foregoing, Respondent concludes that it has no obligation to offer Grievants summer employment unless they secure external funding to support that employment.

Discussion

Considering the foregoing, Grievants' complaint is entirely understandable. They accepted positions at WVU, and have built lifestyles, based upon an eight year history of earning twelve-

month salaries. Dean Maxwell confirms that he guaranteed the summer employment so long as they participated in a research project. Although Dean Maxwell fulfilled that arrangement so long as he was employed, his successor, Dean Haggett, does not share the same philosophy and does not wish to allocate her budget for this type of summer employment. Grievants did not perceive the provisions of their appointment letters to contradict their understanding of Dean Maxwell's verbal representations. Unfortunately, the letters only expressly guarantee summer employment for three years, for the purpose of developing an approved research project which is to be externally funded or supported with Hatch funds. Grievants did develop the approved research projects; however, the appointment letters do not state, or even imply, that research beyond the initial three years would becompensable beyond the academic year. Evidence indicates that research in the College of Agriculture and Forestry is traditionally conducted during the summer. That practice may no longer remain feasible with the implementation of the nine-month appointment.

To their present detriment, Grievants relied upon the representations of Dean Maxwell, whose promise of ongoing summer employment was contrary to the WVU practice of offering nine- month appointments, with guaranteed summer employment for only a limited period of time. Because Dean Maxwell lacked the authority to bind WVU to a salary arrangement in excess of institutional practice and policy, his action was not binding upon Respondent. See Ollar v. Health and Human Resources, Docket No. 92-HHR-186 (Jan. 22, 1993).

“A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citation omitted.]” Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Service, Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985). The important public policy consideration underlying this strict rule is that “'[a]ny other rule would deprive the people of their control . . ., and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.' [Citation omitted.]” Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415, 421 (1985).

Undeniably, this situation has impacted Grievants harshly, through no real fault of their own; however, to allow the representations of college administrators to supercede institutional practice would surely result in budgetary chaos. Under these circumstances, there can be no legally binding contract. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998); Malone v.

Marion County Bd. of Educ., Docket No. 96-24-084 (May 30, 1996). 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 were employed by WVU in 1988 as Associate Professors in the College of Agriculture and Forestry, Division of Animal and Veterinary Sciences.

2. Appointment letters issued to Grievants by then-Dean Robert Maxwell advised that employment was for the academic year (nine months), and that summer employment would be guaranteed for three years.

3. The stated purpose for the guaranteed summer employment was to provide Grievants sufficient time to develop an approved research project to be funded externally or with Hatch monies, and to demonstrate satisfactory progress with your research efforts.

4. Dean Maxwell assured Grievants that they would retain their summer supplements so long as they had an approved research project, therefore, the offer was “as good as” a twelve- month appointment.

5. By Spring 1988, WVU had implemented a practice of employing faculty under a nine- month appointment.

6. In April 1996, Dean Haggett notified Grievants that their summer salary supplements would no longer be supported, effective July 1, 1997.

7. Dean Haggett offered Grievants additional assignments during the academic year and the summer to offset their lost income in 1997. Similar arrangements may be available in the future, but are not guaranteed. 8. Grievants may earn summer salary in the future if they procure outside grants which make the extended salary support possible.

Conclusions of Law

1. In non-disciplinary grievances, Grievants must prove each of the allegations constituting the grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Shackleford v. W. Va. Bd. of Directors/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997); Baroni v. Bd. of Directors/Fairmont State College, Docket No. 92-BOD-271 (Feb. 11, 1993). See W. Va. Code §18-29-6.

2. Dean Maxwell's oral representation regarding summer employment beyond the initial three

years is not binding on Respondent because he did not possess authority to actually make that offer. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993); Fraley v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993).

3. Grievants have failed to prove they are entitled to ongoing summer employment, even though they may have a research project approved for Hatch funds.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 notbe 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: May 7, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The offices of the President and other WVU administrators are located in Stewart Hall.