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**ANNE HOOPER**

**v. Docket No. BOR-88-027-4**

**WEST VIRGINIA SCHOOL OF OSTEOPATHIC MEDICINE  
and  
WEST VIRGINIA SCHOOL OF OSTEOPATHIC MEDICINE  
CLINIC CORPORATION**

**D E C I S I O N**

Grievant, Anne Hooper, M.D., is employed by the West Virginia School of Osteopathic Medicine (WVSOM) as Associate Professor of Pathology. She initiated a grievance at Level I with her immediate supervisor, Paul Herr, D.O., Acting Dean for Academic Affairs, on January 11, 1988 alleging,

1. I am the only member of the Clinical Faculty not allowed to practice his/her speciality on campus.
2. There are facilities on campus which have been used in the past, and could be used at the present to allow me to practice my clinical speciality.
3. The Clinical Laboratory is being supervised and administered by non-pathologists. Neither have as much knowledge of the field of laboratory management and clinical pathology as I do.
4. The technician who used to prepare the cytology and surgical specimens for pathology examination is still on campus, and not allowed

to perform the services any more, except for autopsies, and cytology generated by Health Fairs. Some of her time is used to assist in Ph.D. research. Surely my need for maintaining my clinical skills by examining surgical specimens and cytology is as great as the Ph.D. need for maintaining research. At the present the volume of cytology and surgical specimens generated by the Campus Clinic could be easily handled by her on a part time basis. If the volume were too large for this, then enough money would be generated to justify hiring an additional technician.

5. The present policy of not allowing me to practice my speciality of pathology in the Campus Clinic makes me turn down requests for junior and senior students pathology electives.

Her request for relief was stated as follows:

The grievance would be satisfactorily resolved if:

1. I were to be reinstated as Director of the Clinic Laboratory. The technician would report to me. I in turn would report to the Clinic Administrator and the Clinic Medical Director.

2. All cytology specimens and all surgical specimens generated by the Campus Clinic would be sent to me for examination.

3. I be allowed to accept junior and senior students for pathology electives again.

4. The resolution of the grievance be stated in writing. This would prevent later misunderstandings.

Dr. Herr responded in a memorandum dated January 18, 1988 that he was unable to grant the grievant's requests and further noted "[T]o my knowledge you have not been denied any request to practice your speciality of Pathology at WVSOM that was within your authority to approve". After a Level II hearing

held February 11, 1988, grievance evaluator Frederick Smith, M.S., denied the grievance on the grounds that Dr. Hooper failed to show WVSOM had not allowed her to practice her speciality. By memorandum dated February 8, 1988 Olen Jones, Jr., President, also denied the grievance adopting the Level II findings and conclusions. A Level IV hearing was held May 17, 18 and November 29 and 30, 1988.<sup>1</sup> The parties submitted extensive briefs in support of their positions by April 5, 1989.

The sequence of events which lead to the filing of the grievance are essentially undisputed but the parties substantially disagree on their legal significance and at what point a grievable event occurred. Grievant was first employed

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<sup>1</sup>At the May 17 proceedings counsel for the WVSOM Clinic Corporation (Corporation), who had been subpoenaed as a witness for the grievant, made a motion that the Corporation be joined as a party and the motion was granted. At the conclusion of the presentation of evidence on May 18, the parties indicated they would enter into negotiations for the purpose of reaching a settlement and a joint motion to continue Level IV proceedings until such time as those negotiations were concluded was granted. By letter dated July 29, 1988 counsel for the grievant notified the undersigned that no settlement had been reached and it appeared further proceedings were necessary. In October all parties conceded such and the Level IV hearing was resumed in November. Transcripts of the Level II and Level IV hearings are herein referred to as T2 and T4, respectively.

by WVSOM on July 15, 1977 as an Assistant Professor of Pathology. In addition to her instructional duties, she was given the task of establishing a certified independent laboratory on the premises of the Corporation. This task was assigned by the administration of WVSOM although it is unclear which official made that decision (T4.44). The laboratory received federal inspection and licensure for Medicare purposes approximately a year later. Another faculty pathologist became the director of the lab at that time and served as such until 1983 when grievant was awarded the position. In December 1985 a plan to downgrade the function of the laboratory was initiated. The scope of services provided was significantly narrowed and the majority of pathology specimens generated at the clinic were then sent to outside or "reference" laboratories for examination on a fee-per-test basis. The laboratory essentially became one in which examination of specimens was performed only when results were needed within a short period of time.<sup>2</sup> Support staff was reassigned and, since licensure regulations no longer required a pathologist director, grievant was removed from that position.

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<sup>2</sup>Although witnesses offered varying terms for the laboratory after the changes, the parties generally agree it became a laboratory similar to that found in a general practitioner's office.

Shortly after the status of the lab was changed grievant, through counsel, informed the Corporation's Board of Directors of her dissatisfaction with the change. At a Board meeting held December 19, 1985 the Corporation's counsel informed members that the grievant had no standing to protest a Corporation decision as she was an employee of WVSOM. Members were also advised that further correspondence between themselves and grievant was unnecessary and inappropriate. Counsel for the grievant recounted the events leading to the changes in the lab by letter dated May 5, 1986, to counsel for the Corporation and noted:

When this action was taken, I was of the opinion that it was part of a pattern and practice of discrimination and retaliation, against Dr. Hooper, by various persons who have been associated with both WVSOM and the WVSOM Clinic. At the time the action was taken, Dr. Hooper's status at the School was uncertain, and other matters needed to be resolved. Therefore, at that time, we decided to defer any responses to the action taken by the Clinic Board.<sup>3</sup>

(Employee's Exhibit P)

Counsel for grievant further informed counsel for the Corporation that grievant had been contacted by Dr. Belinda Smith and Dr.

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<sup>3</sup> Counsel did not cite any reasons why she and grievant believed persons were engaging in discrimination and/or retaliation. At the Level IV hearing allusions were made to grievant's successful attempt to be reinstated as a member of the WVSOM faculty following her termination in a reduction of programs. See Hooper v. Jensen, 328 S.E.2d 519 (W.Va. 1985). Counsel's reference to matters which needed to be resolved is apparently a reference to that action.

Gregory Wallace concerning a plan of the Corporation to seek the services of a pathologist on a fee-per-test basis and expressed concern over this type of approach to pathology services at the Corporation. Counsel went on to note that "[b]ecause of her unique position at WVSOM, it is our position that she (grievant) should be reinstated to the position of Director of the laboratory forthwith". Counsel for the Corporation, in a letter dated May 14, 1986 acknowledged this letter and informed grievant's counsel that a copy had been sent to WVSOM and a notification of its decision would be forwarded (Employee's Exhibit O). It appears from the record that neither WVSOM nor the Corporation engaged in any discussion of grievant's letter or acted on the requests therein.

By memorandum dated May 28, 1986 Tom Shaver, D.O., Vice-Chairman of the Corporation's Board of Directors, informed "Members of the WVSOM Clinic, Inc." that the radiology and clinical pathology laboratory services at the Corporation would be discontinued altogether. Maintenance costs, the availability of cheaper alternatives outside the Corporation and a memorandum from President Jensen were cited as considerations in this decision. The latter which was directed specifically to Dr. Shaver informed him that the Executive Council<sup>4</sup> had decided that the contract between WVSOM and the Corporation to be initiated for the ensuing fiscal year

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<sup>4</sup>This council is an administrative body of WVSOM. It is apparently the final decision-making body at the school on a great many policy matters (T4.157,158).

would not contain funding from WVSOM for those services. President Jensen further stated that he was bringing the matter to Dr. Shaver's attention at that time because of "the expectation that you may need to discuss with the Clinic Corporation Board of Directors the need for and the financial feasibility of these functions as purely Corporate activities" (Employee's Exhibit T).

Pursuant to arrangements made by WVSOM, grievant had begun, in April 1985, working at the Welch Community Hospital on a temporary basis. This work entailed travel to the hospital several days a month and supervision of at least two lab technicians. Grievant was not formally named director of the lab but had some latitude in its supervision and, according to the testimony of the technicians, was responsible for the correction of serious deficiencies in its operation. Her work there ended in July 1987 when WVSOM decided not to continue payment for the necessary malpractice insurance. According to the grievant, she had numerous undocumented conversations concerning her need to return to active clinical work in her field with administrative staff of WVSOM following this decision. By memorandum dated November 19, 1987 she stated those concerns to Paul Kleman, D.O., Associate Dean of Clinical Sciences, and requested a response within ten (10) days. It is not clear whether Dr. Kleman responded in conversations with grievant but there was no written response. There is no evidence of record of any other written communications between grievant and WVSOM until January 11, 1988, the date the grievance was filed.

Grievant contends WVSOM has engaged in a continuing discriminatory practice of denying her the same opportunities for professional enrichment that are accorded other members of the teaching staff pursuant to the contract between WVSOM and the Corporation. According to grievant, this practice first began when the decision to downgrade the functions of the laboratory was made. An integral and perhaps crucial part of this claim is the assertion that at all relevant times WVSOM and the Corporation were not separate entities but were so closely aligned that the actions of one could be attributed to the other.

WVSOM maintains that neither its contract with the Corporation nor applicable state law requires it to provide the grievant the opportunity to practice her speciality. WVSOM further contends the grievant's request for relief clearly shows that the event giving rise to the grievance was the decision in December 1985 to downgrade the lab and remove her from the director's position and the grievance was therefore not timely filed.

The Corporation maintains that the implementation of the decision to change the status of the lab was a duly authorized action taken by its board of directors and grievant, who was not one of its employees, had no standing to protest it. The Corporation also asserts any ties between itself and WVSOM are those of two separate and distinct entities and WVSOM could not



require it to provide the relief grievant requests<sup>5</sup>. The Corporation also joins in WVSOM's assertion that the grievance was not timely and further contends consideration of the matter is barred by the doctrine of laches.

#### TIMELINES

W.Va. Code §18-29-4(a)(1), in pertinent part, provides:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The assertion of the Corporation and WVSOM that the action to downgrade and its effect on grievant's ability to maintain her skills in the area of pathological medicine does not constitute a continuing practice within the meaning of these provisions is not persuasive. Grievant's request for relief does tend to focus attention on her removal from the lab director's position but the statement of the grievance is more relevant in a

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<sup>5</sup>Despite the motion to be joined as a party, see n.1, counsel for the Corporation made on-going objections to the authority of the West Virginia Education and State Employees Grievance Board to grant any form of relief which would require the Corporation to take any action whatsoever. Due to the outcome herein, it is not necessary to address grievant's or the Corporation's assertions concerning the relationship between WVSOM and the Corporation.

consideration of its timeliness. That statement sufficiently alleges discrimination on the part of WVSOM and the evidence supports grievant's assertion that the actions she perceives as discriminatory were part of a continuous practice. It is evident that since at least July 1987 there have been some differences in the nature of the opportunities for professional enrichment accorded grievant and other professors at WVSOM and regardless of whether or not those differences constitute discrimination they have been continuous. The grievance was therefore filed in compliance with W.Va. Code §18-29-4. Nevertheless compliance with statutory time limitations does not preclude consideration of the applicability of the doctrine of laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246 (W.Va. 1987).

#### LACHES

The West Virginia Supreme Court of Appeals has consistently held that the controlling element of the doctrine is prejudice. Brand v. Lawther, 285 S.E.2d 474 (W.Va. 1981); Bank of Marlinton v. McLaughlin, 1 S.E.2d 251 (W.Va. 1939). The prejudice may be the result of loss of evidence, change in the condition of the subject-matter or death of parties, Laurie v. Thomas, 294 S.E.2d 78 (W.Va. 1982); Mundy v. Arcuri, 267 S.E.2d 454 (W.Va. 1980) and can also be found where the request for relief would require the expenditure of public funds. Maynard v. Board of Education of Wayne County, supra. While the grievant's delay

in the present case certainly caused difficulties in the production of evidence for WVSOM and the Corporation, these difficulties did not constitute the prejudice necessary for application of the doctrine. The testimony of nearly all witnesses called by grievant revealed the administrations of both WVSOM and the Corporation have undergone major personnel changes during the last several years and the changes obviously had an impact on grievant's ability to present her case. Those changes and the witnesses' inability to recall particular events also hindered cross-examination by WVSOM and the Corporation but that in itself does not constitute sufficient prejudice. Significantly neither WVSOM and the Corporation called any witnesses on their behalf and made no representations that any particular person(s) were unavailable due to the lapse of time. Other than general representations by counsel that the lapse of time hampered their ability to provide rebuttal to grievant's claims, there was no evidence presented concerning the unavailability of particular witnesses or documentary evidence.

The only remaining factor relevant to a consideration of whether grievant's delay in filing caused the prejudice necessary for the application of the doctrine is the monetary one discussed in Maynard, supra.<sup>6</sup> While the parties minimized or overemphasized

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<sup>6</sup>Grievant was not given additional compensation for her services as director of the laboratory and therefore has not requested backpay. It is not clear whether she was paid fees for the examination of specimens in the lab but it is assumed she was not as there is no request for compensation for such.

the potential costs involved according to their respective positions, few figures were provided. The only estimates offered concerned the cost of a lab assistant and it was Clinic Administrator Michael Painter's opinion that the salary would be from \$16,000.00 to \$22,000.00 per year (T4.254). Mr. Painter also testified that supply and malpractice insurance costs might increase but no estimates had really been made (T4.255). The doctrine of laches is an affirmative defense and as such it requires the asserting party to establish the existence of factors necessary for its application. The Corporation failed to meet its burden in that regard and therefore the doctrine cannot be applied.

#### MERITS OF GRIEVANCE

Grievant finds the duty on the part of WVSOM to provide her with professional enrichment opportunities in W.Va. Code 18-26-30, which in pertinent part, provides:

Each state college or university shall have the authority to establish and operate a faculty and classified employee continuing education and development program under rules and regulations adopted by the board. Funds allocated or made available may be used to compensate and pay expenses for faculty or classified employees who are pursuing additional academic study or training to better equip themselves for their duties at the college or university.

She maintains WVSOM also has the duty to provide those opportunities to staff in a consistent manner and its failure to do so amounts

to discrimination, which is defined in W.Va. Code §18-29-2(m) as,

Any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

W.Va. Code §18-26-30 is clearly just an authorization to provide a program for the enhancement of the educational credentials of a college or university's staff and imposes no obligations to do so. W.Va. Code §18-29-2(m) does, however, require that any such program, once implemented, be administered in a manner which is not discriminatory. The evidence does not support grievant's claim that WVSOM has not adhered to that requirement.

It is conceded that most faculty members at WVSOM who are also physicians see patients in the Clinic and provide those patients the type of care they would receive in a general practitioner's office. Inasmuch as the general practice of medicine is the chosen field of most of those physicians, it can be said that they are able to practice their speciality at the Clinic. In that grievant's chosen field is pathology any opportunity for professional enrichment provided her through the use of Clinic facilities would be inherently different from that accorded other professors. It follows that the availability of a Clinic which primarily provides its patients general as opposed to specialized medical services most likely enables WVSOM to provide those professors with greater opportunities to maintain their skills in

their chosen fields. The evidence, however, does not support grievant's claim that this is the case.

Nearly all witnesses called by the grievant testified that she had the same access to Clinic facilities as other physicans at WVSOM and could use the laboratory to examine specimens generated from her own general practice or that of other physicans if so requested. According to the testimony of Dr. Irvine Prather, Medical Director of the Laboratory, physicans were given a great deal of latitude in making referrals for a variety of tests, including radiology and pathology (T4.89-91). Significantly, Dr. Prather also testified that WVSOM has always been receptive to requests from staff to attend conferences or seminars which are related to their fields and requests for use of facilities to conduct special research projects (T4.73). Aside from her own testimony, the only witness called who expressed an opinion that grievant had less opportunities to maintain skills in her speciality was Dr. Herr, (T4.162) and even he stated that grievant had been allocated more than the allotted amount for travel to conferences. Dr. Herr also noted that the school authorizes "special monies to people that have special needs" (T4.163). It appears WVSOM has made available to the grievant ample opportunities for hands-on experience in her field to compensate for any loss

she may have incurred as a result of the changes in the laboratory.<sup>7</sup> Grievant obviously considers anything short of reinstatement to the position of Medical Director of the Laboratory and control over all specimens generated at the Clinic to be inadequate but such action is simply not required in order for WVSOM to maintain a reasonable balance in the professional enrichment opportunities offered its staff. The record as a whole supports the conclusion that WVSOM has maintained such a balance and therefore has not engaged in any discriminatory practices toward grievant.

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

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<sup>7</sup>This conclusion is also supported by the fact that WVSOM made the arrangements for grievant to perform her management services at Welch Community Hospital. It should also be noted that grievant can engage in the general practice of medicine at the Clinic and avail herself of laboratory facilities to examine any specimens generated in that practice.

### FINDINGS OF FACT

1. Grievant is employed by the WVSOM as an Associate Professor of Pathology.

2. In 1977, at the direction of the administration of WVSOM, grievant supervised the establishment of a full-service independent laboratory in the Corporation's Clinic and served as its director from 1983 to December 1985.

3. In December 1985 the functions of the laboratory were substantially curtailed and the majority of the services it performed were taken over by outside reference labs. As a result of the changes, licensure regulations no longer required that a pathologist supervise the operations of the lab and grievant was removed from the director position.

4. Since December 1985 grievant has had the same opportunities as other professors at WVSOM to treat patients at the Clinic. Grievant has also had the right to use the laboratory's facilities to examine specimens generated by her practice of medicine at the Clinic and those of other physicians if requested.

5. The number of specimens available to grievant for examination has substantially decreased since December 1985. Grievant



therefore does not have the same opportunities to apply her skills in the are of pathology as she did as director of the Clinic laboratory.

#### CONCLUSIONS OF LAW

1. The grievance was filed within fifteen (15) days of the most recent occurrence of a continuing practice in compliance of the provisions of W.Va. Code §18-29-4(a)(1).

2. The failure of the Corporation to produce evidence in support of its claim that any delay in filing caused prejudice in the presentation of its case precludes the application of the doctrine of laches. Laurie v. Thomas, supra; Mundy v. Arcuri, supra.

3. The decision to reduce the functions of the laboratory and any effect it may have had on grievant's ability to practice her speciality at the Clinic was not an act of discrimination as defined in W.Va. Code §18-29-2(m).

4. It is incumbent upon a grievant to substantiate the allegations contained in a grievance by a preponderance of the evidence. Smith v. West Virginia School of Osteopathic Medicine,


Docket No. BOR88-051-4 (September 29, 1988); Baisden v. Mingo County Board of Education, Docket No. 29-87-207 (January 11, 1988); Harrison v. Kanawha County Board of Education, Docket No. 20-87-134-1 (October 30, 1987).

5. In order to substantiate an allegation of discrimination as defined in W.Va. Code §18-29-2(m), a grievant must present sufficient evidence to show a difference in treatment of employees and that such differences are not related to the actual job responsibilities of said employees.

6. Grievant failed to prove by a preponderance of the evidence that provisions for her professional enrichment made by WVSOM through its contract with the Corporation and other forms of continuing education are less than those made for other professors at WVSOM.

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 receipt of this decision (W.Va. Code §18-29-7). Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

  
JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: June 29, 1989