MARY CASTIGLIA,

Grievant,

v. **Docket No. 97-BOT-360**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Dr. Mary Castiglia, employed by the Board of Trustees as Assistant Professor of Clinical Pharmacy and Assistant Director of the Drug Information Center in the West Virginia University (WVU) School of Pharmacy (Respondent), filed a level one grievance on June 11, 1996, in which she alleged that the denial of her promotion and tenure was in violation of unspecified rules and policies. Grievant also alleged disparate treatment and harassment. Grievant's immediate supervisor, Dr. Arthur I. Jacknowitz, Chair of the Department of Clinical Pharmacy, denied the complaint at level one. Following an evidentiary hearing at level two, David C. Hardesty, Jr., President of WVU, accepted the recommendation of the grievance evaluator and denied the grievance. Appeal was made to level four on July 31, 1997. A level four hearing was conducted on November 12 and 13, 1997, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on February 11, 1998. (See footnote 1)

The following findings of fact have been developed based upon a review of the record in its entirety.

Findings of Fact

1. Grievant was appointed to the position of Assistant Professor of ClinicalPharmacy and Assistant Director of the Drug Information Center in the WVU School of Pharmacy, a twelve-month tenure-track position, on September 6, 1989. Grievant assumed these duties effective January 1, 1990.

2. In 1991, after conflict arose between Grievant and Dr. Marie Abate, the Director of the Drug Information Center, she was allowed to transfer her work to the area of Infectious Disease.

3. In September 1993, Grievant requested that Department Chair Arthur Jacknowitz provide her with promotion and tenure guidelines. In a letter dated January 5, 1994, Grievant requested that Dr. Jacknowitz provide her with “written expectations and requirements for P&T with the options regarding tenure status and a time-frame for making any decisions.” Dr. Jacknowitz requested information in return and suggested they schedule a meeting. It does not appear that the meeting ever took place.

4. During the 1995-96 academic year Grievant applied for promotion and tenure. It is the applicant's responsibility to prepare the promotion and tenure file and to insure that all relevant material is included for consideration.

5. The Departmental Promotion and Tenure Committee members for the 1995 -96 academic year were Charles Ponte, Gerald Higa, David Elliott, Barbara Kaplan, and Todd Wandstrat.

6. The members of the School of Pharmacy Faculty Evaluation Committee were Charles R. Craig, Mary Davis, Mohamadi Sarkar, Eugene Makela, and Sidney Rosenbluth.

7. As part of the promotion and tenure review, Grievant's work in the area of research and scholarly activity was evaluated by external reviewers. Five of the six reviewers responded. Their submissions were interpreted to be two positive, two negative,one neither positive or negative, or two positive and three negative, depending upon the interpretation of the reader.

8. Grievant's petition for promotion and tenure was unanimously denied by the Department Faculty Evaluation Committee, the Chair of the Department of Clinical Pharmacy, the School of Pharmacy Faculty Evaluation Committee, the Dean of the School of Pharmacy, and the Vice President for Health Sciences.

9. The University Promotion and Tenure Advisory Panel, consisting of six faculty members elected by the University Senate Executive Committee, examined the review process and confirmed that all proper criteria had been applied, and the appropriate procedures had been followed.

10. At the conclusion of the review process, and as a result of the decision that she not be granted tenure, Grievant was issued a terminal contract for the 1996-97 academic year.

11. Grievant did not formally seek additional time to meet the criteria for promotion, nor did she request that her areas of emphasis be changed from teaching and research to teaching and service. While some informal discussion may have taken place with Dr. Jacknowitz, no such relief was pursued beyond the level of the Department Chair.

12. At least one other faculty member was permitted to change his area of emphasis from research to service prior to tenure review.

13. A formal mentoring program does not exist in the Department of Clinical Pharmacy; however, it appears that Grievant was provided guidance to some extent by former Dean Rosenbluth and other faculty members during her employment at WVU.

14. Annual evaluations serve in part to inform the faculty member of his or herdeficiencies. Since 1992 the Departmental Committee informed Grievant that improvement was needed in the area of research and scholarly activity.

15. Grievant resigned her appointment at WVU, with termination of her on-site activities effective June 28, 1996.

Issues

Grievant raises the following issues for consideration:

1. Whether the process of evaluation for promotion and tenure and decision making were arbitrary, capricious or clearly wrong;

2. Whether the report of the School of Pharmacy Faculty Evaluation Committee

accurately reflected the committee's findings;

3. Whether Grievant was treated in a disparate manner and contrary to university policy, and;

4. Whether Grievant was subject to harassment.

Argument

Grievant asserts that her evaluation was flawed at every level. She argues that the Departmental evaluation was erroneous because the committee did not consider that an institutional shift in emphasis from teaching to research had occurred, effectively changing the ground rules as she approached the tenure process, and that she had not been afforded a meaningful review of her work as compared to recent faculty who had been granted tenure. Because she was required to demonstrate “excellence” in two areas, and excellence is defined by Respondent's policy as work equal to or exceeding that of one's peers, Grievant asserts that the failure of the committee to conduct a true relative comparison was a significant flaw in the evaluation process. She also asserts that thereviewers failed to properly consider the quality rather than the quantity of her work . Finally, she states that the committee was uninformed regarding a Center for Disease Control (CDC) grant

which had been awarded, but not previously funded due to budgetary problems with the federal government. Grievant expressed concern that the committee was unaware as to whether the grant was competitive or that it had been subsequently funded.

Grievant complains that Department Chair Jacknowitz also did not consider her CDC research project, based upon his comment that he did not see it in her file. She notes that he did not bring to her attention that any materials were missing. Grievant also cites comments which she believes indicate that Dr. Jacknowitz based his decision largely on quantity rather than the quality of her research. She opines that these errors at the Departmental level were problematic because the reports were relied upon by the Dean and others.

Proceeding to the School level of review, Grievant asserts that the Committee report fails to explain the finding that her research was only “satisfactory”, and the members failed to make a comparable review of her to her peers. Addressing Dean Spratto's report, Grievant notes that he was a recent appointee and was still somewhat unfamiliar with the promotion and tenure process. She opines that he also focused almost exclusively on the quantity, rather than the quality, of her research, and may have been unaware of the change in focus from the Drug Information Center to Infectious Disease late in her career. Grievant specifically cites the Dean's expectation that she produce one peer-reviewed article in a respected publication per year as arbitrary, and notes that he testified that he was not familiar with one of the journals in which she had published. Grievant complainsof a failure to define how the records of two other faculty recently promoted were superior to her own, but notes that they were not similarly-situated in any event considering her unique situation.

Grievant asserts that the review by Vice President D'Alessandri reflects the area where most reliance had been placed at the lower levels of review, and that his decision was only as good as the information he received. Grievant takes issue with his testimony that the committee members were not required to review the files of recently tenured and/or promoted faculty, questioning how else to achieve comparability.

In support of the second issue raised by Grievant, that the School Committee report did not accurately represent the committee's findings, she relies upon the testimony of committee member Mohamadi Sarkar. Dr. Sarkar stated that he voted that Grievant be awarded promotion, but not tenure, Grievant asserts that the letter fails to state that any member split his or her vote. Grievant

also asserts that Dr. Makela, chair of the School Committee, provided testimony at level two which "seems to imply that he voted for tenure, but not promotion." If that is the case, Grievant argues, then the statement that one member voted for tenure and against promotion is accurate, but substantiates that Dr. Sarkar's vote was overlooked. Grievant suggests that to the extent the report may be inaccurate, it is possible that the Dean, and others, may have reached different conclusions had they been privy to the correct vote, but in any case, the failure to accurately record the vote is a gross procedural error.

Somewhat in the nature of an alternative argument, Grievant claims that because the criteria for promotion and tenure are the same, a vote for one but not the other is inconsistent. Grievant's third argument, that she was treated in a disparate manner and contrary to WVU policy, is based upon a suggestion made by Dr. Jacknowitz in January 1994, that she transfer to the non-tenure track. He later rescinded the offer, claiming that to allow such an move would create claims of discrimination from the rest of the faculty. Grievant asserts that had it been made available, she would have considered this option, and suggests that any claims of discrimination were illusory, and that such a change was permitted, as per the testimony of Dr. D'Alessandri.

Grievant claims that the disparate treatment, or harassment, occurred because another faculty member, David Elliot, was permitted to change his focus away from research to service during the evaluation process for promotion and tenure. Grievant asserts that to permit another faculty member to change his areas of excellence, while denying her the right to change to non-tenure track, meets the definition of discrimination, as defined by W. Va. Code §18-29-2(m). The ultimate outcome, Grievant argues, is that Dr. Jacknowitz went to great lengths to assist one faculty member in achieving tenure, while at the same time, creating a barrier regarding different options for her. Grievant acknowledges that Dr. Jacknowitz told her she could go to the Dean at the time he withdrew the offer; however, because she had "gone over his head" before, and consequently suffered harassment, she concluded that she had no true viable option other than to continue on the tenure track.

Grievant submits that she prevailed at level two regarding the issue of harassment. In support of that claim, Grievant cited a Minority Report filed by Dr. Rosenbluth with the School's recommendation, and a letter, apparently filed with the Department of Social Justice, by a former secretary, addressing actions relating to Grievant by Dr. Jacknowitzand Dr. Abate.

Respondent asserts that there was no violation of any rule, policy, procedure, or law in this matter, and that the decision to deny Grievant tenure and promotion was neither arbitrary and capricious, nor clearly wrong, but was based upon fact, thoroughly substantiated by the multi-level review process. Respondent also denies that Grievant was subject to harassment, and asserts that her complaint of an alleged failure of Dr. Jacknowitz to verbally acknowledge her achievements does not constitute that claim.

Discussion

WVU chose to not grant Grievant promotion and tenure in accordance with Series 36 of the Procedural Rules enacted by the State University System of the West Virginia Board of Trustees (Series 36), 128 C. S. R. 36 (1992). Series 36 addresses the "appointment, promotion, tenure and nonreappointment or dismissal of faculty . . . ." 128 C. S. R. 36 §1.1 (1992). Series 36 addresses tenure in pertinent part:

8.1. . . . There shall be demonstrated evidence that tenure is based upon a wide range of criteria such as: excellence in teaching; accessibility to students; professional and scholarly activity and recognition; significant service to the college community; experience in higher education and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field; publications and research; potential for continued professional growth and service to the people of the State of West Virginia. Ultimate authority regarding the application of guidelines and criteria relating to tenure shall rest with the institution.

8.2. In making tenure decisions, careful consideration shall be given to the tenure profile of the institution, projected enrollment patterns, staffing needs of the institution, current and projected mission of each department/division, specific academic competence of the faculty member, and preservation of opportunities for infusion of new talent. . . .

8.3. Tenure shall not be granted automatically, or for years of service, but shall result from action by the president of the institution following consultation with appropriate academic units.

The WVU Faculty Handbook (1993) provides that "academic tenure is awarded to those faculty members who have served a probationary period and whose overall record of performance in teaching, research, and service has been examined and warrants permanent or continued employment. . . ." The decision to recommend or deny tenure is based on the evaluation of the

strengths and weaknesses of the faculty member and the needs and condition of the department/division, college and university. The criteria for promotion and tenure are general, but a faculty member normally will be expected to demonstrate “excellence in research, excellence in teaching in classroom or other settings, and satisfactory performance in service”, although this criteria may be modified to require excellence in a different pair of these categories, with satisfactory performance required in the third. Excellence is defined as “performance which meets or exceeds that of peers recently achieving similar promotion and/or tenure who are respected for their contributions in research and instruction at [WVU] and peer research universities.”

The maximum period of probation may not exceed seven (7) years. Before or during the sixth (6th) year of a probationary appointment, the nontenured faculty member wishing to be reviewed for promotion and/or tenure must notify the Dean in writing of the request for review and update his or her personnel file to include all information the candidate wishes to be considered during the evaluation process. Minimally, the file should include an up-to-date curriculum vitae and bibliography, a record of classes taught, annual evaluations, and all other information that bears upon the quality of the facultymember's performance in all pertinent areas.

In addition to the Board of Trustees' Series 36, and the WVU Faculty Handbook, WVU Provost and Vice-President for Academic Affairs and Research Thomas J. La Belle, issued Faculty Evaluation Guidelines in August 1995, and “Policies and Procedures for WVU School of Pharmacy Faculty Evaluation” (Rev'd 5/18/95), which provide direction regarding this matter. WVU is bound by the substantive and procedural requirements set forth in all these documents. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993).

To the extent that Grievant alleges the decision to deny her promotion and tenure was arbitrary and capricious, it is noted that a reviewing body must apply a narrow scope of review, limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20- 537 (Mar. 22, 1995). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra.

In applying the arbitrary and capricious standard of review to academic matters such as promotion, tenure, and nonretention of faculty status, this Grievance Board has recognized that the decisional, subjective process by which such status is awarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation. Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997); Gomez-Avila v. W. Va. Bd. of Trustees, Docket No. 94-BOT-524 (Mar. 14, 1995); Carpenter v. Bd. of Trustees, Docket No. 93-BOT-220 (Mar. 18, 1994); Cohen v. W. Va. Univ., Docket No. BOR1-86-247-2 (July 7, 1987). This generally parallels the federal courts' approach to adjudicating such matters in civil rights disputes: “Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.” Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3rd Cir. 1980).

With these standards as guides, the factual reasons stated by the various reviewers for denying Grievant tenure are contained in the correspondence generated through the review process. By memorandum dated January 30, 1996, the Department of Clinical Pharmacy Faculty Evaluation Committee reported that it unanimously recommended against promotion to Associate Professor with tenure. Although the committee found Grievant had established excellence in teaching, and considered her performance in the area of service to be satisfactory, after careful review, it concluded that her performance in research and scholarly activities was deficient. While acknowledging that Grievant's recent work was “more substantive and worthy of consideration for the greater recognition it may bring her, it is also important to state that it may be premature to make any definite comments on the scholarship and the impact it will have at this time.”

Upon his review, Dr. Jacknowitz, in his role of Department Chair, found that Grievant had achieved excellence in the area of teaching, and, while expressing some doubt about her commitment, judged her performance in service to be satisfactory. After noting thefindings of the external reviewers, and making a comparison of Grievant to the two most recently promoted faculty members, Dr. Jacknowitz, noted, as did the Department Committee, that Grievant's previous evaluations had urged her to aggressively pursue research and scholarly activities, but that she had only recently began to produce in this area. He concluded that Grievant had presented an insufficient

record of original research to support a finding of excellence in this area, and recommended that Grievant not be awarded promotion with tenure.

The School of Pharmacy Faculty Evaluation Committee, commended Grievant for her efforts in research and scholarly activity during the preceding year, and found the quality of Grievant's research and scholarly activity to be good, but noted that because the activity was only recently evident, the record did not necessarily predict future success. It was determined that a record of sustained activity had not been demonstrated, and rated Grievant's efforts to be satisfactory. The Committee found that Grievant had demonstrated excellence in teaching. Four members determined that Grievant's work in the area of service had been satisfactory, one member believed her to be excellent in that category. The report noted there were differences in opinion regarding a number of issues which were considered, including, the history of conflict between Grievant and her Chairman, and whether it had impacted on her ability to perform or had affected his ability to fairly evaluate her. Consideration was also given to whether Grievant had been mentored, and that she had changed the focus of her activity, but had not requested a new timetable for promotion and tenure. The external reviews were considered, and a brief comparison made to the two similarly-situated faculty members who were most recently promoted. The Committee concluded that, by majority, it did not support the granting ofpromotion and tenure. Although he signed the Committee report, Dr. Rosenbluth filed a Minority Report in which he opined that Grievant had achieved excellence in all three areas, and recommended that she be granted promotion and tenure.

After his review of Grievant's personnel file and the recommendations of the three prior reviews, Dean Spratto concurred that Grievant should not be granted promotion and tenure. Consistent with the prior reports, the Dean found Grievant's teaching an area of excellence, and her service to be satisfactory. In his evaluation of Grievant in the area of research and scholarly activity, he determined her performance to be unsatisfactory. His findings were as follows:

Dr. Catiglia's progress in research and scholarly activity has been listed as a concern in nearly every annual report since 1991. In 1992, the Departmental Review Committee stated Dr. Castiglia is 'encouraged to develop her research, initiate scholarly activities, and establish a strong clinical practice base.' In January, 1993, the Departmental Review Committee stated '...the Committee feels that she will not be eligible for promotion and tenure when she reaches her critical year.' In 1994, the Department Evaluation committee praised Dr. Castiglia for 'significant strides in increasing Research

and Scholarly Activity since the last review.' In a later paragraph, this same Committee stated 'It is important that research and scholarly activities are aggressively pursued.' However, in my estimation, in recent years Dr. Castiglia has not achieved a sustained effort in research and scholarly activities.

Of the nineteen publications listed in her most recent curriculum vitae, six are abstracts, six are topics published in the **Drug Information Bulletin** when she was Assistant Director of the Drug Information Center, two are 'letters,' one is a chapter in a textbook, one is a case report, and two can be considered research publications. The final entry under 'Publications' indicates a 'Preliminary Draft Protocol: Acute Sinusitis' to the American Pharmaceutical Association. However, no publication date is provided. In addition, three additional manuscripts have been submitted, although it is difficult to determine whether or not they are researchpublications. The publications which are found in Dr. Castiglia's personnel file are well written.

Dr. Castiglia has provided documentation of a number of grants and contracts in which she has been or is currently involved. Unfortunately, her precise role in these efforts has not been provided.

Dean Spratto also addressed the reports filed by the five external reviewers, finding two to be positive, and three negative. Comparing Grievant to the two most recent faculty members granted tenure, Dean Spratto concluded that their records were superior to hers. In conclusion, he did not recommend promotion with tenure for Grievant.

Vice President D'Alessandri advised Grievant by letter dated May 13, 1996, that he concurred with the finding that there was insufficient evidence of excellence in two of the three areas of teaching, research, and service to support a decision that she be granted promotion and tenure. Based upon an independent review of Grievant's personnel file, the prior reports, and Grievant's rebuttal, Dr. D'Alessandri concluded that her performance in teaching had been excellent, and her performance in service satisfactory, but that her performance in the area of research had been unsatisfactory. He advised Grievant that as a result of his decision, she would receive a terminal contract for the 1996-97 academic year.

The reports filed during the evaluation process establish that Grievant's concerns were considered throughout the decision-making process. Grievant's less than optimal relationship with the Department Chair was known, the quality of her work was considered, and her change of focus was noted. A comparison to recently-tenured faculty was made, if not to the detailed extent Grievant

would have liked. Because one of the recently- tenured faculty members was on the Department Committee, and the other member wason the School Committee, it appears that sufficient input regarding that matter was available at both levels. It also appears that Grievant may not have received the quality or quantity of mentoring she desired. While it would be of tremendous assistance, Respondent is not required to provide this service, apparently leaving new faculty to seek out a mentor on their own. If the reviewers were not completely aware of the importance of the CDC grant, it was Grievant's responsibility to ensure that they were provided with the latest information available.

While it appears that Grievant was also affected to some extent by factors beyond her control, such as the dispute between Dr. Jacknowitz and Dr. Rosenbluth, and what may have been a misunderstanding with Dr. Abate, Grievant did not request additional time to compensate for her change in focus. Neither did she request that her areas of excellence be changed from teaching and research to teaching and service. She also declined to pursue the possibility of changing to non-tenure track. In short, Grievant neglected to exercise opportunities which were available to her. In consideration of all the evidence, it cannot be determined that the decision not to grant promotion with tenure was either arbitrary and capricious or clearly wrong.

Grievant's second issue, whether the school report was accurate in reporting the votes of the committee members, is specious. First, all of the members signed the report, signifying agreement. Notwithstanding his signature, Dr. Rosenbluth filed a minority report to more fully express his position which was contrary to that of the committee as a whole. Whether Dr. Sarker voted for promotion, but not tenure, is of no consequence, because Grievant was in her critical year in which she had to gain tenure, or be given a terminal contract. It is not clear whether another member had voted for tenure but not promotion,but in any event, tenure would still have been denied by the majority.

The issue of discrimination appears to be based solely upon a comparison to Dr. David Elliot whose areas of excellence were changed from teaching and research to teaching and service during his critical year. Discrimination is defined by W. Va. Code §18- 29-3(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.” To establish a prima facie case of discrimination, Grievant must establish:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Shackleford v. W. Va. Bd. of Directors/Concord College, Docket No. 96-BOD-414 (Oct. 9, 1997). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. If the employer provides a legitimate, nondiscriminatory explanation for its action, grievant may then show the reason is pretextual.

Grievant has failed to establish a prima facie case of discrimination because she did not request a change in her areas of excellence. Such a change is permitted as stated in the WVU Faculty Handbook, which states, “[t]he criteria requiring excellence in teaching, excellence in research, and satisfactory performance in service may be modified on an individual basis to require excellence in a different pair of these categories, withsatisfactory performance required in the third.” The Handbook further advises that such a modification must be agreed to in writing by the faculty member, Chairperson of the department, in consultation with the departmental personnel or promotion and tenure committee, the Dean of the college, and the Provost or the Vice President for Health Sciences. It was Grievant's responsibility to be aware of this option and to pursue the alternative if she was interested. She may not now claim discrimination because it was not brought to her attention.

To the extent that this claim was based upon the offer, and subsequent retraction of the offer, to change to non-tenure track, Grievant has not established that any other faculty member has been permitted to make such a change. Again, she did not pursue this alternative, and has never indicated that she wanted to do so. At level four, she merely said that she would have considered it.

Because Grievant prevailed upon the issue of harassment at level two, and the matter is not dispositive to the matter of promotion and tenure, no further consideration is warranted at level four.

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. In a grievance challenging promotion and/or tenure of a probationary faculty member, the

grievant has the burden of proving each element of her complaint by a preponderance of the evidence. Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993).

2. The subjective decisional process by which promotion and tenure areawarded or denied is best left to the professional judgment of those presumed to possess a special competency in making the evaluation, unless shown to be arbitrary and capricious or clearly wrong. Sui v. Johnson, 784 F.2d 238 (4th Cir. 1984); Fasce, supra; Carpenter v. Bd. of Trustees, Docket No. 93-BOD-220 (Mar. 18, 1994).

3. Grievant failed to prove that Respondent's decision not to grant promotion and tenure was arbitrary and capricious or clearly wrong.

4. Grievant failed to prove that the School of Pharmacy Promotion and Tenure Committee Report contained errors regarding individual voting, or that any such errors would have altered the outcome of her quest for promotion and tenure.

5. Discrimination is defined by W. Va. Code §18-29-3(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.”

6. To establish a prima facie case of discrimination, Grievant must establish:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

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7. Grievant failed to establish a prima facie case of discrimination.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of

Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: May 27, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by George P. Surmaitis, Esq., Respondent was represented by Samuel R. Spatafore, Esq. and Beverly Kerr, Esq.