STEPHEN L. COOK,

Grievant,

v. **Docket No. 05-HE-352**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Under cover letter dated September 22, 2005, Stephen L. Cook ("Grievant"), employed by West Virginia University ("WVU") as an Associate Professor, filed a grievance directly to level four stating: On or about 09-15-05, Grievant was arbitrarily and capriciously demoted when WVU, relying upon false accusations, removed him as Director of WVU Institute for Labor Studies and Research (ILSR). WVU breeched Grievant's contract and violated statutes, policies, rules, regulations, and agreements, including but not limited to, WV Higher Education Policy Commission's Policy 2 and Grievant's due process of law as guaranteed by U.S. Constitution Amendment XIV & WV Constitution.

For relief, Grievant requested reinstated as Program Director of WVU ILSR with back pay and benefits from September 20, 2005, including administrative supplements and merit increases. He further requested restoration of annual leave days taken for preparation of the grievance, or to be compensated for those days, and that his personnel file be expunged of all documents referencing the incident which gave rise to the demotion, including those held by WVU counsel. Finally, Grievant requests his reappointment be announced to all extension employees and in a press release to all local media, along with a public apology.

An evidentiary hearing was conducted in the Grievance Board's Westover office on December 6 and 20, 2005, and January 26, 2006. Grievant was represented by James M. Cagle, Esq., and WVU was represented by Kristi A. McWhirter, Assistant AttorneyGeneral. Following the hearing, proposed findings of fact and conclusions of law were filed by the parties on February 15, 2006. On April 26, 2006, the parties filed a stipulation of the testimony of Stanley Hostler, and the grievance was mature for decision. (See footnote 1)

The following facts have been derived from a preponderance of the credible evidence admitted

during the level four proceedings.

Findings of Fact

1. Grievant was first employed by WVU in 1967 as an Assistant Professor in the Extension Service/Institute for Labor Studies & Research ("ILSR"). Grievant left this position in 1977 to serve as West Virginia's Labor Commissioner. He then pursued employment in the private sector, and was elected to the West Virginia State Legislature. 2. By letter dated June 5, 1995, Charles Morris, Interim Director offered Grievant the position of Program Director for Labor Studies with the WVU Extension Service. The tenure-track position was designated the academic rank of Extension Assistant Professor. Mr. Morris advised that it was his intent to continue the appointment through June 30, 2000, subject to Grievant's performance, availability of funds and mutual consent. Thereafter, consistent with WVU practice, Grievant received annual notices of faculty appointment reflecting his academic and administrative roles, his base salary, and the administrative supplement for his duties as Program Leader.

3. Grievant was granted tenure and promoted to Associate Professor in 2001. 4. In May or June of 2004, Bob Galardi, Development Director for Extension, asked Grievant to approach Mr. Stanley Hostler about the possibility of endowing a chair in the ILSR. Mr. Hostler has made many philanthropic gifts to WVU, and as a labor lawyer, has a particular interest in the ILSR. Grievant responded that he did not feel comfortable making the request, and did not believe that he was required to solicit financial gifts for the program. However, after Grievant's immediate supervisor Ken Martin also made the request, Grievant agreed to discuss the matter with Mr. Hostler. (See footnote 2)

5. Both Grievant and Mr. Hostler attended the Democratic National Convention in Boston July 26-29, 2004. While attending a social function, Mr. Hostler stated that he had received calls from Mr. Galardi and Dr. Larry Cote, Associate Provost and Extension Service Director, and asked Grievant what they wanted. Grievant responded that it was in reference to a donation to fund a chair. Mr. Hostler indicated that he was not interested in funding a chair at that time, to which Grievant stated that he had already advised Mr. Galardi and Dr. Cote that he (Mr. Hoster) would not be interested.

6. In January 2005, Grievant met with Mr. Hostler and Larry Matheny, Secretary/Treasurer of the West Virginia Labor Federation, AFL-CIO, to discuss an April Evaluation Summit being proposed and financially supported by Mr. Hostler. The meeting was to include representatives from the

business community, government, education, and organized labor. Grievant expressed reservations about the Summit because the AFL-CIO Executive Board had just completed a strategic planning process and none of those boardmembers were invited to the Summit. Mr. Hostler was dismayed at Grievant's lack of support, and redirected the Summit through another program of Extension Services.

7. In February 2005, Mr. Hostler opined that the labor program needed to change directions, and recommended a change in leadership to an evaluation committee, observing that Grievant was politicized. During a conversation which included President Judy Hale, at the American Federation of Teachers Charleston office on March 9, 2005, Mr. Hostler again opined that Grievant should be replaced.

8. At an ILSR Advisory Board meeting on June 24, 2005, the subject of approaching Mr. Hostler for a financial contribution was discussed. A comment was made to the effect that Mr. Hostler was not a “cash cow” to be milked.

9. By letter dated July 7, 2005, to WVU President David C. Hardesty, Mr. Hostler resigned from the ILSR Advisory Board, noting that he had been affiliated with the labor program since 1959.

10. The following day Mr. Hostler telefaxed Dr. Cote a memorandum explaining his decision to resign from the Board. He stated in pertinent part:

On Thursday, July 7, 2005 I received a phone call from Jim Bowen regarding the ILSR Advisory board meeting held on June 24, 2005 in Morgantown. Jim told me that during the meeting Steve Cook made the statement that your only interest in me was to secure financial contribution and I was viewed by you as a financial milk cow. Apparently, Bowen agreed with the statement and volunteered to talk to me thus the phone call. Kenny Perdue and Larry Matheny confirmed the statement by Cook immediately following my phone conversation with Bowen.

I reminded Bowen, Perdue and Matheny that I was a 'big boy' and I did not need Steve Cook or anyone else to question my financial decisions. I also reminded them that according to Steve Cook he had told Bob Galardi that I would not be interested in making a contribution to the swimming pool at Jackson's Mill . . . .

I deeply resent Steve's comments and his right to discuss my financial contributions. I would also add that I am deeply disappointed in Bowen's role in the question of [my] financial support of activities at West Virginia University.

11. Dr. Cote and Dr. Paul Becker, Associate Director and Extension Professor, met with Grievant on July 13, 2005, at which time they advised him they had information that he had suggested to the Board during the June 24 meeting that Mr. Hostler should be warned WVU might be exploiting him by frequently seeking funds, and that he had referred to Mr. Hostler as a “cash cow”. Grievant denied the allegation.

12. On July 14, 2005, Dr. Cote telephoned Mr. Matheny, who is member of the ILSR Advisory Board, and Kenneth Perdue, President of the AFL-CIO and Chair of the ILSR Advisory Board, to inquire about Grievant's comments at the June 24 meeting. They confirmed that Grievant had initiated a conversation that denigrated Dr. Cote's view of Mr. Hostler as it related to the request for gifts from him, and that Grievant had used the term “milk cow” or “cash cow” when describing Dr. Cote's approach to Mr. Hostler.

13. Dr. Cote and Dr. Becker again met with Grievant on September 1, 2005, at which time they confronted him with their information indicating his untruthfulness. During the meeting, Dr. Cote also provided Grievant with a letter dated August 29, 2005, memorializing their July 13, 2005, meeting. Dr. Cote noted that four issues were discussed, including:

3. An allegation by Bob Galardi, Director of Development for WVU Extension, that he at my direction requested your assistance in obtaining a donation from Mr. Hostler for an endowed chair at ILSR or other program support. He states that you were unwilling to help in this regard.

You confirmed this conversation and stated that you did not think it was your role to ask donors for money.

Paul Becker expressed his amazement that you would have such a grave misunderstanding of the expected role of a WVU faculty member and administrator. He made it clear to you that there is an expectation that you would support seeking resources for important programming. In fact, your faculty assignment document clearly speaks to your need to provide administrative oversight and that you should initiate and coordinate grant and fee income opportunities.

4. An allegation from Stan Hostler that you initiated a discussion with the Institute for Labor Studies and Research (ILSR) Advisory Board (with Mr. Hostler not present) in which you indicated that I (and the University) are only interested in Stan Hostler for his money, and that I viewed him as

a 'financial milk cow.'

You confirmed that such a conversation did occur at the Advisory Board meeting, but denied that you either initiated the discussion or used the term 'milk cow.'

I have spoken to Ken Perdue . . . and to Larry Matheny . . . . They both confirm Mr. Hostler's allegation that you initiated the discussion and that you did use the term 'milk cow' indicating my (and the University's) view of Mr. Hostler.

At this meeting I was pleased to hear your responses and we ended by stating that Paul and I would continue our fact finding and would take some time to consider appropriate follow up to the meeting.

* * *

With reference to the third allegation, I warn you that you have not performed the responsibilities of an administrator in a manner consistent with well know[n] expectations.

My investigation has corroborated the allegation that you initiated a conversation that was derogatory concerning my (and the University's) solicitation of funds from Stanley Hostler. Furthermore, you did use the specific term 'milk cow' in that conversation. This confirmation comes from both Ken Perdue and Larry Matheny who attended the ILSR Advisory Board meeting. This is a very serious transgression. Our system depends on a premise of trust, particularly in the honesty and truthfulness of our interchanges. Further, confidentiality about donors' actual or intended gifts is a well established practice among University employees, particularly thoseof us in leadership roles. I find your untruthful statement to be of such a serious nature that I intend to remove you from your Program Leader position effective September 12, 2005. However, prior to that time . . . you may contact me and provide me with information that you believe warrants a different decision on my part.

I also note that your statement meet the test of Causes for Dismissal for tenured faculty, (West Virginia University Board of Governors, Policy 2 §12.1.1) 'Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct.'
I also consider that your unwillingness to work with Bob Galardi undercuts my efforts to bring

resources to WVU and meets the additional standard of Policy 2 and Series 9 §12.1.2, 'Conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities . . . .'

Therefore, also consider this a warning that any subsequent act of an untruthful nature, or one that substantially impacts your fulfillment of institutional responsibilities may result in termination of your faculty appointment.

14. At Grievant's request, a second meeting was conducted on September 13, 2005. Grievant explained that while he had initially refused to ask Mr. Hostler about the gift, he later made the request, and was supportive of the gift. For the third time, Grievant denied making any disparaging remarks about Dr. Cote's solicitation of funds from Mr. Hostler.

15. After confirming with Mr. Hostler that Grievant never asked him to endow a chair, and was not supportive of the gift when the topic was mentioned, Dr. Cote issued a second letter on September 15, 2005. After acknowledging the follow-up meeting and restating his conclusions from the August 29 letter, Dr. Cote concluded that Grievant continued to be dishonest regarding the two issues in contention, and confirmed that Grievant he would no longer serve as Program Leader, effective September 20, 2005.

16. Dr. Cote and Mr. Perdue notified the ILSR Advisory Board Members by letter dated September 20, 2005, that Grievant would no longer serve as Program Leader forILSR, but would continue to serve as a tenured Associate Professor and specialist with ILSR.

17. Mr. Perdue e-mailed Dr. Cote on October 7, 2005, stating that it had been a “huge error in judgment” to co-sign the September 20, 2005, letter as some labor leaders mistakenly believed that he shared in making the decision. Mr. Perdue continued to state that the appearance of support by himself and Mr. Matheny had been grossly misstated, and that he disagreed totally with the dismissal. Representing both himself and Mr. Metheny, Mr. Perdue clarified that while they “believed” Grievant used the term “cash cow,” they were not asked to describe the context in which the term was used, which was very innocuous. Mr. Perdue concluded by opining that the underlying issue is the University's desire to “get rid of the ILSR”.

18. Both Mr. Perdue and Mr. Metheny failed to honor Grievance Board subpoenas to testify at the level four hearing.

19. Eight individuals who were in attendance at the June 24 meeting testified that the term

"cash cow" was in fact used by Dr. Sarah Etherton, another ILSR faculty member. The witnesses consistently testified that the term was not used in a derogatory manner, but rather, in the sense that Mr. Hostler should not be thought of in those terms.

Discussion

Grievant asserts that WVU failed to establish good cause for his dismissal as Program Leader of ILSR. WVU argues that Grievant's assignment as Program Leader was an "at-will" position which expired June 30, 2005. In fact, Grievant was neither dismissednor an at-will employee. Grievant's administrative assignment was not at-will employment because the annual notice of appointment serves as an administrative contract, stating his position, salary, and term of employment.

The West Virginia Supreme Court of Appeals has held that higher education employees assigned as administrators have only the rights attendant to their current contracts. In such cases, an employer may refuse to renew these types of employee contracts without giving a reason and without providing a hearing. "The only exception to this general principle is in cases where an employee demonstrates that he had a property right in continued employment, entitling him to due process of law." *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 181, 386 S.E.2d 835 (1989); *Loundmon Clay v. HEPC/Bluefield State College*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept. 11, 1997). "For [an] employee to possess a property interest in his employment he must have a sufficient expectancy of continued employment derived from state law, rules or understandings. . . . [t]he expectation must be more than unilateral" *Scragg v. Bd. of Directors/ W. Va. State College*, Docket No. 93-BOD-436R (Jan. 30, 1996). Here, Grievant was not dismissed, as he was allowed to serve the full term of his contract. As in *Tuck, supra,* WVU has done nothing to create any objective expectancy that Grievant's employment as an administrator would be continued beyond the initial five-year term which expired in 2000. Grievant's property rights in his administrative employment as Program Director ended when his contract expired in 2005, and absent a basis for entitlement to continued employment in that role, any expectation was unilateral. *Smith, supra. SeeWhitaker v. Bd. of Director/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000).

Grievant was not entitled to any reason for the non-renewal decision, but was given several,

which will now be reviewed. As set forth in the September 15, 2005, letter, Dr. Cote charged Grievant with making untruthful statements of a serious nature. The first involved Grievant's denial that he had made derogatory comments concerning WVU and Dr. Cote's solicitation of funds from Mr. Hostler, and his use of the term “milk cow”. The second involved Grievant's failure to solicit funds for an endowed chair from Mr. Hostler. The evidence of record establishes that Grievant did not refer to Mr. Hostler as a “milk cow” or “cash cow,” but the reference was made by another faculty member. Further, although Grievant did not initiate the discussion with Mr. Hostler regarding funding for an endowed chair, he did engage in a brief discussion of the matter. Grievant did not pursue the contribution after Mr. Hostler unequivocally stated that he was not interested at that time. While Grievant did not expend the effort Dr. Cote expected, he was not untruthful in stating that he had spoken with Mr. Hostler about the matter. Because Grievant has proven the reasons for nonrenewal were erroneous, the August 29, 2005, and September 15, 2005, letters, and any other documentation addressing those charges must be removed from his personnel file.

Finally, Grievant requests restoration of annual leave days taken for preparation of the grievance, or to be compensated for those days. *W. Va. Code* § 29-6A-3(p) provides in part:

The grievant or the employee selected by a grievant to represent him or her in the processing of a grievance through this procedure, or both, shall be granted necessary time off during working hours for the grievance procedurewithout loss of pay and without charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant or the employee representative, or both, shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits.

Grievant is entitled to restoration of four hours of annual leave for preparation of the grievance, as well as any annual leave taken during which Grievant was in attendance at the level four hearing.

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

Conclusions of Law

1. Absent a protected property interest in their employment, higher education employees assigned as administrators have only the rights attendant to their current contracts. *State ex rel. Tuck*

v. Cole. 182 West Virginia 178, 386 S.E.2d 835 (1989).

2. A protected property interest in employment is more than an abstract desire or unilateral expectation of it. An employee must have a legitimate claim of entitlement to it, grounded in contract, statutes or regulations. *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *State ex rel. Tuck v. Cole*, 182 W. Va. 178, 181, 386 S.E.2d 835 (1989); *Loundmon Clay v. HEPC/Bluefield State College*, Docket No. 02- HEPC-013 (Aug. 29, 2002); *Smith v. Bd. of Directors/Fairmont State College*, Docket No. 97-BOD-238 (Sept. 11, 1997).

3. Grievant had no objective expectation of continuing the administrative assignment as Director of the ILSR beyond the terms of the annual contract which expired in June 2005. Accordingly, the grievance is **GRANTED** to the extent that WVU is ORDERED to remove the documentation from Grievant's personnel file, and adjust his annual leave consistent with this decision. All other relief is **DENIED.**

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. 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.

DATE: MAY 22, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Upon review of the audio record of the level four hearing, Mr. Hostler's testimony on direct and cross examination was found to be missing, either as a result of mechanical malfunction or human error.

Footnote: 2

Grievant understands that one of his duties is to "[i]nitiate and coordinate additional grant and fee income opportunities," and he has done so. It is only the personal solicitation to which he objects.