MARTA HENDERSON,

Grievant,

v. **Docket No. 98-BOT-099**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Dr. Marta Henderson, employed by the Board of Trustees (Respondent) as an Associate Professor of Medical Technology at West Virginia University (WVU), filed a level one grievance on May 15, 1997, in which she requested reinstatement of her previous teaching assignment in hematology and clinical microscopy. Jean Holter, Director of the Medical Technology Program, and Mary Ann Sens, Chair of the Department of Pathology, issued a joint decision denying the grievance at level one. The matter was denied at level two following an evidentiary hearing, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on March 30, 1998, and an evidentiary hearing was conducted on June 16, 1998. The grievance became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before September 10, 1998. (See footnote 1)

The following undisputed facts have been derived from the record, including thelevel two transcript and exhibits, the decisions issued at levels one and two, the testimony, exhibits, and post hearing proposals, submitted at level four.

Findings of Fact

1. Grievant , a Certified Medical Technologist and Associate Professor in the Medical Technology Program in the Department of Pathology in the School of Medicine, has been employed at WVU since 1963, and has been tenured since 1977.

2. Grievant has routinely taught undergraduate medical technology classes in introductory laboratory and clinical microscopy and hematology.

3. In March1995, the National Accrediting Agency for Laboratory Sciences made an on-site visitation. Shortly thereafter, Dr. Sens and Dr. Holter advised Grievant that the program was in jeopardy of losing accreditation due to her poor teaching performance. Grievant was subsequently

required to complete twelve hours of educational courses on teaching effectiveness at Johns Hopkins University during the Summer and Fall semesters of 1995.

4. Grievant returned to her teaching assignment at WVU for the Spring 1996 semester.

5. Grievant continued to receive poor evaluations from students, and the students complained to Dr. Sens regarding Grievant's teaching performance.

6. Grievant's relationship with Dr. Holter deteriorated. Grievant did not receive any feedback from her sabbatical reports, her classes had been reworked with the course material changed, and her committee seats reassigned.

7. Grievant and Dr. Sens engaged in a number of mediation sessions addressing the ongoing situation. 8. In March 1997, Dr. Sens advised Grievant that she was relieved of her instructional duties, and was reassigned to the Urology Clinic to work with residents. This assignment appears to consist of teaching, and some clinical work.

9. Grievant's salary, rank, and status as a tenured Associate Professor, were not affected by the transfer to the Urology Clinic.

Discussion

Grievant argues that she was denied due process when Respondent failed, or refused, to provide her with a reasonable definition of “teaching effectiveness” or an objective and definitive evaluation mechanism by which to measure teaching effectiveness. She also asserts that Dr. Holter engaged in policies and practices which constituted substantial detriment to, and interference with, Grievant's effective classroom instruction and job performance, resulting in favoritism and harassment. Finally, Grievant claims that her reassignment was arbitrary and capricious given that it was based upon unsubstantiated and anonymous student evaluations.

Respondent asserts that Grievant had received poor evaluations for a number of years, and had not improved her performance. While termination had been considered, it was decided that in consideration of Grievant's many years of service, her reassignment to graduate level instruction might alleviate the problem. Respondent argues that it is within Dr. Sens' authority to reassign faculty duties, with or without reason. Respondent also asserts that Grievant failed to produce any credible evidence to support the claims of harassment, or that Dr. Holter created any substantial detriment to or interference with her classroom instruction and job performance.

As this grievance does not involve a disciplinary matter, Grievant has the burden ofproving each

element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

At the level four hearing, Grievant stated that she understood Respondent can reassign duties, but asserted that she was hired to teach, and wants to continue in that capacity. Grievant does not allege a violation or misapplication of any policy, rule or regulation relating to her reassignment. Grievant admits that reassignment is the prerogative of Respondent. She is simply upset that she no longer teaches the classes of her choice. Grievant does not claim, and the undersigned is not aware of any authority which provides instructors in institutions of higher education a vested right to any particular assignment. The assignment of instructors to meet the best interests of the institution is within the discretion of the institution. See generally, State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980), (which addressed a similar situation with an employee of a county board of education.) Given Respondent's discretion in this matter, Grievant's performance related claims need not be addressed, because the reassignment could have been implemented even if Grievant's performance had been satisfactory. However, Respondent's discretion to reassign would reasonably be tempered by acts which are arbitrary and capricious.

Grievant contends that Respondent's action was arbitrary and capricious because it was based on unsubstantiated and anonymous student evaluations. Respondent Exhibit I (Level IV), establishes that Dr. Holter provided Grievant and other faculty members acomposite of the evaluations completed by the medical technology students. This report included responses to multiple choice questions as well as narrative comments. Not all the student complaints were anonymous, however. Dr. Sens testified extensively at the level four hearing regarding the extraordinary number of student complaints she heard. She noted that one session consisted of twenty students and lasted approximately ninety minutes.

Further, Dr. Holter testified that she had discussed Grievant's evaluations with her, and counseled her. She stated that she had observed two of Grievant's classes, and listened in periodically. At one point, Dr. Holter regraded an examination given by Grievant, and noted that some scores differed dramatically. Grievant admited that her student evaluations have historically been below average, and her annual reviews by the Promotion and Tenure Committee have noted concern regarding student

evaluations since 1991.

Although the student evaluations were properly accorded substantial weight, Respondent has established that the decision to reassign Grievant included consideration of other sources of information which also substantiated the claims. Therefore, the reassignment of Grievant to the Urology Clinic was not arbitrary and capricious.

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. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1§4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. Grievant has failed to prove that her reassignment to the Urology Clinic was an arbitrary and capricious action by Respondent.

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: October 30, 1998 _____ SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Carrie Coombs, Esq., and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General, and Beverly Kerr, Esq.