HOWARD KEITH THACKER,

Grievant,

v.

DOCKET NO. 98-BOT-400

BOARD OF TRUSTEES/
MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Howard “Keith” Thacker, filed a total of seventeen (17) grievances against his employer, Marshall University (“Marshall”), from October 6, 1997 through June 2, 1998. Grievances filed from October 6, 1997 through December 19, 1997 were not resolved at level one and advanced to level two. Thereafter, the remaining grievances from March 19, 1998 through June 2, 1998 were filed, and it is disputed whether they were properly responded to at level one, but nevertheless were advanced to level two for purposes of hearing, but not decision. A level two hearing was conducted on all of the grievances on July 9, August 21, August 27, September 28, and September 30, 1998. A recommendation was made by the level two hearing examiner, Stephen W. Hensley, to President J. Wade Gilley, on October 6, 1998. President Gilley adopted Mr. Hensley's recommendation and communicated his decision to Grievant by letter dated October 7, 1998. That decision upheld two (2) of the grievances, and denied, dismissed or renderedmoot the remaining fifteen (15) grievances. Level three was by-passed and Grievant appealed to level four on October 19, 1998. A level four hearing was scheduled for the week of February 1, 1999, but the parties subsequently agreed to submit the grievances on the record developed below. The grievances became mature for decision on March 4, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Diane Ridgway Parker, Laborers' Local 814, and Marshall was

represented by Mary Roberta Brandt, Esq., and Gregory Skinner, Esq., Assistant Attorneys General.

SUMMARY OF EVIDENCE

See Attachment A.

BACKGROUND

Grievant was employed at Marshall University on August 8, 1997, as a result of an out-of-court settlement agreement negotiated in July 1996 with the West Virginia Graduate College ("the Graduate College"). By the time that agreement was finally signed, that institution had become the Marshall University Graduate College. The issues which created the settlement agreement are not relevant to this action.

Grievant began employment at Marshall as a Computer Lab Consultant Lead in the Computer Center. His responsibilities included supervision and consulting with both departmental computer and the "public" computer labs in the major academic buildings. Other assignments related to Computer Center functions were also given to Grievant to perform. Grievant's claims in these multiple grievances address a variety of issues. At the heart of many of these charges is the contention by Grievant that Marshall has been unresponsive to his request for accommodation and consideration for him as an employee with a disability. Grievant is currently on unpaid medical leave. (See footnote 1) Grievant has provided evidence that he suffers from sarcoidosis, and that this condition is further complicated by depression and anxiety disorder, although Grievant has not provided Marshall with any further, more detailed information regarding this condition. Grievant seeks as relief several actions on the part of Marshall, including reinstatement to active employment status, restructuring of his duties and responsibilities as a reasonable accommodation for his disability, back pay for work time missed when he was sent home, removal of offensive materials from his personnel file, and apologies for wrong actions.

GRIEVANT'S POSITION

Grievant contends that the evidence produced herein supports his contention that Marshall, through Mr. Jim Stephens and Mr. John Giglia, has not been responsive to his requests for

accommodation for his disability, and that it has engaged in a pattern of harassment and unfair actions, including retaliation for prior grievances. Grievant further contends that his initial hiring violated his settlement agreement, in that he was hired into a position unlike the one he had vacated at the Graduate College. Grievant also contendsthat Marshall has not met is required statutory time lines, and thus he should prevail in several of the individual grievances by default.

MARSHALL'S POSITION

Marshall argues that Grievant has not provided adequate explanation of how his disability should be accommodated, despite numerous requests for additional information from Grievant and/or his physicians. Marshall denies it has harassed or retaliated against Grievant, or engaged in any wrongful acts against him. Marshall denies that it has violated the statutory time lines with respect to several of the grievances, and urges the undersigned to address each of those grievances on its merits.

PRELIMINARY ISSUE

Grievant alleges that Marshall is in default on the grievances filed from March 19, 1998 through June 2, 1998, for failure to timely respond at level one in accordance with W. Va. Code § 18-29-3, which provides in pertinent part, that “[i]f a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, the grievant shall prevail by default.”

This Grievance Board has found that the burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Galloway v. Div. of Banking, Docket No. 98-DOB-167 (Sept. 22, 1998); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). It is appropriate thatthis same principle apply to an assertion of default by a grievant, so that the burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Harmon v. W. Va. Div. of Corr., Docket No. 98-CORR- 284 (Oct. 6, 1993). In this case, the burden is upon Grievant to demonstrate that the Level I decisions were not issued in a timely

manner. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The following is a brief chronology concerning the filing of the grievances alleged to be in default.

1. Grievant filed four grievances on March 19, 1998.

2. Mr. Giglia responded on March 24, 1998, with three dates for level one conference. G. Ex. 62.

3. Mr. Giglia and Ms. Parker (Ridgway) have a phone conference on March 26, 1998 regarding the grievances.

4. Mr. Giglia writes to Ms. Parker on March 27,1998, agreeing to postpone level one until Grievant can return to work. G. Ex. 63.

5. Ms. Parker writes to Mr. Giglia on April 2, 1998, attaching a form for him to sign agreeing to postponement. Grievant has already signed the form. G. Ex. 71.

6. Grievant agrees on April 23, 1998, to postpone the level two hearing, although he does not specify which grievances. G. Ex. 75.

7. Grievant filed two more grievances on May 4, 1998.

8. Ms. Parker writes to Mr. Stephens and Mr. Giglia on May 6, 1998, asking to schedule the level two hearing as soon as possible. G. Ex. 84.

9. Mr. Stephens responds to Grievant on May 15, 1998, acknowledging the receipt of three grievances received on May 5 and 7, and responds to each as the level one response. G. Ex. 85.

10. Grievant files two more grievances on May 21, 1998.

11. Grievant writes to Mr. Stephens on May 21, 1998, complaining that he (Mr. Stephens) answered three grievances in one letter and did not have a conference face to face. G. Ex. 86. 12. Mr. Stephens writes to Grievant on May 28, 1998, responding to a medical leave grievance filed on May 21, 1998. G. Ex. 88.

13. Mr. Burdette writes to Grievant on May 28, 1998, stating Ms. Parker has agreed to consolidate the grievances for level two, and informing him that Marshall waives all level ones to level two, and schedules a level two hearing. G. Ex. 89.

14. Grievant files a grievance on June 2, 1998.

15. Grievant writes to Mr. Giglia on June 2, 1998 regarding the overpayment grievance. G. Ex. 89.

16. Grievant writes to President Gilley on June 2, 1998, requesting a level two hearing. G. Ex. 89.

17. Mr. Stephens writes to Grievant on June 8, 1998, responding to the overpayment grievance. G. Ex. 93.

18. Mr. Burdette writes to Grievant on June 25, 1998, rescheduling the level two hearing. G. Ex. 94.

19. Ms. Parker writes to Mr. Burdette on July 2, 1998, claiming default. G. Ex. 91.

20. Mr. Burdette writes to Ms. Parker on July 6, 1998, responding to her letter, and schedules a level two hearing. G. Ex. 92.

Following this chronology closely, there is no evidence that Marshall is in default on any of these grievances. Grievant's correspondence indicates his disapproval of Mr. Stephens responding to his grievances without the benefit of a level one informal conference. However, given the history of Grievant and Marshall up to this point, there is nothing which would prevent Mr. Stephens from denying the grievances at level one and simply advancing them to level two to be heard with the rest of the grievances. Grievant makes some argument that Mr. Stephens was not his immediate supervisor, and therefore, it was improper for him to decide the grievances. This simply puts form over function. Grievant's complaints generally were directed at his immediate supervisor, Mr. Giglia, for actions he took. It is not unreasonable for Marshall to conclude that an informal conference between Grievant and Mr. Giglia would accomplish little in this context. Grievant also challenges the documentation which unequivocally supports Marshall's contention that Grievant agreed to postponements and continuances of level one conferences in these matters. Grievant alleges that, even though he agreed to the continuances, since Marshall did not return a form with a signature confirming this, the continuances were not mutually agreed upon, causing Marshall to be in default. Of course, the conferences did not take place, and no party arrived for a hearing without notice that it had been continued. Quite simply, Grievant attempts to create a “default trap” with this argument. Grievant has not established by a preponderance of the evidence that any of the grievances were defaulted upon by Marshall, and these will be decided upon their merits, which, in this instance, is in the best interests of all involved.

For purposes of clarity and brevity, I will address each grievance and its history, and make findings of fact and conclusions of law with respect to each one separately throughout this decision.

I.

GRIEVANCE 1 (10/6/97).

I am grieving the letter of reprimand dated September 26, 1997 addressed to me from John Giglia. I seek a full retraction of this letter.

FINDINGS OF FACT

1. On September 26, 1997, John Giglia, Director of Information Technology Systems, University Computing Services, at Marshall, and Grievant's immediate supervisor, sent Grievant a memorandum entitled “Letter of Reprimand”. G. Ex. 29. 2. Paragraph number one (1) of Mr. Giglia's memorandum requests that Grievant stop referencing his settlement agreement with Marshall to Mr. Giglia or his department, due to the confidentiality of the agreement.

3. Grievant's settlement agreement contained a strict confidentiality clause between Grievant and certain, limited members of the Marshall administration, which did not include Mr. Giglia. G. Ex. 100. Thus, Mr. Giglia had no knowledge of the terms of the agreement, nor did he have access to them.

4. Mr. Giglia had been advised by Jim Stephens, Associate Director of Human Resources at Marshall, that he had not violated the terms of Grievant's settlement agreement.

5. Grievant refused to perform certain tasks requested by Mr. Giglia, responding that such things were not in his settlement agreement.

6. Paragraph number two (2) of Mr. Giglia's memorandum requests that Grievant review and submit his position information questionnaire. Grievant had submitted a position information questionnaire for his previous position at the Graduate College, and refused to submit an updated form.

7. Grievant claimed to have a disabling condition associated with pulmonary problems, as well as a medical condition referred to as “sarcoidosis.”

8. Paragraph number three (3) of Mr. Giglia's memorandum requests that Grievant provide documentation regarding his “handicapping condition” and any requested accommodation in regard

to this employment at Marshall. 9. Despite Mr. Giglia's requests from Grievant and his representative for a list of specific accommodations and a medical doctor's verification that such accommodations are necessary, Grievant and his representative failed to provide the proper and adequate documentation and verification to Marshall.

10. Grievant did not challenge the accuracy of Mr. Giglia's September 26, 1997, memorandum, nor did he refute the facts as presented in that memorandum.

CONCLUSIONS OF LAW

1. In all disciplinary matters, the employer bears the burden of proving the charges against the employee by a preponderance of the evidence.

2. Marshall has met its burden of proving the allegations in Mr. Giglia's memorandum, and Grievant did not challenge or refute those charges.

3. Grievant failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation, with regard to Mr. Giglia's memorandum. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

II. GRIEVANCE 2 (10/14/97).

> I am grieving the letter from John Giglia dated 10/10/97 re: probationary period. I am seeking a full retraction.

FINDINGS OF FACT

1. Grievant received a memorandum from Mr. Giglia, dated October 10, 1997, which extended Grievant's probationary period from three (3) months to six (6) months. G. Ex. 15.

2. Grievant began work at Marshall in the University Computing Services department on August 8, 1997.

3. Grievant was classified as a Computer Laboratory Consultant Lead. R. Ex. 3.

4. Previously, Grievant had been employed at the West Virginia Graduate College as a Local Area Network (LAN) Specialist.

5. The position of Computer Laboratory Consultant Lead at Marshall was a new and different position from the LAN Specialist position Grievant held at the West Virginia Graduate College.

6. Grievant had been reassigned/transferred from his previous employment position at the Graduate College to a different position at Marshall.

7. The Marshall University Classified Staff Handbook provides, in pertinent part, that a minimum three month probationary period applies to all employees who transfer into a different position. R. Ex. 7.

8. The Marshall University Classified Staff Handbook gives an immediate supervisor of an employee the option of extending that employee's probationary period from three (3) to six (6) months if the immediate supervisor is not satisfied with the employee's work performance. R. Ex. 7. 9. Grievant did not grieve the fact that he initially began his employment with Marshall in September of 1997 as a three (3) month probationary employee.

10. Mr. Giglia extended Grievant's probationary period, in accordance with the Handbook, because he, in his capacity as Grievant's supervisor, was not satisfied with Grievant's work performance during Grievant's initial three (3) month probationary period.

11. Grievant received poor work performance evaluations from Mr. Giglia during his three (3) month probationary period. G. Ex. 9.

DISCUSSION

Grievant contends that the settlement agreement with the Graduate College was intended to place him exactly where he would have been had he not been dismissed. The settlement agreement (G. Ex. 100) provides with regard to reemployment, that “Marshall University Graduate College will offer Mr. Thacker the position of Computer Lab Consultant Lead, pay grade 18. Mr. Thacker would begin work in this full-time position at Marshall University Graduate College in Huntington, West Virginia, on a mutually agreed upon date.” Further, it provides that “Mr. Thacker would be treated as all other Marshall University Graduate College classified employees for salary plan purposes. Any unused accrued sick leave and annual leave, as of the date that Mr. Thacker left the position, would be retained by Mr. Thacker.”

There is no language specifically addressing whether Grievant would be reemployed as a probationary employee or not. Considering Mr. Giglia's complete ignorance of the contents of the settlement agreement, he would have had no reason to question whether Grievant was a probationary employee upon his transfer to his position at Marshall. Further, there is nothing to show

that Grievant suffered in any way from this belief, as he was continued in employment throughout and after the probationary period ended. Thus, Mr. Giglia's belief that Grievant was a probationary employee, if wrong, was harmless error, and Grievant has not shown any harm suffered as a result.

CONCLUSIONS OF LAW

1. Mr. Giglia followed all applicable policies and laws in extending Grievant's probationary period from three (3) to six (6) months.

2. Grievant did not prove by a preponderance of the evidence that he was not a transferred employee, as defined by the Handbook.

3. Grievant did not prove that he suffered any harm as a result of his probationary period being extended from three (3) to six (6) months.

Accordingly, this grievance is **DENIED**.

III. GRIEVANCE 3 (referred to at Level II as grievance MU No. 3).

Grievant withdrew this grievance prior to the Level II hearing.

IV. GRIEVANCE 4 (12/2/97).

> I am grieving the e-mail that you [Mr. Giglia] sent me dated 11/17/97 which was followed by a verbal reprimand in your office 12-2-97. This e-mail & accompanying reprimand has worsened my handicapped condition. See attached note!

FINDINGS OF FACT

1. Grievant grieved an e-mail, dated November 17, 1997, from Mr. Giglia, as well as a verbal reprimand by Mr. Giglia on December 2, 1997. G. Ex. 31.

2. In the e-mail, Mr. Giglia returned a Marshall campus computer laboratory inventory assigned to and conducted by Grievant, citing that Grievant had provided information on the inventory that was incorrect. G. Ex. 32.

3. Mr. Giglia requested that Grievant correct the mistakes on the computer laboratory inventory.

4. In the above-mentioned inventory, Grievant was responsible for compiling information in relation to all of the computer laboratories on the Marshall campus in spreadsheet format. R. Ex. 26.

5. Although Grievant alleged Mr. Giglia made certain errors on the inventory lists, Mr. Giglia did not change any of the information provided by Grievant. Therefore, any and all errors committed on the inventory lists were committed by Grievant. Mr. Giglia merely pointed out errors committed by Grievant and ordered him to correct the errors.

6. Grievant was responsible for providing accurate information on the inventory lists, and for providing services to computer laboratories for the entire Marshall campus.

7. As Grievant's immediate supervisor, Mr. Giglia may order a subordinate employee to repeat a job he felt was performed inadequately.

8. Grievant presented no evidence to rebut the testimony of Mr. Giglia.

CONCLUSIONS OF LAW

1. The fact that Mr. Giglia requested that Grievant correct the errors on the job Grievant performed is non-disciplinary in nature.

2. An immediate supervisor may order a subordinate employee to repeat a job the employee performed poorly.

3. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

4. The verbal reprimand by Mr. Giglia to Grievant is disciplinary in nature.

5. Marshall proved that Grievant committed errors in relation to his assigned job duties which constituted the underlying basis for the reprimand.

6. Grievant did not rebut, or provide any credible evidence, that Marshall was incorrect in its assessment of Grievant's job performance, nor that the above mentioned reprimand was not warranted.

Accordingly, this grievance is **DENIED.**

V. GRIEVANCE NO. 5 (referred to at Level II as grievance “MU No. 5").

Grievance was granted at Level II of the grievance procedure.

VI. GRIEVANCE 6 (12/15/97).

> I am grieving the “contents” of the recent employee evaluation done by Mr. John Giglia. This evaluation was first shown to me 12-2-97. However, it was not given to me till a week later. I seek a total withdrawal, and full retraction of this evaluation.

FINDINGS OF FACT

1. Grievant grieved the Probationary Performance Evaluation, dated December 2, 1997, written and conducted by Mr. Giglia. G. Ex. 9.

2. Mr. Giglia, as Grievant's immediate supervisor, was entitled and required to evaluate Grievant's work performance.

3. Grievant was a probationary employee at the time in question.

4. The Handbook states that “[t]ransferred employees shall receive an evaluation at the conclusion of their three-month probationary period.”

5. The period of evaluation was from August 8, 1997 through November 7, 1997. G. Ex. 18.

6. The Probationary Performance Evaluation allows for the evaluation of twelve (12) categories for the employee.

7. Grievant was evaluated at two (2) “meets expectations,” six (6) “occasionally meets expectations,” and four (4) “constantly below expectations.”

8. Mr. Giglia orally explained each individual category and his corresponding evaluation of Grievant, including his reasoning for the evaluation, to Grievant.

9. Mr. Giglia expressed to Grievant, in detail, how Grievant could improve his work performance.

10. As a result of the level one hearing in this case, Mr. Giglia deleted a sentence from the Probationary Performance Evaluation. Specifically, Mr. Giglia deleted on page 1, number 7, the sentence, “[h]e [Grievant] challenges every decision which he doesn't likeby filing unmerited grievances because he feels he has been wronged.” Currently, the Probationary Performance Evaluation does not contain the deleted sentence.

11. Grievant did not present any evidence to rebut Mr. Giglia's evaluation.

CONCLUSIONS OF LAW

1. A performance evaluation is not disciplinary in nature, and the employee has the burden of proving the evaluation is in violation of a statute, policy, rule, or regulation, or arbitrary and capricious.

2. Grievant presented no evidence to support his allegations, or to rebut the Probationary Performance Evaluation performed by Mr. Giglia on December 2, 1997.

3. The mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. Jones v. Braxton County Bd. of Educ., Docket No. 97-04-311 (Apr. 4, 1998).

4. The Grievance Board will not intrude on the evaluations of employees unless there is evidence to demonstrate such arbitrary abuse on the part of a school official to show the primary purpose of the evaluation process has been confounded. Id. See also, Brown v. Wood County Bd. of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); Oni v. Board of Directors/Bluefield State College, Docket No. 93-BOD-515 (Dec. 30, 1994).

5. Grievant has failed to show that Mr. Giglia acted in an arbitrary or capricious manner in performing Grievant's evaluation.

Accordingly, this grievance is **DENIED**.

VII. GRIEVANCE 7 (12/19/97).

> I am grieving your [Mr. Giglia] letter of request dated 12/18/97, wherein you are insisting on a letter from my physician, and medical documentation for my sick leave time for the past four months. I am seeking as a remedy a total retraction of this letter.

FINDINGS OF FACT

1. Grievant grieved a memorandum dated December 18, 1997, from Mr. Giglia to Grievant, where Mr. Giglia requested additional information from Grievant's physician for an accommodation requested by Grievant, as well as medical documentation of Grievant's use of sick leave for the four (4) preceding months. G. Ex. 35.

2. In regard to Mr. Giglia's request for verification of Grievant's alleged medical conditions and corresponding use of sick leave, approximately half of the documentation Grievant provided to Mr. Giglia during that four (4) month period only contained a release to work, and not an explanation of what the actual medical condition was.

3. Marshall had no specific or verified knowledge of the reasons Grievant used as much sick leave as he did.

4. During this four (4) month period, Grievant used the following amounts of sick leave:

(1) September, 1997: 60.75 hours total;

(2) October, 1997: 41.00 hours total;

(3) November, 1997: 57.00 hours total;

(4) December, 1997: 15.00 hours total.

R. Ex. 32. Grievant used a total of 173.75 hours of sick leave during the above-mentioned four (4) month period. 5. Mr. Giglia's request for additional information about Grievant's alleged medical condition was necessary to respond to Grievant's request for an Americans with Disabilities Act accommodation. Mr. Giglia was attempting to obtain the information necessary for Marshall to make a reasonable accommodation for Grievant.

6 Marshall did not have adequate information upon which to make an accommodation for Grievant, despite repeated requests from Marshall to Grievant for such information.

7. Dr. Patel's letter only references that Grievant has “possible sarcoidosis”, and does not state any specific suggestions for an accommodation. G. Ex. 3.

8. The Handbook provides that a “[s]upervisor may require documentation of an illness regardless of the duration of leave. Sick leave for more than five consecutive days should not be granted to an employee without satisfactory proof of illness or injury as evidenced by a statement of the attending physician.” R. Ex. 10.

CONCLUSIONS OF LAW

1. 128 C.S.R. 35, §8.6 states, “[t]he institution may require evidence from an employee for verification of an illness or other cause for which leave may be granted under this policy, regardless of the duration of the leave.”

2. Mr. Giglia was entitled to the above-referenced information by law and by Marshall policy.

3. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

VIII. GRIEVANCE 8 (3/19/98).

> I am grieving your letter of reprimand dated 3/10/98 and received via US mail to my residence 3/11/98. You cite poor work performance. I am seeking a total withdrawal of

this letter.

FINDINGS OF FACT

1. Grievant grieved a letter of reprimand, dated March 10,1998, from Mr. Giglia to Grievant regarding a complaint about Grievant's poor work performance and neglect of duty. G. Ex. 60.

2. Mr. Giglia received a letter of complaint, dated March 5, 1998, from Sharlee Henry of the Marshall Center for Academic Excellence, Yeager Scholars, in regard to Grievant. G. Ex. 60.

3. Ms. Henry complained that Grievant neglected his duty, in that he would not show up on a weekly basis, and would at times promise to return to fix a problem, but would not return.

4. Grievant was responsible for, among other areas, the computer laboratory at the Marshall Center for Academic Excellence.

5. At a minimum, Grievant had the responsibility to service the Marshall Center for Academic Excellence computer laboratory once a week.

6. Martha Woodward, Executive Director of the Center, and Sheri McGhee, Honors Program Assistant, were in concurrence with Ms. Henry's assessment of Grievant's work performance. G. Ex. 60. 7. Mr. Giglia's letter of reprimand, and Ms. Henry's letter of complaint, were not based upon a single incident, but were based upon poor work performance over a period of time.

8. Grievant did not dispute the accuracy or content of the letter of reprimand.

CONCLUSIONS OF LAW

1. Mr. Giglia followed all applicable policies and laws in reprimanding Grievant.

2. Marshall proved by a preponderance of the evidence that Grievant performed sub-standard work and was neglectful in his duty.

Accordingly, this grievance is **DENIED**.

IX. GRIEVANCE 9 (3/19/98).

> I am grieving your [Mr. Giglia] letter of reprimand dated 3/05/98. This letter had memos from Jonathan Brown attached to it. I am seeking a full retraction of this letter.

FINDINGS OF FACT

1. Grievant grieved a letter of reprimand, dated March 5, 1998, from Mr. Giglia to Grievant regarding a complaint about Grievant's poor work performance and neglect of duty from Jonathan Brown, Director of the Media Center for the Marshall School of Nursing, to Mr. Giglia.

2. Mr. Giglia received the letter of complaint from Mr. Brown on March 5, 1998. G. Ex. 66.

3. Mr. Brown complained about the lack of competency Grievant exhibited in his inability to fix certain computers within Mr. Brown's computer laboratory. 4. Mr. Brown stated that a Marshall student was able to fix the problem within a few minutes.

5. Grievant is responsible for, among other areas, competently maintaining Mr. Brown's computer laboratory.

6. Grievant failed to competently maintain Mr. Brown's computer laboratory.

7. Grievant did not dispute the accuracy or the content of Mr. Giglia's March 5, 1998, letter of reprimand.

CONCLUSIONS OF LAW

1. Mr. Giglia followed all applicable policies and laws in reprimanding Grievant.

2. Marshall proved by a preponderance of the evidence that Grievant performed sub-standard work and was neglectful in his duty.

Accordingly, this grievance is **DENIED**.

X. GRIEVANCE 10 (3/19/98).

> I am grieving your [Mr. Giglia] letter of reprimand dated 3/5/98 received via U.S. mail to my residence 3/11/98. This letter claims I am dispruptive and I defamed you. I am seeking a total withdrawal of this letter.

FINDINGS OF FACT

1. Grievant grieved a letter of reprimand from Mr. Giglia dated March 5, 1998, in regard to Grievant's disruptive behavior. G. Ex. 67.

2. Grievant left a telephone voice mail message on the Audex system (Marshall's telephonic voice mail system) for Mr. Giglia claiming that Mr. Giglia was harassing him and causing Grievant to become more ill. G. Ex. 67. 3. Grievant further stated on the Audex system that Mr. Giglia was retaliating against him, and expressed his dissatisfaction for certain alleged administrative actions taken against him.

4. Grievant left this Audex message for all forty-five (45) employees within the department to individually hear, and specifically mentioned Mr. Giglia by name.

5. Publicly broadcasting serious allegations of retaliation, harassment, and dissatisfaction with the Marshall administration and one's supervisor over the departmental voice mail system is not an appropriate forum for airing a complaint.

6. To publicly broadcast such allegations and dissatisfaction, as Grievant did, was disruptive of Mr. Giglia's department.

7. Grievant did not deny publicly leaving the voice mail message, nor did he dispute the accuracy or the contents of Mr. Giglia's March 5, 1998 letter of reprimand.

CONCLUSIONS OF LAW

1. The State and its various agencies have reason to expect employees to observe a standard of conduct which will not reflect discredit upon the State and will not cause the public to lose confidence in either the ability or the integrity of the State's employees or create suspicion with reference to their capacity properly to discharge the duties of their positions. Thurmond v. Steele, 159 W. Va. 630, 632, 225 S.E.2d 210, 212 (1976).

2. Mr. Giglia followed all applicable policies and laws in reprimanding Grievant for his inappropriate and unprofessional behavior. 3. Marshall proved by a preponderance of the evidence that Grievant behaved in an inappropriate and unprofessional manner, and thus was subject to reprimand.

Accordingly, this grievance is **DENIED**,

XI.

GRIEVANCE 11 (3/19/98).

I am grieving the inquiry made by Mr. John Giglia to my college instructor Dr. Martha Brake, wherein Mr. Giglia requests my attendance records. I am seeking a total withdrawal of this request.

FINDINGS OF FACT

1. Grievant grieved an inquiry made by Mr. Giglia on March 10, 1998, from Grievant's college instructor, Dr. Martha Brake, requesting Grievant's class attendance records. G. Ex. 68.

2. Grievant enrolled in a college course during the Spring semester of 1998.

3. In order for Grievant to attend class on time, however, it was necessary for him to leave work early on the days that class was scheduled.

4. In accordance with Marshall policy, Mr. Giglia approved Grievant's request to leave work early on the days Grievant's class was scheduled.

5. Approval to leave work early to attend class is a privilege, and not a guarantee. R. Ex. 31.

6. The Handbook states, "[f]ull-time regular employees may be permitted to enroll for university classes during regularly scheduled work hours. The following conditions must be met if release time is to be granted:

(1)

Supervisor must give prior approval for release time. (2)
Course must fall within employee's regularly scheduled work week.

If these conditions are met, the employee may take up to five hours per week release time to attend the class." R. Ex. 30.

7. During the time period in question, Grievant was off work on sick leave a great deal.

8. Mr. Giglia was concerned that if Grievant missed work due to illness, he should not be attending class on those days.

9. At no point did Mr. Giglia request any information in regard to Grievant other than attendance records from Dr. Brake.

10. There is no policy stating that a supervisor cannot request, or is not entitled to, attendance records of a subordinate employee, whom the supervisor gave express permission to leave work early, in order to attend class.

11. Mr. Giglia never obtained the attendance information he requested from Dr. Brake.

12. Grievant's class concluded at the end of the 1998 Spring semester.

13. Mr. Giglia is no longer employed at Marshall.

CONCLUSIONS OF LAW

1. The Handbook states, "[f]ull-time regular employees may be permitted to enroll for university classes during regularly scheduled work hours. The following conditions must be met if release time is to be granted:

(1)

Supervisor must give prior approval for release time.

(2)

Course must fall within employee's regularly scheduled work week.If these conditions are met, the employee may take up to five hours per week release time to attend the class." R. Ex. 30.

2. Marshall may inquire into an employee's class attendance records where the employee has been granted work release time in order to attend the class.

3. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

4. Moreover, due to the amount of time which has elapsed since Grievant took the class, and the fact that Mr. Giglia is no longer employed with Marshall, this issue is moot.

Accordingly, this grievance is **DENIED**.

XII. GRIEVANCE 12 (4/3/98).

I am grieving your (Mr. Giglia) letter entitled "Request for accommodation under the ADA". I received this letter on the 19th of March. I am seeking accommodation for my handicap. I know that somewhere at Marshall there is a job that I can perform.

FINDINGS OF FACT

1. Grievant grieved a memorandum from Mr. Giglia to Grievant, dated March 17, 1998.

2. Grievant requested a job, with little or no physical mobility, at Marshall, as an accommodation under the Americans with Disabilities Act. G. Ex. 69. 3. Mr. Giglia, in the above-referenced letter, stated that Marshall did not have an employment position at that time in which Grievant could work as an accommodation under the Americans with Disabilities Act. G. Ex.

69.

4. Mr. Giglia's March 17, 1998 letter is not a letter of termination, as claimed by Grievant.

5. Despite repeated attempts by Marshall, Grievant at no point provided Marshall with the proper and adequate information and documentation upon which Marshall could make an educated and informed decision about how to accommodate Grievant. Due to Grievant's unwillingness to provide the proper documentation to Marshall for an accommodation, Marshall could not provide Grievant with an accommodation.

6. Grievant has only stated that he has “sarcoidosis”. No documentation has been provided by Grievant to inform Marshall what “sarcoidosis” is, although Marshall has repeatedly attempted to get this information, as well as an explanation of the symptoms, if any, which need accommodating. Grievant has not provided Marshall with this information.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission and the West Virginia Supreme Court have inferred that the West Virginia Human Rights Act imposes the same duty upon employers to reasonably accommodate its disabled employees as does the Americans with Disabilities Act. Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561, 574 (1996).

2. To comply with the West Virginia Human Rights Act, and thus with the Americans with Disabilities Act, an employer must make reasonable accommodations forknown impairments to permit an employee to perform the essential functions of the job. Id.

3. To state a claim for breach of the above duty, a grievant may prove the following elements:

a.

The grievant is a qualified person with a disability.

b.

The employer was aware of the grievant's disability.

c.

The grievant required an accommodation in order to perform the essential functions of the job;

d.

A reasonable accommodation existed that would meet the grievant's needs;

e.

The employer knew or should have known of the grievant's needs and of the accommodation; and

f.

The employer failed to provide the accommodation.

Id.

4. Grievant has not proven that he is a qualified person with a disability. Marshall repeatedly requested from Grievant medical documentation proving Grievant has a disability. Grievant has only stated that he has “sarcoidosis,” without any explanation of the disease, its symptoms, or its disabling characteristics which need accommodated.

5. Grievant has not proven that he requires an accommodation, in accordance with Skaggs, to perform the essential functions of his job.

6. Grievant has not proven that a reasonable accommodation exists, in accordance with Skaggs, that would allow Grievant to perform the essential functions of his job. In fact, Grievant refuses to provide Marshall with any documentation or evidence that an accommodation is necessary.

7. “An employer may defend against a claim of reasonable accommodation by disputing any of the above elements [listed in Conclusion of Law Number 3].” Id. 8. Marshall, in reliance on Skaggs, did not have informed knowledge of Grievant's alleged disability, that Grievant was a qualified person with a disability, that there was an accommodation which would have allowed Grievant to perform the essential functions of his job, and that Grievant even required an accommodation within the purview of the law.

9. The American with Disabilities Act states, among other things, that “[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3)(1995).

10. Grievant refused, despite Marshall's repeated requests, to define his “precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” Id.

11. When information necessary for a meaningful determination of accommodation only can be provided by one party, the failure to provide that information is considered obstruction.” Skaggs, at 479 S.E.2d 578.

12. “When an employee requests a reasonable accommodation and the employer has doubt as to the employee's disability, the employer may request documentation from an appropriate professional (e.g., a doctor, rehabilitation counselor, etc.), describing the employee's disabilities or limitations. Our law does not require anemployer to wear blinders at the preaccommodation stage but contemplates an interactive process beneficial to both employer and employee.” Id.

13. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XIII. GRIEVANCE 13 (4/3/98).

> I am grieving your [Mr. Giglia] letter of reprimand; poor performance letter dated 3/20/98. I am seeking a full withdrawal.

FINDINGS OF FACT

1. Grievant grieved a letter of reprimand dated March 20, 1998, from Mr. Giglia to Grievant regarding a complaint from Mark Gale, Associate Head Football Coach, about Grievant's poor work performance and neglect of duty. G. Ex. 70.

2. Mr. Giglia received Mr. Gale's complaint on March 13, 1998.

3. Mr. Gale complained about Grievant's “sub-par” services in the maintenance of the football program's computers.

4. Grievant is responsible for, among other areas, competently maintaining the Marshall football program's computers.

5. Grievant failed to competently maintain the football program's computers.

6. Grievant did not dispute the accuracy or content of Mr. Giglia's letter of reprimand.

CONCLUSIONS OF LAW

1. Marshall proved by a preponderance of the evidence that Grievant performed sub-standard work in the maintenance of the Marshall football program's computers.

2. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XIV. GRIEVANCE 14 (4/23/98).

> I am grieving being sent home 4/9/98 at 10:30 a.m. I had provided proper physician's and psychologist release letters. I am seeking back pay and damages as well as an apology from Marshall.

FINDINGS OF FACT

1. Grievant grieved being sent home on April 9, 1998, and being placed on a medical leave of absence.

2. On April 9, 1998, Jim Stephens, Associate Director of Human Resources at Marshall, informed Grievant that he was being placed on a medical leave of absence due to Grievant's alleged medical conditions, and the fact that Grievant had not provided an adequate and proper medical release to work.

3. Mr. Stephens informed Grievant of the conditions necessary for Grievant to return to active pay status.

4. In order to return to active pay status, Grievant must provide a letter from his medical doctor stating that he can return to work without limitation or restrictions, or return to work with stated limitations or restrictions. In the alternative, Grievant could provideMarshall with a letter signed by Grievant which states that his medical doctor has examined him and authorized Grievant to return to work without limitation or restriction, or return to work with stated limitations or restrictions. G. Ex. 81.

5. Grievant provided a medical release dated April 21, 1998, from Dr. Hitendra K. Patel, and returned to work on April 27, 1998. G. Ex. 82.

6. Grievant's medical excuse, however, was inadequate and did not fully respond to the

concerns Marshall had requested. G. Ex. 81.

7. Dr. Patel, in his letter dated April 21, 1998, did not state any limitations Grievant was suffering from, and did not adequately address Marshall's concerns about Grievant's ability to work. G. ex. 82.

8. Dr. Patel, however, stated in the last paragraph of his letter: “I would be happy to answer any further questions from your department regarding his medical condition and his disease should that assist you in affording Mr. Thacker the workplace accommodations that would allow him to perform his duties without exacerbating his medical condition.” G. Ex. 82.

9. Mr. Stephens, in reliance on the above offer for more information from Dr. Patel, requested additional information from Grievant on his alleged medical conditions in relation to Grievant's job. R. Ex. 1.

10. Grievant has failed to, and in fact refused to, provide any additional clarification of Dr. Patel's letter dated April 21, 1998. 11. To date, although Grievant has been provided every opportunity to do so, he has not provided Marshall with any other evidence or verifiable assurances that he is medically able to work with or without limitation.

CONCLUSIONS OF LAW

1. “In cases of serious illness or injury, a physician's statement must be submitted to the immediate supervisor in order to return to work.” Marshall University Classified Staff Handbook, p. 47.

2. 128 C.S.R. § 8.5, in pertinent part, states, “[a]n employee having an extended illness or serious injury shall, before returning to duty, obtain medical clearance to help insure adequate protection.”

3. Although given every opportunity, Grievant has not provided Marshall with an adequate medical release or verifiable assurance, in relation to his alleged medical conditions, to return to active employment at Marshall.

4. A public apology is not an appropriate form of relief and will not be granted by the Grievance Board. Fekete v. Board of Trustees/W. Va. Univ., Docket No. 95-BOT- 484 (Aug. 20, 1996).

5. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XV. GRIEVANCE 15 (5/4/98).

> I am grieving the action taken by Mr. John Giglia, Mr. Jim Stephens and the Attorney General's office on April 29, 1998. I was disciplined, in that I was sent home and instructed to not return to work at Marshall until I had obtained the proper doctor's letter from my physician. Neither Mr. Stephens, Mr. Giglia or the Attorney General's office has explained this action to me. At 4:15 p.m. I asked Mr. Giglia if this was a layoff, termination or disciplinary action. He was unable to answer. I am seeking back pay for the time I have missed work, along with a public written apology for the damage that this repeated harassment has caused me professionally.

FINDINGS OF FACT

1. Grievant was sent home on April 29, 1998, and placed on medical leave of absence without pay.

2. On April 9, 1998, Jim Stephens, Associate Director of Human Resources at Marshall, informed Grievant that he was being placed on a medical leave of absence due to Grievant's alleged medical conditions, and the fact that Grievant had not provided an adequate and proper medical release to work.

3. Mr. Stephens informed Grievant of the conditions necessary for Grievant to return to active pay status.

4. In order to return to active pay status, Grievant must provide a letter from his medical doctor stating that he can return to work without limitation or restrictions, or return to work with stated limitations or restrictions. In the alternative, Grievant could provide Marshall with a letter signed by Grievant which states that his medical doctor has examined him and authorized Grievant to return to work without limitation or restriction, or return to work with stated limitations or restrictions. G. Ex. 81. 5. Grievant provided a medical release dated April 21, 1998, from Dr. Hitendra K. Patel, and returned to work on April 27, 1998. G. Ex. 82.

6. Grievant's medical excuse, however, was inadequate and did not fully respond to the concerns Marshall had requested. G. Ex. 81.

7. Dr. Patel, in his letter dated April 21, 1998, did not state any limitations Grievant was suffering from, and did not adequately address Marshall's concerns about Grievant's ability to work. G. ex. 82.

8. Dr. Patel, however, stated in the last paragraph of his letter: “I would be happy to answer any

further questions from your department regarding his medical condition and his disease should that assist you in affording Mr. Thacker the workplace accommodations that would allow him to perform his duties without exacerbating his medical condition." G. Ex. 82.

9. Mr. Stephens, in reliance on the above offer for more information from Dr. Patel, requested additional information from Grievant on his alleged medical conditions in relation to Grievant's job. R. Ex. 1.

10. Despite Dr. Patel's offer, and Marshall's insistence that more information was required to allow Grievant to return to active employment, Grievant has adamantly refused to provide any additional information to Marshall.

11. Although Grievant stated throughout the Level II grievance hearing that he has nothing to hide, and despite Marshall's persistent and reasonable attempts to obtain information from Grievant, Grievant has at no point cooperated with Marshall and providedit with the information it requires to allow Grievant to return to active employment and to grant him an accommodation.

12. On April 28, 1998, Grievant left work due to his alleged medical condition, and went to the Casto Clinics.

13. Grievant provided Marshall with a letter from the Casto Clinics on April 29, 1998.

14. The Casto Clinics letter only references April 28, 1998, and does not state that Grievant is released to return to active employment. Further, the letter does not state whether Grievant has any limitations or is free from limitations. Moreover, the letter is generic in nature, and is not even signed by anyone. R. Ex. 12.

15. As a result, on April 29, 1998, Marshall again placed Grievant on a medical leave of absence, until such time as he was willing to comply with Marshall's request for information.

16. Mr. Stephens reiterated Marshall's position, in respect to the necessity of Grievant providing Marshall with the proper information, to Grievant by e-mail on April 29, 1998. G. Ex. 83.

17. Grievant has not provided any additional information or responses in regard to Marshall's request for a release to work.

CONCLUSIONS OF LAW

1. "In cases of serious illness or injury, a physician's statement must be submitted to the immediate supervisor in order to return to work." Marshall University Classified Staff Handbook, p.

47. 2. 128 C.S.R. § 8.5, in pertinent part, states, "[a]n employee having an extended illness or serious injury shall, before returning to duty, obtain medical clearance to help insure adequate protection."

3. Although given every opportunity, Grievant has not provided Marshall with an adequate medical release or verifiable assurance, in relation to his alleged medical conditions, to return to active employment at Marshall.

4. A public apology is not an appropriate form of relief and will not be granted by the Grievance Board. Fekete v. Board of Trustees/W. Va. Univ., Docket No. 95-BOT- 484 (Aug. 20, 1996).

5. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XVI.

GRIEVANCE 16 (5/4/98).

I am grieving the action taken by Mr. Jim Stephens on April 29, 1998. Mr. Stephens wrote to my physician (Dr. Hitendra Patel) requesting confidential information that he is not allowed to access. I am seeking a Level I hearing immediately as the first step in relief.

FINDINGS OF FACT

1. Grievant grieved the fact that Mr. Stephens sent Dr. Patel a letter requesting more specific information regarding Grievant's limitations.

2. On April 9, 1998, Jim Stephens, Associate Director of Human Resources at Marshall, informed Grievant that he was being placed on a medical leave of absence dueto Grievant's alleged medical conditions, and the fact that Grievant had not provided an adequate and proper medical release to work.

3. Mr. Stephens informed Grievant of the conditions necessary for Grievant to return to active pay status.

4. In order to return to active pay status, Grievant must provide a letter from his medical doctor stating that he could return to work without limitation or restrictions, or return to work with stated limitations or restrictions. In the alternative, Grievant could provide Marshall with a letter signed by

Grievant which states that his medical doctor has examined him and authorized Grievant to return to work without limitation or restriction, or return to work with stated limitations or restrictions. G. Ex. 81.

5. Grievant provided a medical release dated April 21, 1998, from Dr. Hitendra K. Patel, and returned to work on April 27, 1998. G. Ex. 82.

6. Grievant's medical excuse, however, was inadequate and did not fully respond to the concerns Marshall had requested in Mr. Stephens' e-mail to Grievant. G. Ex. 81.

7. Dr. Patel, in his letter dated April 21, 1998, did not state any limitations, or lack of, Grievant was suffering from, and did not adequately address Marshall's concerns about Grievant's ability to work. G. ex. 82.

8. Dr. Patel, however, stated in the last paragraph of his letter: “I would be happy to answer any further questions from your department regarding his medical condition and his disease should that assist you in affording Mr. Thacker the workplaceaccommodations that would allow him to perform his duties without exacerbating his medical condition.” G. Ex. 82.

9. Mr. Stephens, in reliance on the above offer for more information from Dr. Patel, requested additional information from Grievant on his alleged medical conditions in relation to Grievant's job. R. Ex. 1.

10. Despite the open offer from Dr. Patel to provide more information, Mr. Stephens never attempted to, nor actually did, make direct contact with Dr. Patel.

11. Mr. Stephens attached a blank medical form used by Marshall in the correspondence he sent to Grievant, and courtesy copied Dr. Patel. R. Ex. 1.

12. To date, no additional information has been received by Marshall from either Grievant or Dr. Patel.

13. Mr. Stephens at no point directly contacted Dr. Patel, despite Dr. Patel's offer of assistance.

CONCLUSIONS OF LAW

1. Mr. Stephens was within his rights to courtesy copy Dr. Patel in his April 28, 1998 correspondence with Grievant.

3. “When an employee requests a reasonable accommodation and the employer has doubt as to the employee's disability, the employer may request documentation from an appropriate

professional (e.g. a doctor, rehabilitation counselor, etc.), describing the employee's disabilities or limitations. Our law does not require an employer to wear blinders at the preaccommodation stage but contemplates an interactiveprocess beneficial to both employer and employee." Skaggs v. Elk River Run Coal Company, 198 W. Va. 51, 472 S.E.2d 561 (1996).

4. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XVII.

GRIEVANCE 17 (5/21/98).

I am grieving the cancellation of the Level II Hearing that was scheduled for the 23rd of April, 1998. I am seeking a Level II hearing immediately as relief and an apology from Marshall and the Attorney General's office for denying me my rights in this matter.

FINDINGS OF FACT

1. Grievant grieved the postponement of the level two hearing scheduled for April 23, 1998.

2. Diane Parker (then Ridgway), Grievant's representative, faxed to Marshall a document which stated "Howard Keith Thacker agrees to the postponement of the Level II hearing scheduled for April 23, 1998. The hearing will be scheduled at a later date, after the issues associated with his release to return to work are resolved and when it is convenient for all the parties involved." Grievant signed this document on April 23, 1998. G. Ex. 75.

3. The Level II hearing which was postponed has since been conducted.

CONCLUSIONS OF LAW

1. Grievant agreed, in writing, to the postponement of the level two hearing on April 23, 1998.

2. Grievant has failed to show a violation, misapplication or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XVIII.

GRIEVANCE 18 (5/21/98).

I am grieving the notice that received from Marshall (May 18th 1998) In a phone conversation Ms. Coffey informed me that I had been placed on a Medical Leave of absence without pay effective April 1st 1998. I am seeking back pay for the entire month of April 1998 as relief along with an apology from Marshall and the Attorney General's office for denying me my rights in this matter.

FINDINGS OF FACT

1. As of April 1, 1998, Grievant did not have any remaining sick leave. Therefore, the only alternative was to place Grievant, due to his unwillingness to cooperate with Marshall and failure to provide the information Marshall requested in relation to his alleged medical conditions, on a medical leave of absence without pay.

2. Once an employee is on a medical leave of absence, that employee can only be restored to pay status by providing a work release from their physician. Alternatively, the employee may present documentation, signed by the employee, that he or she has been examined by a medical doctor, and that doctor has released him or her to return to work. 3. Mr. Stephens informed Grievant of the conditions necessary for Grievant to return to active pay status.

4. To date, Grievant has not provided Marshall with an adequate medical release and/or documentation, in relation to his alleged medical conditions.

5. “In cases of serious illness or injury, a physician's statement must be submitted to the immediate supervisor in order to return to work.” Marshall University Classified Staff Handbook, p. 47.

CONCLUSIONS OF LAW

1. Grievant failed to present any evidence or argument in support of this grievance.

2. Grievant failed to show a violation, misapplication, or misinterpretation of a statute, policy, rule or regulation. W. Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

XIX.

GRIEVANCE 19 (6/2/98).

Grievance granted at level two of the grievance procedure.

XX.

RETALIATION, DISCRIMINATION, HARASSMENT

Grievant alleges that Marshall is guilty of retaliation, discrimination, and harassment in its continued treatment of him as evidenced by all of the above grievances.

W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

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

(b)

that he has, to his detriment, been treated by his 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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to make a prima facie case of discrimination, because he has failed to identify one other employee who was treated differently than he by Marshall, with respect to any of his grievances. Therefore, Grievant's claim of discrimination fails.

W. Va. Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a

grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretailatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

Establishment of a prima facie case of retaliation shifts the burden of proof to the employer to show that its actions were the result of legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra.

Grievant has established a prima facie case of reprisal under the Grievance statute. He certainly has filed numerous grievances of which Marshall was aware, and subsequently was treated in an adverse manner by Marshall, in terms of reprimands andpoor work performance evaluations. However, Marshall has proven, by a preponderance of the evidence, that its actions were the result of legitimate, non-retaliatory reasons, as discussed in each of the individual grievances.

W. Va. Code § 18-29-2(n) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform his duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997). Similarly, repeated comments of a sexual nature by a supervisor have been found to constitute harassment. Hall v. W. Va. Dept. of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997). An isolated incident does not rise to this level. See Tibbs v. Hancock County Bd. of Educ., Docket No. 98-15-016 (June 16, 1998).

Grievant has failed to establish that Marshall harassed him through his many grievances. As indicated above, Marshall has established legitimate reasons for each and every one of its actions with respect to Grievant. Moreover, in light of the never ending stream of grievances filed by Grievant, Marshall should be commended for its patience in dealing with Grievant. Indeed, if any behavior in this case falls within the definition of harassment, it is Grievant's.

CONCLUSIONS OF LAW

1. Grievant has failed to establish a prima facie case of discrimination against Marshall. 2. Grievant has established a prima facie case of reprisal against Marshall, but Marshall has successfully proven by a preponderance of the evidence that its actions were legitimate, and non-retaliatory.

3. Grievant has failed to establish that he was harassed by Marshall.

Accordingly, this grievance is **DENIED**.

ATTACHMENT A

SUMMARY OF EVIDENCE

Grievant's Exhibits

1.

W. Va. Code § 18-29-1, et seq.

2.

September 9, 1997 memorandum from Keith Thacker to UCF Operations Staff.

3.

September 18, 1997 letter from Hitendra K. Patel, M.D. to David N. Harris.

4.

September 18, 1997 Report of Occupational Injury.

5.

September 29, 1997 memorandum from John A. Giglia to Human Resources Administration.

6.

Amended Report of Occupational Injury, dated October 1, 1997.

7.

September 22, 1997 memorandum from Keith Thacker to UCF Operations Staff.

8.

September 25, 1997 memorandum from Keith Thacker to UCF Operations Staff.

9.

Probationary Performance Evaluation of Keith Thacker, dated December 2, 1997.

10.

October 1, 1997 memorandum from Keith Thacker to UCF Operations Staff.

11.

October 3, 1997 letter from Jim Stephens to Howard Keith Thacker.

12.

October 3, 1997 memorandum from John Giglia to Keith Thacker.

13.

October 7, 1997 agreement to extend level one conference.

14.

October 7, 1997 letter from Diane Ridgway to John Giglia, with attachment.

15.

October 10, 1997 memorandum from John Giglia to Keith Thacker.

16.

October 13, 1997 memorandum from John Giglia to Keith Thacker.

17.

October 20, 1997 memorandum from John Giglia to Keith Thacker.

18.

Grievance statements of Keith Thacker, dated October 14, December 2, December 15 (2), December 19, 1997.

19.

September 26, 1997 memorandum from John Giglia to Keith Thacker.

20.

Copy of Parking Permit and related correspondence dated November 3, 1997.

21.

November 5, 1997 memorandum from Keith Thacker to Tanya Bobo.

22.

November 5, 1997 memorandum from Keith Thacker to Arnold Miller and November 6, 1997 response from Arnold Miller to Keith Thacker.

23.

November 6, 1997 letter from Shirley Skaggs to Diane Ridgway.

24.

November 12, 1997 memorandum from Keith Thacker to Computing Services.

25.

November 18, 1997 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

26.

November 24, 1997 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

27.

Grievance statement dated December 2, 1997, with attached memorandum from Keith Thacker to John Giglia.

28.

Grievance statement dated October 6, 1997.

29.

September 26, 1997 memorandum from John Giglia to Keith Thacker.

30.

Grievance statement dated October 14, 1997, with attached memorandum from John Giglia to Keith Thacker.

31.

Grievance statement dated December 2, 1997 (same as Ex. 27).

32.

November 17, 1997 memorandum from John Giglia to Keith Thacker.33.
Grievance statement dated December 15, 1997, with attached December 5, 1997 memorandum from John Giglia to Jim Stephens.

34.

Withdrawn.

35.

Grievance statement dated December 19, 1997, with attached December 18, 1997 memorandum from John Giglia to Keith Thacker.

36.

Withdrawn.

37.

December 15, 1997 memorandum from John Giglia to Keith Thacker.

38.

Withdrawn.

39.

January 13, 1998 memorandum from John Giglia to Keith Thacker.

40.

Withdrawn.

41.

January 16, 1998 letter from Diane Ridgway to John Giglia.

42.

January 26, 1998 memorandum from Jim Stephens to Keith Thacker.

43.

January 26, 1998 Signed Release of Confidentiality of Settlement Agreement.

44.

January 26, 1998 memorandum from Diane Ridgway to Lalitha, Human Resources, Marshall University.

45.

Follow-up Probationary Performance Evaluation dated February 16, 1998.

46.

February 4, 1998 memorandum from Keith Thacker to Arnold Miller and February 11, 1998 response from John Giglia to Keith Thacker and Arnold Miller.

47.

February 16, 1998 memorandum from Keith Thacker to John Giglia and Jody Perry.

48.

February 16, 1998 memorandum from John Giglia to Keith Thacker.

49.

February 19, 1998 letter from Hitendra K. Patel, M.D. to David N. Harris.

50.

February 27, 1998 letter from David N. Harris to Hitendra K. Patel, M.D.

51.

March 3, 1998 memorandum from Keith Thacker to John Giglia, and March 3, 1998 response from John Giglia to Keith Thacker.

52.

March 5, 1998 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

53.

Withdrawn.

54.

March 13, 1998 letter from Shirley A. Skaggs to Samuel R. Spatafore, with attachments.

55.

March 18, 1998 letter from Shirley A. Skaggs to Samuel R. Spatafore.

56.

Withdrawn.

57.

March 19, 1998 letter from Shirley A. Skaggs to Samuel R. Spatafore.

58.

March 19, 1998 letter from Shirley A. Skaggs to Samuel R. Spatafore.

59.

Withdrawn.

60.

Grievance statement dated March 19, 1998, with attached March 10, 1998

memorandum from John Giglia to Keith Thacker, with attachment.

61.

March 24, 1998 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

62.

March 24, 1998 memorandum from John Giglia to Keith Thacker.

63.

March 27, 1998 memorandum from John Giglia to Diane Ridgway.

64.

March 25, 1998 certified receipt.

65.

Grievance statement dated March 19, 1998.

66.

March 5, 1998 memorandum from John Giglia to Keith Thacker, with attachments.

67.

Grievance statement dated March 19, 1998, with attached March 5, 1998 memorandum from John Giglia to Keith Thacker.68.
Grievance statement dated March 19, 1998, with attached March 10, 1998 letter from John Giglia to Martha Jane Brake.

69.

Grievance statement dated April 3, 1998, with attached March 17, 1998 memorandum from John Giglia to Keith Thacker.

70.

Grievance statement dated April 3, 1998, with attached March 20, 1998 memorandum from John Giglia to Keith Thacker.

71.

April 2, 1998 letter from Diane Ridgway to John Giglia.

72.

April 3, 1998 letter from Shirley A. Skaggs to Mary Roberta Brandt.

73.

April 9, 1998 memorandum from Jim Stephens to Keith Thacker.

74.

April 16, 1998 memorandum from Keith Thacker to Arnold Miller, Jim Stephens, John Giglia, Jody Perry.

75.

April 23, 1998 agreement to postpone level two hearing, signed by Keith Thacker.

76.

Grievance statement dated April 23, 1998, with attached April 23, 1998 memorandum from Keith Thacker to John Giglia.

77.

September 18, 1997 letter from Hitendra K. Patel, M.D. to David N. Harris.

78.

November 18, 1997 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

79.

November 24, 1997 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

80.

April 7, 1998 letter from Stephen L. O'Keefe, Ph.D. to John Giglia.

81.

April 9, 1998 memorandum from Jim Stephens to Keith Thacker.

82.

April 21, 1998 letter from Hitendra K. Patel, M.D. to John Giglia.

83.

April 29, 1998 memorandum from Jim Stephens to Keith Thacker.

84.

May 6, 1998 memorandum from Diane Ridgway to Jim Stephens.

85.

May 15, 1998 memorandum from Jim Stephens to Keith Thacker, with attachments.

86.

Grievance statement dated May 21, 1998, with attached May 28, 1998 memorandum from Jim Stephens to Keith Thacker.

87.

May 28, 1998 letter from Bill Burdette to Keith Thacker.

88.

May 28, 1998 memorandum from Jim Stephens to Keith Thacker.

89.

Grievance statement dated June 2, 1998, with attached June 2, 1998 memorandum from Keith Thacker to John Giglia.

90.

Grievance statement dated June 2, 1998 (same as Ex. 89).

91.

July 2, 1998 letter from Diane Ridgway Parker to Bill Burdette.

92.

July 6, 1998 letter from William Burdette to Diana Ridgway Parker.

93.

June 8, 1998 letter from Jim Stephens to Keith Thacker, with attachment.

94.

June 25, 1998 letter from Bill Burdette to Keith Thacker.

95.

November 27, 1995 memorandum from Jim Stephens to Joe Gregg; December 4, 1995 memorandum from Jim Stephens to Keith Thacker; January 3, 1996 letter from

Jim Stephens to Keith Thacker.

96.

Private Laboratory List Oct. 97.

97.

Private Laboratory List Oct. 97.

98.

Private Laboratory List Dec. 97.

99.

Private Laboratory List Dec. 97.

100.

Settlement Agreement between Keith Thacker and West Virginia Graduate College.

101.

Handwritten notes of Diane Ridgway Parker, dated March 19, 1998.102.
May 7, 1998 letter from Keith Thacker to Bill Burdette.

103.

August 24, 1997 letter from Keith Thacker to John Giglia.

Marshall's Exhibits

1.

April 28, 1998 memorandum from Jim Stephens to Keith Thacker, with attachments.

2.

West Virginia Higher Education Position Information Questionnaire for Computer Lab Consultant - Lead, dated June 16, 1997.

3.

July 14, 1997 letter from Samuel R. Spatafore to Shirley A. Skaggs with attachment.

4.

September 22, 1997 memorandum from Jim Stephens to John Giglia.

5.

October 3, 1997 memorandum from Jim Stephens to Keith Thacker, with attachments.

6.

May 7, 1998 letter from Keith Thacker to Bill Burdette.

7.

Marshall University Employee Handbook, Probationary Periods.

8.

Probationary Performance Evaluation of Keith Thacker, dated December 2, 1997.

9.

§ 128-35-8 Sick and Emergency Leave, Sec. 8.6.

10.

Marshall University Employee Handbook, Sick Leave.

11.

Affidavit of Samuel R. Spatafore, dated September 10, 1998.

12.

April 28, 1998 letter from Casto Clinics, Inc. to Sir/Madam.

13.

Grievance statement dated May 21, 1998.

14.

Grievance Board Decision, Ehle v. Board of Dir./West Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

15.

Grievance statement dated May 21, 1998.

16.

Grievance statement dated May 4, 1998.

17.

June 2, 1998 memorandum from Keith Thacker to Dr. Wade Gilley.

18.

May 28, 1998 memorandum from John Giglia to Keith Thacker.

19.

October 1, 1997 letter from Kemp W. Winfree to Jim Stephens.

20.

Grievance Board Decision, Fekete, et al. v. Board of Trustees/West Virginia University, Docket No. 95-BOT-484 (Aug. 20, 1996).

21.

Organization Chart, Computing Services, July 27, 1998.

22.

October 1, 1997 memorandum from Keith Thacker to John Giglia.

23.

October 7, 1997 letter from Diane Ridgway to John Giglia, with attachment.

24.

October 22, 1997 memorandum from Diane Ridgway to John Giglia.

25.

February 2, 1998 letter from John Giglia to Diane Ridgway.

26.

Private Laboratory List, October and December, 1997.

27.

Helpline Incident Details Reports, January 29, 1998, for period September through December 1997.

28.

April 2, 1998 letter from Diane Ridgway to John Giglia, with attachment.

29.

March 5, 1998 memorandum from John Giglia to Keith Thacker, with attachments.

30.

March 19, 1998 letter from Keith Thacker to John Giglia.

31.

Marshall University Employee Handbook, Educational Benefits.

32.

University Physicians Internal Medecine Prescription Form, dated September 23, 1997.33.
University Computing Services Monthly Time Reports from August 1997 through May 1998.

Testimony

Grievant testified in his own behalf and presented the testimony of Tim Millne and Robert Boag. Marshall presented the testimony of Jim Stephens and John Giglia.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Cabell County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: June 24, 1999

Footnote: 1

Grievant contends that he has been dismissed from employment with Marshall, but as will be discussed in further detail in the decision, there is nothing in the record which supports this contention.