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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

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Charleston, WV 25301
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DR. KENNETH SMITH

v.

Docket No. BOR88-051-4

WEST VIRGINIA SCHOOL OF OSTEOPATHIC MEDICINE

D E C I S I O N

Grievant, Dr. Kenneth Smith, was employed by the West Virginia School of Osteopathic Medicine (WVSOM) until October 1, 1985 in the dual position of Associate Professor of Internal Medicine and Associate Dean of Academic Affairs/Clinical Science. He filed a grievance on October 30, 1987 alleging he had been improperly denied reinstatement to his position after achieving board certification through a two year internship. A Level II hearing was conducted March 15, 1988 and the decision at that level was adverse to the grievant. By letter dated March 21, 1988 Olen E. Jones, Jr., President, affirmed the findings and conclusions of the Level II hearing evaluator, Mr. Frederic Smith. A Level IV hearing was held July 18, 1988.

The parties essentially do not dispute the sequence of events giving rise to the grievance but have substantial disagreements over their legal effect and the applicable West Virginia Board of Regents personnel policy. Grievant began serving in his former position in July 1982 and with only minor changes in his job function, continued serving as such until October 1, 1985. On May 17, 1985 grievant was informed by Dr. Harry Kornhiser, Dean for Academic Affairs, that WVSOM was adopting a policy which required any person serving in an administrative capacity to be board certified. He was further informed all such employees would have to achieve the certification by July 1, 1986.¹ Dr. Smith requested and was granted an unpaid leave of absence commencing October 1, 1985 and ending September 30, 1986 during which time he participated in post-doctoral training at the Suburban General Hospital in Norristown, Pennsylvania. The letter of approval for the leave noted that it would only apply to his faculty position and his administrative position would be filled by a permanent replacement (Grievant's Exhibit No.7). In October

¹In grievant's case the requirement was part of a reorganization of the Clinical Training Office in which the positions of Assistant Dean for Pre-doctoral Training and Assistant Dean for Post-doctoral Training would be created and placed under the supervision of an Associate Dean for Clinical Training. It was not made clear at the Level IV hearing which position grievant would hold but all three had the requirement of board certification.

1986 grievant's request for an extension of his leave was granted and he continued his post-doctoral training in internal medicine until May 30, 1987. This additional year was approved by Dr. Clyde Jensen, President, by letter dated October 9, 1986 in which he informed grievant that he would be resigning in the near future and any extensions beyond May 30, 1987 should be left for his successor's consideration. The letter indicated the leave of absence for his faculty position was extended (Grievant's Exhibit No.11). In April 1987, while still at Suburban General Hospital, grievant applied for the posted position of Associate Dean of Clinical Training/Post-doctoral Education at WVSOM and was informed at that time the search for applicants would be delayed until the new president could assume his duties on July 1, 1987 (Grievant's Exhibit No.19). By letter dated July 28, 1987 the Search Committee for the position notified him that Dr. Paul Kleman had been selected for that job (Grievant's Exhibit No.10). In May 1987, prior to his application for this position, grievant had indicated to the newly appointed President of WVSOM, Dr. Olen Jones, that he would be board eligible in internal medicine on July 1, 1987 but another year at Suburban General would enable him to become board eligible in cardiology. He noted that such a certification would enhance his position and that of the faculty at WVSOM upon his return there and requested an extension of his leave for another year (Grievant's Exhibit No.15). Dr. Smith was only granted a three month extension from June 1, 1987 through September 30, 1987 and Dr. Jones notified

him by letter dated October 1, 1987 that his renewed request for a year's extension was not approved (Grievant's Exhibit No.8). Dr. Jones had also indicated in a letter of September 24, 1987 that no offer of employment would be made to the grievant (Grievant's Exhibit No.17). Grievant then informed Dr. Jones he would contest his actions and requested information on the grievance procedure (Grievant's Exhibit No.21).² Dr. Jones complied with this request and also forwarded an offer for employment in a faculty position (Associate Professor/Clinical Science).³ Dr. Smith made no response to this offer and proceeded to request a Level II hearing.

² This letter was held to be the official filing of the grievance during Level IV proceedings since he thereby placed WVSOM on notice that he felt the actions were improper.

³ This offer was for the second semester of the 1987-88 school term (January 1, 1988 to June 30, 1988) for a sum of \$30,000.00 based on a yearly salary of \$60,000.00 for the position. It appears Dr. Jones reviewed grievant's file when notified of his protest and retracted his earlier statement since he determined this faculty position had been promised by his predecessor, Dr. Jensen.

Dr. Smith's grievance can best be stated as three distinct allegations of impropriety and/or violations of West Virginia Board of Regents Policy on the part of WVSOM:

1. The imposition of the requirement that he be board certified within one year was in effect a "dismissal without cause" since WVSOM was fully aware he could not meet the requirement within that time frame.

2. As it was understood by all involved that his leave of absence was taken to pursue board certification, WVSOM was obligated to reinstate him to both his faculty and administrative positions upon receipt of that certification.

3. Since his former administrative position was in effect eliminated in the reorganization of the department in which he served, the failure of the WVSOM to give him right of first refusal to the position for which he applied in April 1987 was in direct contravention of Section 12.1 of Board of Regents Policy Bulletin No. 36.

Accordingly, Dr. Smith requests that he be reimbursed by WVSOM for all lost income (\$78,564.00 per year), lost fringe benefits toward retirement (\$4,713.84 per year), moving expenses and other incidental costs (\$32,966.52) for a total of \$282,800.04. He does not seek reinstatement to any position at WVSOM as part of his request for relief.

WVSOM contends any and all of its actions taken with regard to Dr. Smith's certification and continued employment were in accordance with West Virginia Board of Regents Personnel Policy but its primary assertion is that the grievance was not timely filed. The evidence presented in support of this argument is

dispositive of Dr. Smith's first allegation.

Dr. Smith was first made aware of the requirement placed upon him in his administrative capacity on May 17, 1985 when he conferred with Dr. Harry Kornhiser about the reorganization of the Clinical Training Office. This notification is recorded as an entry in grievant's business diary of the same date (Employer's Exhibit No.2). By his own admission Dr. Smith took no action which would remotely suggest any dissatisfaction with the requirement or place WVSOM on notice that he felt some provision of West Virginia Board of Regents Personnel Policy had been violated until September 1987. To the contrary, Dr. Smith in a letter of May 23, 1985 to Dr. Kornhiser expressed a desire to explore all available mechanisms by which he might achieve board certification (Grievant's Exhibit No.3). If the imposition of the requirement in May 1985 was in effect a dismissal without cause, Dr. Smith should have exercised his rights through the grievance procedure at that time. The West Virginia Education and State Employees Grievance Board has previously held that when an employee is aware of a possible violation of his rights and does not timely pursue a resolution of the matter or show valid reason for a delay in excess of the timelines for filling a grievance, such matter is untimely and barred by the doctrine of laches. Earls v. Cabell County Board of Education, Docket No. 06-86-360-1;

Zban v. Cabell County Board of Education, Docket No. 06-87-010;
Mayo v. Harrison County Board of Education, Docket No. 17-88-014-2.
These decisions are consistent with the holding in Maynard v.
Board of Education of the County of Wayne, 357 S.E.2d 246 (W.Va.
1987) wherein the West Virginia Supreme Court of Appeals noted:

A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches.

Grievant's only reason for the delay in raising this particular part of his grievance was his reliance on what he characterized as on-going valid and binding promises made by Dr. Kornhiser and Dr. Jensen that he would be allowed to return to both of his positions upon completion of his studies. The testimony of these two individuals, however, disputed this assertion and indicated grievant was cautioned about taking a leave of absence since the administrative position would be filled upon his departure and he would only be allowed to return to WVSOM as a faculty member. (T.__)

In the second part of Dr. Smith's grievance, he contends there was an understanding or tacit agreement between himself and WVSOM established prior to his leave of absence that he would be allowed to resume the duties of his former positions. Since he could have reasonably concluded Dr. Jones' letter of

September 24, 1987, which indicated no offer of employment would be made as a breach of that agreement, this particular part of his grievance is not barred on the grounds of timelines. Evidence adduced at the Level IV hearing, however, does not support Dr. Smith's contention that such an understanding was reached prior to or during the course of his leave of absence. When he indicated in his request for the leave that he would return to WVSOM to assume his previous duties (Grievant's Exhibit No.5), Dr. Jensen made it quite clear in a letter of June 6, 1985 that the administrative position which he had occupied would be filled by a permanent replacement (Employer's Exhibit No.1). As previously noted, Dr. Kornhiser and Dr. Jensen also orally emphasized WVSOM's position in the matter and grievant produced no written communication which could be construed as acquiescence to his plans. In a letter dated July 22, 1985 he even notified the administration and faculty that he was terminating his employment with WVSOM. Dr. Smith's own testimony indicated he certainly had hopes of a reinstatement to all of his previous duties at WVSOM and believed an agreement had been reached but he could point to no concrete evidence on which he based this belief. (T. __)

Grievant's remaining allegation poses a more complex factual and legal question. In this part of the grievance Dr. Smith

alleges he should have been granted the position of Associate Dean, Clinical Training/Post-doctoral Education for which he applied in April 1987. He contends the failure to do so was in violation of Section 12.1 of West Virginia Board of Regents Policy Bulletin No. 36, which provides:

A faculty member's appointment may be terminated because of the reduction or discontinuance of an existing program at the institution as a result of program review, in accordance with appropriate policy bulletins relating to review of academic programs, provided no other program or position requiring equivalent competency exists. If, within two years following the reduction or discontinuance of a program, a position becomes vacant for which the faculty member is qualified, the President shall make every effort to extend first refusal to the faculty member so terminated (Joint Exhibit No.1).

It is Dr. Smith's position that this particular Policy Bulletin is applicable in his case since the reorganization of the Clinical Training Office effectively eliminated his former administrative position (Associate Dean of Academic Affairs/Clinical Science). It is not necessary to determine whether or not the reorganization actually resulted in the elimination of the position since WVSOM is correct in its assertion that provisions of Policy Bulletin No.36 does not apply to administrative positions. Section 3 of the Bulletin enumerates the appointments to which certain protections are afforded and specifically provides:

3.6 Persons assigned full-time or part-time to administrative or staff duties at any institution

may (if qualified) be appointed to, or may retain, one of the foregoing faculty ranks in addition to any administrative or staff title. Such person will be informed in writing at the time of the appointment whether the faculty rank is as a tenured member, probationary member or temporary member of the faculty. Administrative or staff personnel who are not appointed to a faculty position are not faculty and therefore are not entitled to the protections provided by this Policy Bulletin.

(Emphasis added)

It should be noted the title of this particular policy is listed as "Matters Relating to Faculty" and its provisions deal almost exclusively to the terms and conditions of employment of persons who are appointed to teaching positions at various state universities and colleges. Grievant provided no other policy which pertained to employees serving in an administrative capacity and did not rebut WVSOM's assertion that such persons are "at will" employees with no particular entitlement to continued employment when a school decides to reorganize its administrative structure. WVSOM was, therefore, not in violation of Board of Regents policy when it only offered grievant reinstatement to a faculty position comparable to his previous faculty position upon completion of post-doctoral studies necessary for board certification. Dr. Jones merely fulfilled the promise to do so made by the previous President and administrative staff at WVSOM at the time Dr. Smith commenced his leave of absence.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, Dr. Kenneth Smith, was employed by the West Virginia School of Osteopathic Medicine in the dual position of Associate Professor of Internal Medicine and Associate Dean of Academic Affairs/Clinical Science from July 1982 until October 1, 1985.

2. In May 1985 grievant was informed that in order to continue serving in his administrative capacity he would have to achieve board certification and in response to this directive he requested and received a one-year leave of absence from October 1, 1985 to September 30, 1986 in which to complete the necessary training for said certification.

3. Grievant was informed orally by Dr. Kornhiser, Dean for Academic Affairs, and in writing by President Clyde Jensen that during his leave of absence only his faculty position would be held open and his administrative duties would be assumed by a permanent replacement.

4. In October 1986 grievant was given a one-year extension of his leave of absence until May 30, 1987.

5. In April 1987 grievant applied for the posted position of Associate Dean of Clinical Training/Post-doctoral Education

and by letter dated August 28, 1987 grievant was informed Dr. Paul Kleman had been awarded the position.

6. In October 1987, after he had achieved board certification in internal medicine, grievant was offered a faculty position comparable in conditions of employment and salary to the faculty position he previously held but he declined to accept said offer.

CONCLUSIONS OF LAW

1. Grievant's failure to file a grievance at the time WVSOM imposed the requirement of board certification on his administrative position or provide a reasonable explanation for the delay precludes consideration of the matter.

2. Consideration of grievant's allegation that WVSOM improperly imposed the requirement of board certification upon his administrative position is precluded by the timeline requirements contained in W.Va. Code, 18-29-1, et seq. and the doctrine of laches. Earls v. Cabell County Board of Education, supra; Zban v. Cabell County Board of Education, supra; Mayo v. Harrison County Board of Education, supra; Maynard v. Board of Education of the County of Wayne, supra.

3. It is incumbent upon a grievant to substantiate the allegations contained in a grievance by a preponderance of the

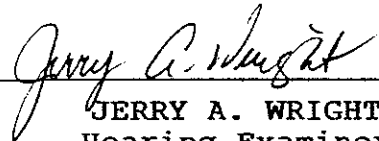
evidence. Wade v. Marion County Board of Education, Docket No. 24-86-248-3; Harrison v. Kanawha County Board of Education, Docket No. 20-87-134-1; Baisden v. Mingo County Board of Education, Docket No. 29-87-207.

4. Grievant failed to prove by a preponderance of the evidence that he had entered into any agreement, oral or written, with WVSOM whereby he was entitled to return to both his administrative and faculty duties and responsibilities upon completion of board certification requirements.

5. West Virginia Board of Regents Policy Bulletin No. 36 is not applicable to full time or part time administrative positions and WVSOM was therefore not in violation of said policy when it did not grant the grievant a right of first refusal of administrative positions similar to the one he vacated upon the commencement of his leave of absence.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Greenbrier County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.


JERRY A. WRIGHT
Hearing Examiner

Dated: September 29, 1988