GARETH W. NORTON,

Grievant,

v. **Docket No. 01-HE-134**

HIGHER EDUCATION POLICY COMMISSION/

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Gareth W. Norton, employed as a faculty member by West Liberty State College (WLSC or Respondent), filed a level one grievance on February 28, 2001, in which he challenged a letter of warning issued to him by Dr. John McCullough, Provost/Academic Vice President, on January 12, 2001. For relief, Grievant requested that the copy of the disciplinary letter sent to Professor Johnette McCracken, and anyone else, be returned, and that she be directed not to make any future reference regarding it, that the letter be rescinded, and the February 1998 letter also be rescinded, or in the alternative, removed from his files.

The record does not include a written decision from level one. WLSC President Ronald M. Zaccari denied the grievance at level two, but partial relief had previously been implemented when the letter sent to Ms. McCracken was retrieved. Grievant advanced this appeal to level four on April 18, 2001. The grievance was held in abeyance at Grievant's request due to health concerns, and was later continued when Grievant and his representative failed to appear at a hearing scheduled on June 13, 2002. A hearing was conducted in the Grievance Board's Wheeling office on September 12, 2002, at which time Grievant was represented by Grace Norton, and WLSC was represented by Kristi McWhirter, Esq., Assistant Attorney General. The grievance became mature for decisionupon receipt of proposed findings of fact and conclusions of law filed by the parties on or before November 21, 2002.

The facts of this matter are as follows.

Findings of Fact

1. Grievant has been employed by WLSC as an Associate Professor of Criminal Justice at all times pertinent to this grievance.

2. A departmental meeting of Criminal Justice faculty was conducted on November 16, 2000, beginning at 6:00 p.m. At some point during the meeting, Grievant uttered an expletive in frustration with the proceedings.

3. On December 7, 2000, Ms. McCracken, Associate Professor of Criminal Justice, filed a written complaint with the WLSC Human Resources office in which she alleged that during the November 16 meeting Grievant had violated Policy 12 “Sexual Harassment” when he told her to “Fuck off.” She opined “that Mr. Norton intended to demean me in front of my professional peers, husband, and the community and create a power based, hostile environment for me in the workplace.” Ms. McCracken cited a 1993 resolution which prohibited Grievant from “personal and/or public comments that would irritate or influence public opinion against me.” She recommended that Grievant's employment be terminated.

4. An investigation of the complaint was conducted by Brian Warmuth, WLSC Director of Human Resources. Upon interviewing the faculty in attendance, Mr. Warmuth found that during a discussion of proposed qualifications for a new faculty member, Grievant “did utter the wor[d] 'Fuck' in some manner, and in some response and context,proximate to Prof. McCracken's statement of opinion regarding what the new-faculty qualifications should be.”

5. The faculty reported hearing variations of the actual comment, including “Fuck off,” “Go get fucked,” “Fuck you,” and “Oh fuck.” While some individuals found the comment to be offensive, others did not, since they often hear that type of language in their line of work.

6. WLSC Provost and Vice President John McCullough issued a final report on the investigation, dated January 12, 2001, to Grievant and Ms. McCracken, in which he concluded that Grievant did not engage in sexual harassment as defined by Policy, but did exhibit unprofessional and improper conduct and comment. He noted that Grievant's behavior might constitute insubordinate behavior since he had previously been directed to refrain from such commentary. Grievant was advised that the report constituted a final written warning/reprimand, and that any further examples of unprofessional conduct could result in further disciplinary action including termination of his employment.

7. In March 2001, Ms. McCracken complied with a request from Provost McCullough to return the January 12, 2001, report/disciplinary letter, and make no future references to the contents.

8. Provost McCullough subsequently issued Ms. McCracken a final report, post- dated January

12, 2001, notifying her that there had been no finding of sexual harassment, but that appropriate disciplinary action would be taken for the unprofessional conduct/behavior exhibited by Grievant.

9. On February 16, 1998, Grievant received a written warning and reprimand for "Unacceptable commentary" after he told a female student to "Shut the fuck up." 10. In 1993, Ms. McCracken filed a complaint against WLSC with the Equal Employment Opportunity Commission alleging a toleration of ongoing conduct by Grievant constituting sexual harassment. The claim was settled, and Grievant was cautioned not to engage in any form of harassment of Ms. McCracken, or disciplinary action would be taken.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

WLSC asserts that the letter was properly issued, given the similar, prior incidents. Grievant argues that the letter was arbitrary and capricious in that it failed to state exactly what he had said or the context within which it was said, and failed to identify a specific provision of the "Statement of Professional Ethics" he allegedly violated. Grievant further argues that the letters of 1998 and 1993 are too old to be used as support for a final warning, and that he never received the 1998 letter, and had no knowledge of it until the most recent warning. Because Grievant admits to saying "oh, fuck" during the meeting, it must be determined whether the letter of reprimand was contrary to law or policy, or was arbitrary and capricious. Title 131 of the State College System of West Virginia Board of Directors, Series 36, provides that a faculty member may be dismissed for a number of causes, including "personal conduct which substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to sexual harassment or other unprofessional conduct toward students or colleagues."

The "Statement of Professional Ethics" approved by the WLSC faculty in 1970, and revised in

1992 provides in part:

As a colleague, the professor has obligations that derive from common membership in the community of scholars. A professor respects and defends the free inquiry of associates. In the exchange of criticism and ideas he/she shows due respect for the opinions of others. He/she acknowledges academic debts and strives to be objective in professional judgement of colleagues. He/she accepts a share of faculty responsibilities for the governance of the institution

The Department of Criminal Justice Code of Ethics provides that faculty are to “behav[e] respectfully and courteously to one another,” “maintain relationships with colleagues to promote mutual respect,” and, “respect the personal feelings of others. Profanity shall never be directed toward another person.”

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for theDeaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the institution administrators. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievant's undisputed testimony establishes that the meeting had been prolonged, and the discussion regarding new faculty had been thorough. By his own admission, when Ms. McCracken indicated a desire to continue the debate, he uttered “oh fuck” in frustration. Because of their adversarial history, and the proximity of the outburst to her suggestion that the discussion continue, Ms. McCracken interpreted the comment to be directed to her.

Grievant asserts that the word “fuck” is no longer verboten, and has become part of the current

vernacular. While that may be true regarding students or criminals, The American Heritage Dictionary (4th Ed. 2000) continues to label the word “vulgar slang.” It is also true, as Grievant asserts, that the term has many meanings, including “a signal of angry dismissal.” It is apparently within this context that Grievant uttered the word. Notwithstanding his intent, Grievant made a comment using a word many people continueto find offensive, and at a point in time that it was reasonably interpreted to be directed to the complaining individual. This behavior is inappropriate, and unwarranted. Given Grievant's command of the English language, he could surely couch his frustration in a more articulate and less offensive manner. Therefore, the letter of January 12, 2001, was properly issued based upon the “Code of Ethics” and the “Statement of Professional Ethics,” and was not arbitrary and capricious.

The final matter to be considered is whether the consideration of incidents in 1993 and 1998 were too stale to be properly considered. In particular, Grievant denies any knowledge of the 1998 letter of reprimand. Accepting Grievant's representation that he was seriously ill and hospitalized for a prolonged period of time in 1998, the record establishes that Ms. Norton acted as his advocate in that matter. Therefore, Grievant had knowledge of this matter through his representative. As to whether the prior letters were “too old” for consideration, the undersigned is not aware of any authority which places a time limit on disciplinary actions. This is an issue which must be addressed on a case by case basis. In the present matter, it is noted that Grievant has engaged in three similar incidents in seven years, and that the behavior is entirely correctable. Therefore, it is permissible to consider the prior incidents as they establish Grievant's disinclination to comply with a reasonable request to act in a professional manner.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd.of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. WLSC has proven by a preponderance of the evidence that Grievant acted in contravention of the institution's “Statement of Professional Ethics,” and the “Department of Criminal Justice Code

of Ethics" when he acted in a manner which was disrespectful and discourteous to another faculty member.

3. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

4. WLSC's determination to issue a letter of warning/reprimand in this case was not arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

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

Date: December 3, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE