

Report to WSU AAUP-AFT Executive Board On Grievance No. 255

The following is an assessment of the present situation with respect to Grievance No. 255, the case of Dr. Lucia Zamarano. Some of following includes information that was included in the latter to the Chair of the WSU Board of Governors on which you were copied. As you know, last month (February 10, 2007), the union received the opinion and decision in Grievance No. 255. The decision was a clear victory for the Union and Dr. Zamarano. The decision, which you have received by email attachment, makes it clear that the actions of university administrators violated the due process rights of the grievant. Those administrators were, particularly, Vice President and General Counsel Louis Lessem, and Vice President for Research, John Oliver, and, to a lesser extent, Director of the Office of the Auditor, Ms. Carolyn Hefner and the Director of the Pro-Card Program, Ms. Christina Radcliffe. Provost Nancy Barrett and Vice President John Davis are mentioned in testimony as being present in relevant meetings, but there is little evidence in the testimony that they played important roles in this matter.

The Arbitrator ordered that:

1. All personal property seized on October 25, 2004, if not returned shall be returned forthwith with Association [WSU AAUP-AFT] input if needed.
2. The balance of her university contract period salary be paid to the grievant to and through the end of June 2005.
3. The University shall examine its records of payment of the grievant's additional grant-based salary covering the period of her operation of the grant (i.e. through October, 2004) and shall either pay the Doctor Zamarano all unpaid sums set forth in the grant (Union [exhibit] 10), or demonstrate the University policies and procedures for paying, or not paying such additional grant-specified sums to its faculty researchers were applied consistently to the grievant.
4. The grievant is awarded voluntary faculty status for a two year period starting as of the date of this decision, for the purposes of regaining privileges at a qualification at University-affiliated medical facilities where such affiliation is required. The University shall not prevent or oppose any affiliation of the grievant with UNS or other practice groups having University affiliated doctors as members\employees.
5. Written notices and media releases of such voluntary status shall be disseminated in a manner acceptable to the grievant, (the Association shall be consulted.) Personnel records shall delete mention of suspension or termination.
6. The university is to reimburse the Union for *half* of the Union's actual attorney fees and out of pocket (not arbitration) costs in prosecution of this grievance. No private attorney fees are reimbursed.

The following summarizes several points that emerge from the Arbitrator Susan J. Alexander's decision. This list is followed by a discussion of the case:

1. Senior administrators, most notably, General Counsel and Interim Vice President Louis Lessem and then Vice President for Research, John Oliver, systematically violated the rights of the grievant, by among other actions, denying her with a hearing on the charges that they laid against her;
2. These administrators made decisions that corrupted the audit process in this case, depriving it of the independence that should be a hallmark of the Office of Internal Audit. These actions bring into question other audits that have influenced the cases of other members accused of procedural violations, most particularly with respect to the Office of Financial Aid.
3. To date, the General Counsel's Office has refused to implement the award and has filed what we view as a frivolous appeal with the Arbitrator asking her to set aside portions of her award. She has ordered the two sides to meet to discuss implementation of her decision. We view this as but another attempt by the General Counsel to delay the inevitable and a waste of our members' money and that of the Michigan taxpayers. We are filing a freedom of information request to discover how much of the taxpayers' money has been spent so far on outside counsel in this bootless enterprise.

Discussion

The Arbitrator's decision illuminates certain faults in the administrative practices and procedures of this Administration that, if continued without correction, may threaten the due process rights of other members of our bargaining unit in the future. Key administrators made decisions that showed an irresponsible disregard for the rights of the grievant. The primary responsibility of General Counsel Lessem and Vice President Oliver for these decisions is clear. The testimony in this case shows it was primarily they who drove the flawed process.

As the General Counsel of the University it is Mr. Lessem's duty to know how to insure that the legal procedures that University follows in disciplinary matters are above reproach. It should have been he who assured that due process was accorded the grievant. He failed. Vice President Oliver, the other major actor in the matter, provided a strange and unconvincing rationale for the dismissal of Dr. Zamarano that certainly helped to impel the flawed decision making process. Both of these matters are dealt with in detail the attached documents. The Arbitrator states: "The decision to suspend, and later terminate, Dr. Zamarano was made by University Vice president (Research), John Oliver, Vice President/General Counsel Louis Lessem, the manager of Internal Audit, among possible others." (p. 2, Arbitrator's decision)

It is ultimately, the responsibility of the Board of Governors to assure that WSU administrators follow the rules that it has adopted and agreed to in the collective bargaining agreements signed with the University's unions. This did not happen in this case.

The Office of Internal Audit

The role of Ms. Hefner, Director of Internal Audit, is of particular concern for us and should be for the Board of Governors, and, most particularly, for the BOG Audit Committee. While Ms. Hefner testified that she was answerable to the BOG Audit Committee, it was clear from the

testimony that she participated in building the case against Dr. Zamarano under the direction of senior University administrators. The Arbitrator states:

“The Union points out the notable omission of the Internal Audit Director to interview the grievant. Ms. Hefner’s explanation for that makes clear that it was a joint decision, discussed with the Vice Presidents. At the same time, the documentation, including the clearly erroneous explanations of the grievant, were persuasive evidence that the doctor was not being honest, at a minimum after the fact. The record shows that Ms. Hefner did make a recommendation as to the termination of Dr. Zamarano and thus her own failure to interview the grievant becomes more significant. Her recommendation role, and position as Head of Internal Audit along with the great weight of the Audit Report cannot compensate for the deliberate refusal at all levels to give the grievant her informal forum.”

The job of the Office of Internal Audit should not be prosecutorial. Its responsibility to the Board of Governors Audit Committee should be one of finding out the facts and letting the chips fall where they may. Instead, the record shows that Ms. Hefner was in close contact with Mr. Lessem at all times and was taking direction from him in building the case against Dr. Zamarano. When asked why the grievant had not been interviewed in the audit process, she testified, “...we discussed that with senior management. At that time *we asked direction on how they would like us to proceed. The decision was made that we would continue with the documentation* [with no interview].” (p. 150, Transcript, Emphasis added.)

In addition to Ms. Hefner taking direction from “senior management” on interviewing Dr. Zamarano, her office was actively engaged in the efforts to get her indicted. Ms. Hefner testified that the member of her staff that she had assigned to the case, Ms. Bhavna Mehta, “accompanied the [WSU] Public Safety officer on a couple of occasions to ...[the Prosecutor’s] office.” (Vol 1, p. 173, Testimony)

The record shows that Ms. Hefner, the Director of the Office of Internal Audit, attended a number of meetings with the senior administrators who were driving this investigation. It is reasonable to assume that she was being responsive to those senior administrators, particularly Lessem and Oliver, who were intent upon firing Dr. Zamarano, when she decided not to interview Dr. Zamarano. Her very presence in such administrative meetings undermines the independence of the Office of the Auditor. This should be a matter of great concern for the BOG, and particularly of its Audit Committee.

The image that emerges from the Arbitrator’s decision and the testimony is one in which senior administrators, particularly General Counsel, and then, Interim Vice Executive President, Lessem and Vice President for Research Oliver, had decided on the result that they wanted and were willing to sacrifice both the due process rights of an accused and the independence of the Office of Internal Audit in their obsession to convict (literally) a grievant about whose guilt they had made up their minds.

The independence of the Office of Internal Audit is of grave concern for all the members of the Board, but particularly for those who are the members of the BOG Audit Committee, to whom

the Office should be reporting, without having to worry about the degree to which the reports to it are shaped by the interests of University administrators. The Director of Internal Office should not be someone ordered about by senior administrators. This case raises important questions about the oversight of the Office by the Audit Committee in other cases.

General Counsel Louis Lessem

Mr. Lessem has particular responsibility in this matter. As the General Counsel of the University it is his duty to know how to insure that the legal procedures that University follows in such matters are above reproach. It should have been he who assured that due process was accorded the grievant. He failed miserably.

The General Counsel marshaled all the University resources that he could to try to get Dr. Zamarano indicted and convicted of a crime. University officials met with Ms. Kim Worthy's Office to push the indictment process.

General Counsel Lessem and Dr. Oliver met with Dr. Zamarano and her attorney at the instance of the grievant. She was seeking to find a way to resolve the issues and repay any funds involved in questionable purchases. The meeting was against the advice of her attorney. When her attorney asked the General Counsel to accept as applicable in the meeting the provisions of Michigan Rules of Evidence 408, which provides that offers to compromise can be exempt from use in subsequent criminal proceedings, General Counsel Lessem refused. He had previously received three very detailed letters from her attorney responding to each of the questioned expenses and providing rationales for Dr. Zamarano's behavior. Lessem did not respond to any of the details in the three letters, but instead provided, "A short, dismissive, even sarcastic, 'response...'" The testimony of Dr. Zamarano was that Lessem stated, "...looking directly at me, 'Dr. Zamarano, ... anything that you say here can be used against you in the course of the case of the Prosecutor.'" He also told Dr. Zamarano that she would be treated the same as someone who had stolen \$20 in a parking structure. The Arbitrator concluded that, "the refusal to agree to the protection of MRE 408 is key...[and] in effect made the requested meeting worthless." (p. 28)

In the arbitration hearing the University sought to characterize this meeting, along with the letters sent to Mr. Lessem by Dr. Zamarano's attorney, as sufficient to satisfy any need for a hearing. The Arbitrator notes that, "What the University cannot demonstrate is that there was any genuine consideration of those letters—in particular the point by point analysis of [her attorney's letter of] 12-8-04. The University statutory obligation is to, '*...include an opportunity for the Respondent to testify.*' A letter is not testimony, much less an ignored/unanswered letter." (p. 36, emphasis in original)

It is worthwhile to note that although Dr. Zamarano sought to arrange repayment of any questioned purchases, the University sued her for the funds anyway, while refusing to accept the proffered payment. As Dr. Zamarano, Union lawyer Gordon Gregory and I walked out of the Faculty Administration Building following the Step one level hearing in this grievance, she was served with a notice of the suit in the foyer of the building. It is not too speculative to suggest that Mr. Lessem filed suit against her in order to create the impression that she was unwilling to

pay for any questioned purchases. She has since settled the suit and the University has accepted the payment that she had offered earlier. Naturally, she incurred additional legal fees in the course of this process.

It was essentially the decision of Lessem as General Counsel to turn the case against Dr. Zamarano into a criminal matter, seek a search warrant, send the Wayne State Police to her home to execute it and take the matter to the Wayne County Prosecutor asking her for an indictment. Much of the behavior of the senior administrators involved in the case seems to have been predicated on the inevitability of such an indictment. The Arbitrator points out, “Ultimately, the County Prosecutor declined to bring charges with a rather stinging press release indicating his (sic) conclusion of an ‘impossibility’ of showing either ‘intent to defraud’ or intent to conceal her purchases.”(p. 3)

After the decision by Prosecutor Kim Worthy not to proceed, the University moved to fire the suspended grievant. This was, again, a legal muddle authored by the General Counsel. The grievant had a two-year contract with the University that ran until June 30, 2005. Lessem and Oliver, and whoever else they consulted, could have terminated the contract with six-months notice and, under prevailing law, argue that they need not cite any reason for the termination. She was an at-will employee under a term contract. If they had done so, it would likely have been the end of the matter. But, fortunately for Dr. Zamarano, they waited until after the six-month deadline (December 31, 2003) for notification of non-renewal, expecting the indictment to come down and evidently believing that it would give them cause for termination. When she was not indicted, they were stuck with having to send her a letter of termination listing causes for their action. Once this occurred, a due process hearing was required under the collective bargaining agreement. It was not given to Dr. Zamarano, and the Union grieved the matter, setting in motion the arbitration process through which in due course the Union prevailed.

Vice President John Oliver

Aside from the legal incompetence shown in the case, the reasons given by Vice President Oliver for the firing bordered on the farcical. He provided a strange and unconvincing rationale for the dismissal of Dr. Zamarano that certainly helped to impel the flawed decision making process. Oliver took the position that if a scientist was dishonest in financial matters that you could not trust any scientific work they might do. He stated, “...the way in which one does business financially or in science is just part of your fabric. You do quality work and report it accurately. The same thing would be expected in the financial side and it goes both ways.” (p. 25) He returned to this argument again and again in his testimony, but never offered any evidence for a connection between financial and scientific integrity. Neither did he offer evidence of any review by him of the scientific validity of Dr. Zamarano’s research, which he merely assumed was invalid because he also assumed that she had been willfully dishonest.

The check on scientific integrity is in the nature of the scientific process in which peer review plays the central role, in, among other processes, the review of applications for funding of research grants and in the review process involved in journal publication. The casual manner in which he maligned the scientific integrity of Dr. Zamarano’s work was astonishing. It showed a strange conception of the scientific process in a chemist such as Oliver. When asked about the

Lumigen case, in which his colleague, Chemistry Professor Paul Schaap, was found in a Michigan Court to have plagiarized materials and appropriated the ideas of others in his work, Oliver plead almost complete ignorance. He did admit to knowing Professor Schaap, but beyond that his mind seemed to be a blank. Oliver found no irony in Schaap being continued as a Professor of Chemistry, despite the Court's finding of his misconduct, while he was adamantly seeking the dismissal of Dr. Zamarano. Fortunately, Dr. Oliver is no longer Vice President for Research or, to be consistent, he might be coming after any University researcher who gets into trouble with an IRS audit.

The Arbitrator cites the Union's summation of the problem with Oliver's position:

"...without ground or reason, and without a nexus, the Employer asserted that her research was tainted. Yet nowhere in the record did the Employer show how Dr. Zamarano's research was false, incorrect, or even merely flawed. Nowhere in the record is there evidence of an attempt to determine if there was a problem with Dr. Zamarano's research.... it is notable the Dr. Oliver expressed no concern that the research continued without the direction and expertise of the scientist who promulgated it and obtained the grant to support it....

...the Employer wrongfully and illogically concluded that her research lacked integrity before it was determined whether she committed the crimes of which she was accused."

Departmental Procedures

It is clear that the checks that were required by the Pro-Card Program at the departmental level were not in place in the Department of Neurosurgery. The required reviews did not take place on a timely basis and it was months before the discrepancies in Dr. Zamarano's Pro-Card account. The Director of Internal Audit was asked, "...did you conclude that the Department of Neurosurgery had inadequate review and monitoring of the Pro-Card activity?" She answered, "Yes, we did." Union Counsel asked, "That contributed to what occurred in the Zamarano matter. Is that right?" Answer, "Yes."

Dr. Murali Guthikondi:

It is instructive of the quality of the decision making process that Dr. Murali Guthikondi, the Chair of the Department of Neurosurgery, was appointed by Oliver as Principal Investigator to replace Dr. Zamarano on the multi million dollar grant to develop computer-based neurosurgery techniques obtained by her. Guthikondi admitted in testimony that he has "minimal involvement [in the grant] meaning, I give them medical advice if they have medical questions." When asked, "Are you the only neurosurgeon involved in the grant?" He answered, "Correct."(p. 22, transcript) In his testimony, Vice President Oliver returned regularly in his testimony about the connection between financial integrity and scientific integrity and how it can affect the reputation of the University. Yet he blithely appoints a faculty member who admits that he knows very little about the subject of the grant, and is "minimally involved" in it, to be responsible for the conduct of a multi-million dollar grant. Moreover, Dr. Guthikondi testified

that this grant to which he was assigned as principal investigator is the first experience he has ever had with a grant. (p. 25, transcript) How does this contribute to the reputation of the University?

Dr. Guthikondi's testimony illuminated the underlying circumstances of his firing of Dr. Zamarano's from the Department of Neurology practice plan, Universal Neurological Surgeons (UNS). Dr. Guthikondi, as Chair of the Department was also President of the UNS. Dr. Zamarano was terminated from her faculty position on February 7, 2005, but was not terminated from the practice plan until June 20, 2005. Dr. Guthikondi was asked why the discrepancy between the dates (considering that the University's position is that to be a member of a practice plan a physician has to be a member of the School of Medicine faculty). He stated that the decision was wholly his and that the delay was due to his long acquaintance with Dr. Zamarano as a colleague and for "humanitarian, personal" reasons. (p. 34, transcript) Dr. Guthikondi denied that he had been pressured to fire Dr. Zamarano from the UNS. He had been the Interim Chair of the Department for several years. *Less than a month, in July 2005, just after the firing, Dr. Guthikondi was given a contract as the regular Chair of the Department of Neurosurgery.* When Dr. Guthikondi fired Dr. Zamarano from the practice plan, he curiously forgave her a \$50,000 loan that had made to her by the UNS.

The Director of the Pro-Card Program

The Arbitrator also cited Ms. Christina Radcliffe, the Director of the Pro-Card Program for her behavior, which, although she denies it, was very likely influenced by those to whom she answered administratively. The Arbitrator states,

"Procurement Manager Radcliffe after independently contacting Sky Mall [from which firm questionable purchases were made], received two separate faxes from Sky Mall with all of the detail for the purchases."... She did not share the received Sky Mall information with Dr. Zamarano. ... Asked why she kept asking the doctor to obtain receipts from Sky Mall '...since you had apparently undertaken to do that yourself?' Ms. Radcliffe replied 'because we wanted to get the documentation directly from the card holder...*we wanted to see what was produced.*' This interest in building a 'case' for the suspected abuse had superseded any goal of stopping or merely correcting\preventing reoccurrence of this abuse, including by use of the remedies actually specified in the Procurement Card Procedures."(Emphasis in original.) (p. 38)

It is clear that Ms. Radcliffe was a minor player in this affair, but seems to have been helping to build a case against Dr. Zamarano . Her conduct had overtones of intent to entrap the grievant.

Dr. Zamarano's Failures:

The Arbitrator does not let Dr. Zamarano off the hook in this matter.

"The grievant is not relieved of her own absolute responsibility. But the University has terminated this professor, severed her full academic appointment,

and denied her voluntary status. The *Departmental* contribution to the situation was not considered.” (Emphasis in original.)

The key problem lies in the alleged ‘Intention to conceal.’ There is no question but that Doctor Zamarano herself, and due to her negligence a third party also made a host of inappropriate purchases. They were obviously, indisputably personal and unrelated to the grant.

But the Pro Card already had a procedure for handling such [a] situation: revocation of the card, pay back of the funds and, if necessary, payment of University legal fees, if needed for collecting sums owed. The doctor knew that she would be paying back all misused sums. I cannot find that she intended to ‘steal or deprive.’”(pp.38-9)

Dr. Zamarano admitted from early in the process that she had been irresponsible in the misuse of the Pro-Card. Both the Arbitrator and the Wayne County Prosecutor cited her carelessness. The Arbitrator quotes the testimony of Dr. Zamarano:

“...I have every day students that have made mistakes...office people...I have seen many people around me that have made mistakes every day. I think that we are all human...you can say ‘Dr. Zamarano, you are terrible with credit cards. We will never issue a credit car to you in your life.’ Bit it is very different to destroy my life...(Tr. 3/223)” (p. 21, Arbitrator’s decision)

The Arbitrator’s decision is long and more involved than is suggested here and needs to be read to capture the full import of it. I do not minimize the blame that must be assumed by Dr. Zamarano. The Arbitrator finds that she was at fault in her behavior, but the clumsy and self-righteous zeal with which this case was pursued was not justified. The decision suggests that there are real institutional problems beyond mere bad judgment that need to be addressed.

Conclusion:

This case has been costly for the Union, although the Arbitrator awarded us one-half of our costs in pursuing it. This is the first time on our memory that the Union has won a legal fee reimbursement in the many cases that we have won against this and past Administrations. We believe that it signifies the degree to which the Arbitrator sense of justice was offended by the Administration’s high-handed disregard for procedures in its dogged pursuit of Dr. Zamarano. She has suffered major losses of hundreds of thousands of dollars in income, legal costs and has had major damage done to her professional reputation as a result of the actions of the Administration. Whether or not she will take this case further in a civil suit to recover damages, I do not know and it is not our role as a Union to advise her on this.

This matter could have been resolved early by following the Pro-Card regulations, recovering the questioned funds, insisting on reimbursement for all questionable items purchased and providing for the close monitoring the financial administering of the Dr. Zamarano’s grant in the future. The University lost a valuable clinician and researcher whose efforts had brought in millions of

research dollars. Anyone at the funding agency who cares to look will see a cavalier treatment of the grant by the University after removing Dr. Zamarano from any role in the study. Our view is that this whole sad affair could have been easily avoided by a little restraint on the part of a few administrators.

I hope that the Board can address the on-going administrative problems that the Zamarano case highlights. In particular, the problem of the independence of the Office of Internal Audit is important. The Director of that Office should be reporting independently to Audit Committee of the BOG and should not be seen as a member of the management team, helping its members to pursue its particular political goals of the moment. The Auditor should be seeking only to find out the facts, not build cases to justify positions taken by senior administrators.

As to Mr. Lessem, I have given up on him. In the Rauch case, some years ago, he had a judgment personally levied against him for his egregious behavior in calling and misleading a bank officer into thinking that the University was filing a charge of criminal fraud against her, causing the bank to call in a building loan to her daughter on which she was a co-signatory. The jury awarded \$115,000 to her against Lessem personally, as part of the adverse judgment against the University of \$680,000. In that case the University pursued fruitless appeals, presumably on the advice of Mr. Lessem, until the Michigan Supreme Court turned it down and it had to pay up. The final cost was easily a million dollars higher than if a settlement had been sought in a timely manner, or if the University administrators had not behaved so badly in the first place. How much Mr. Lessem's decisions have cost the University in the intervening years is anybody's guess. Perhaps the Union should take some comfort in knowing that Mr. Lessem will likely continue to be on the other side of the table, mismanaging the University's responses in those future grievances that the Union will inevitably be forced to file as a result of his legal advice.