

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JENNIFER J. MOSHER,
Grievant,

v.

Docket No. 2021-1040-MU

MARSHALL UNIVERSITY,
Respondent.

DECISION

Jennifer Mosher, Grievant, was employed by Respondent, Marshall University (“MU”), as an associate professor of micro-biology. She filed an expedited grievance directly to level three¹ dated October 14, 2020, alleging that her employment was improperly terminated for making protected statements in a virtual class. She alleges that Respondent’s actions violated the First Amendment, her due process rights, the West Virginia “whistle blower” statute, the Americans with Disabilities Act, as well as policies of Marshall University and the Higher Education Policy Commission. As relief she seeks reinstatement with back pay and the restoration of all benefits as well as attorney fees.²

A level three hearing was held over the course of four days. The first day was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on August 25, 2021. The remaining three days of hearing were conducted at Marshall University upon joint request of the parties. Those day were August 30 and 31, 2021, and September 1, 2021.

¹ See W. VA. CODE § 6C-2-4(a)(4).

² It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep’t of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep’t*, Docket No. 95-BCHD-362R (June 21, 1996). Consequently, that remedy will not be addressed herein.

Grievant Mosher appeared personally and was represented by Michael Frazier, Esquire and Drew Frasier, Esquire, Frazier, Oxley & Proctor, L.C. Respondent appeared through Jendonnae Houdyschell, Associate General Counsel, and was represented by Gretchen Murphy, Assistant Attorney General. This matter became mature for decision on October 1, 2021, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Grievant made statements of a political nature which allegedly wished death upon a group of people who were holding mass rallies without public safety precautions during the COVID 19 pandemic. The statements were made during discussions at the beginning of two classes which were held virtually and recorded. Someone gained access to the recordings and posted selected clips of Grievant's comments on Twitter which cause a great deal of reaction among people on social media. Respondent dismissed Grievant alleging that her comments directly and substantially impair her ability to fulfill her teaching responsibilities at Marshall University. The basis of this conclusion was that the Provost and President believed conservative students would feel unsafe and uncomfortable taking Grievant's classes in the future.

Respondent did not prove the reasons for Grievant's dismissal by a preponderance of the evidence. It is more likely than not that the stated reasons were not the actual reasons for Grievant's dismissal. Additionally, her comments were protected by the First Amendment, as well as Grievant's rights related to academic freedom and tenure.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Jennifer Mosher, was employed by Respondent, Marshall University (MU), as an associate professor of micro-biology. She was a tenured member of Respondent's Biology Department.

2. Grievant Mosher holds a Bachelor Degree from Florida Atlantic University, a Master of Science Degree from Youngstown State University, and a Doctor of Philosophy Degree from the University of Alabama, all in Biology. She served in two post-doctoral assignments prior to joining the Marshall University Faculty in 2014.

3. The events giving rise to this grievance occurred in September 2020, during the height of the COVID 19 pandemic prior to any vaccines being available.

4. The instructors for the Biology Department generally receive high scores on evaluations from students. Grievant Mosher is very popular with students and receives higher student evaluations for her teaching than the remainder of the department.³ Her classes are considered to be challenging but fair. Grievant carried an exceptionally high teaching load and was active in national institutions⁴. She is considered to be a good teacher and a valuable colleague by the remainder of the Biology Department faculty.⁵ Department Chair Antonsen specifically found that Grievant was active in professional development, mentored well, published well, taught well, and her level of research was rated "excellent."

5. Grievant attempted to use topical issues as examples in her classes and regularly interspersed jokes and satire to keep the students engaged.

³ Dean of the College of Science, Charles Somerville described the student comments as "overwhelmingly positive."

⁴ Dean Somerville believes that these activities enhance Marshall's academic reputation.

⁵Testimony of Department Chair Brian Antonsen, PhD.

6. Grievant suffers from Multiple Scleroses, and in September 2020 was taking immune suppression drugs to control the symptoms. Such medications restrict the effectiveness of the immune system to combat viral infections such as COVID 19.

7. Grievant's parents were in a residential care facility for the elderly which made her extremely concerned regarding the risks of them contacting COVID 19 and their likelihood of having extreme symptoms because of their advanced age.

8. During the summer of 2020, eight personal and family friends of Grievant Mosher died from complications related to contracting COVID 19.

9. During the month of September 2020, Marshall University was conducting all classes remotely utilizing the BlackBoard Collaborate program. Instructors were originally required to teach the classes from their office or another location on campus. Students attend these classes from remote locations. Students had discussion options available through live chat dialogue as well as video and microphone discussion. All staff and students on campus were required to wear an appropriate face covering ("mask") while inside any building.

10. During the Fall Semester, 2020, Dr. Mosher taught the following two classes:

- CRN1220 (BSC: 302, SEC: 101) "Principles of Microbiology," and
- CRN5042 (BSC482) "Special Topics: Biology of COVID-19"

The Special Topics course was a "team taught" course with each faculty member associated with the course assigned to develop his or her own lectures and presentations for the class.

11. At the beginning of the Fall 2020 semester, Dr. Mosher was required to teach virtual lectures on campus from her office. She informed Dean Somerville and Chair of the Biology Department, Brian Antonsen that she was "immunocompromised" due to

“MS and underlying issues” and believed she was “one of the candidates for severe infection or death” from the coronavirus. Dr. Mosher also discussed with supervisors her concerns regarding the lack of mask usage and proper mask protocols within the engineering building where her office was located. For these reasons, Grievant requested that she be allowed to teach her courses from home.

12. After working several weeks on-campus, Grievant was approved by her supervisors to teach her virtual lectures from home or another off-campus location. She was able to teach her virtual lectures off-campus for a week and a half until she started having trouble with internet connectivity at home.

13. While the classes were being held remotely, Grievant started her classes by briefly asking the students how they were getting along with the virtual learning and dealing with the issues of the pandemic in general. This allowed student to express or vent their concerns and frustrations. After these brief discussions the classes got down to the topic at hand.

14. On September 15, 2020, Grievant Mosher was having connectivity problems with her home computer and came to the Engineering building where her office was located to teach her Microbiology class and a section of the Special Topics COVID 19 class. She was concerned and upset when she discovered that many students and staff were violating the mask mandate by wearing them improperly or not wearing a mask at all. This made her feel she was unsafe teaching in her office.

15. On Tuesday, September 15, 2020, Grievant Mosher was scheduled to teach “Principles of Microbiology” from 2:00 p.m. – 3:15 p.m. Grievant Mosher’s lecture for that class was recorded and lasted an hour and fourteen minutes.

16. As the class began, the students were again discussing their frustration with the pandemic and people not following the mask requirements or the science. In response to some of these comments Grievant Mosher stated:

So, I came into the Engineering Building today, um, four people were wearing either their nose out or they were wearing their mask as a chin strap, so, um, so I guess we still aren't compliant here. Which is one of the reasons why I have been staying at home. "the weather is glorious!" I wish I could be outside with [this] weather . . .

In response to a specific joking comment by a student regarding thinning the gene pool and another regarding Darwinism taking its course Grievant Mosher responded:

[T]hinning the gene pool? I am a horrible person, oh, I think the same thing about, um, thinning the gene pool. Um, without getting into politics, all the large gatherings of certain groups of people holding rallies, um, I'm, I'm like yeah, let Darwin take, do its job, or Darwinism. Um, and hopefully they'll all be dead by the election. [laughing] I'm sorry, that's horrible and I'm actually being recorded, and I said that. That is, um, but I'm sorry, as this is going on [pause, reading student comment]. True. Um, as this is going on, I'm getting more and more angry, um, 'cause we shouldn't be in this position. . .⁶

After a brief comment regarding the pandemic response in Brazil, Grievant Mosher wrapped up the discussion as follows:

[S]orry, I put us on a tangent! That's okay, we need tangents, I need tangents sometimes. You know, I'm easily taken off on a tangent, so, um. But anyhow, so, I hope you guys are safe. Um, if you have any complaints...

⁶ This segment of the tape was cited in the investigation report which will be discussed herein as Respondent Exhibit 1. Students are making written and verbal comments in the chat dialogue during this discussion and Grievant is commenting to those comments. It is noted in this segment when Grievant laughed at her own comment and was reading comments while answering.

Thereafter the class commenced on topic. No students expressed any negative comments during the discussion or during the lecture.

17. On Tuesday, September 15, 2020, Grievant Mosher was scheduled to teach “Special Topic: Biology of COVID-19” from 3:30 p.m. – 4:50 p.m. The topics Grievant Mosher was assigned to discuss were: (1) molecular evolution, (2) transmission, and (3) preventative measures. The Course Description states the following:

The class will cover a range of topics concerning coronavirus and COVID 19, focusing on the facts behind the news, how to distinguish science from pseudoscience or misinformation, how to make sense of the rapid flow of information related to this emerging disease.⁷

Because of the public discourse and the proliferation of misinformation it was impossible to teach this course without touching on politics. Mask wearing was expected to be discussed as an important part of the class related both to misinformation and how such virus are spread.⁸

18. Towards the beginning of this lecture, Dr. Mosher showed a 2015 TED Talk video led by Bill Gates entitled, *The Next Outbreak? We’re Not Ready*. Grievant Mosher’s focus of this lecture was to ensure that the students took the virus seriously and to show them that scientists had predicted this type of virus several years before it occurred.

19. Following the TED Talk, Grievant began the discussion regarding the initial US response to the COVID 19 outbreak. During that discussion and in response to questions, she stated in part:

Why were we so underprepared? Exactly, why were we so underprepared? So, this is where this gets tricky for me. I do

⁷ Respondent Exhibit 3 course syllabus for the course *The Biology of COVID*.

⁸ Testimony of Dep’t. Chair Brian Antonsen and Dean Charles Somerville.

my best not to bring politics into science and science classroom, [but it seems] crazy to me that happened four years ago and now we're here. Yeah, here we are.⁹ There was a pandemic response team and a plan set into place and I think it was put in, in fact that year that Bill Gates gave that talk it was 2015. Where they had a solid plan. They had people on the ready and, unfortunately, after 2016, um, that, they felt that wasn't worth the budget.¹⁰

20 As the questions continued Grievant Mosher stated:

So, wearing a mask is serious... And I'm kind of, you know, like a certain person is holding rallies, you know and I think yesterday he held one inside – no one wore a mask and I become the type of person where I hope they all get it and die (laughing) I'm sorry, but that, I am so frustrated and, just, I don't know what else to do. I – you can't argue with them. You can't talk sense into them. I said to someone yesterday I hope they all die before the election. That's the only that's the only saving hope I have right now. Okay I'm going to stop talking about politics cause I really, I really should not be talking about politics in here. Um, I don't know if that's a rule, but I've always kind of made it a rule myself to keep away from it, but, my God, you can't help it now. I mean, with the way this has been played. The way this has, the federal response, it's just so frustrating and it's unbelievable.¹¹

21. In both classes Grievant immediately apologized for her political statements. In both classes the course continued without interruption or negative comments by any students. The consensus among the Dean Somerville, Chair Antonsen, other instructors who are familiar with Grievant's teaching and the students who testified, was that Grievant Mosher's comments were made sarcastically and were clearly not literally intended to wish death upon a person or group of people. Rather it was a sharp

⁹ The event addressed by Bill Gates in the TED Talk was the international outbreak of the SARS virus, which effected the US less severely than other parts of the world.

¹⁰ Respondent Exhibit 1

¹¹ *Id.*

criticism of specific behavior which was inconsistent with science and a danger to public health, borne out of frustration and safety concerns.

22. At 4:57 p.m., immediately after her last lecture Grievant Mosher sent an email to Dep't. Chair Antonsen which stated:

Oh, so I had been doing so well at keeping politics out of class. The COVID students got me going on a tangent today (After I showed the Bill Gates Ted Talk) and I got on my soapbox and ranted about the federal response to the pandemic. In my defense, the students were cheering me on...Yeah, I can't blame them... I don't think I offended anyone, but just in case it comes back to you – yes, I did it and will do my best not to do it again (at least while recording).

(Respondent Exhibit 5)

23. Grievant Mosher intended her comments that she hope people die before the election to come across to students more as sarcasm and dark humor. Most of the students in the course had taken one or more of her classes before and she intended it to be a flippant comment and did not intend it to be real. Grievant was upset, and frustrated. She stated to an investigator, students “in my classes know they can get me off on a tangent, I'm well known for that... A lot of times my tangents are entertaining, this one I regret. I don't mean to be controversial at all. I was just frustrated with a lot of my personal issues with COVID.”¹²

24. Grievant Mosher told the investigator, I've also been upset because science or scientists are ignored, and scientists are now considered to be part of a hoax...and I've taken that really personally.” Grievant stated, “microbiology is my expertise, it's my field,

¹² Respondent Exhibit 1. Finding of Fact 26 made by the investigator by the investigator restated.

and, you know, I've been attacked by so many people that have no science background that tell me that I'm crazy and this is a hoax..."¹³

25. September 16, 2020, at 8:54 p.m. a Twitter account holder made a post on Twitter with four (4) clips of videos from Grievant Mosher's class lectures. Each post showed a small section of Grievant Mosher's lectures relating solely to her negative comments about people refusing to wear masks or participate in social distancing. The posts were sent to (tagged): @DonaldTrumpJr, @realDonaldTrump, @GOP, @FoxNews, @IvankaTrump, @marshallu, @marshalluPress, @CNN, @MSNBC, @WSAnews, @wchs*fox 11, and @seanhannity. The following hashtags were attached: #Trump2020, #RedWave 2929, #MakeHerFamous, and #LiberalTears. The posts encouraged followers to retweet the clips, attaching two laughing emojis. (Respondent Exhibit 6)¹⁴

26. On September 16, 2020, Tiffany Davis, an employee of Marshall University Communications, first became aware of the posting because @marshallu and @MarshalluPress were tagged in the post. She notified her supervisors in MU Communications administration of the posting via text.

¹³ *Id.* FOF 23

¹⁴ The exhibit contained screen shots of Grievant Mosher only. The Twitter clips had been taken down prior to the level three hearing. Respondent provided recordings of the segments of the classes wherein Grievant vented regarding her frustrations in both classes and complete recordings of each class as Respondent Video Exhibits 1-4. Given the limited content allowed on Twitter posts it is more likely than not that the posts contained only small snippets of Grievant's comments without any contextual information related to Grievant's serious medical concerns, scientific concerns or Grievant's apologies.

27. Between 7:00 a.m. and 7:15 a.m., September 17, 2020, Associate Dean Brian Morgan became aware of the Twitter clips and sent texts to Dean Somerville and Biology Chair Antonsen.

28. Around 7:45 a.m. on September 17, 2020, Dean Somerville sent Grievant Mosher an email stating:

I'm sure you know that one of our students¹⁵ has posted a video of you to Twitter. Please make no responses on social media until we had a chance to talk. Do not take any actions or make any statements against the student. We will need to make a statement from the university. Do not make it any more difficult by putting out a statement before we have had a chance to work with communications on the message.

29. At 9:02 a.m. the same day Grievant Mosher responded to Dean Somerville's email stating "um, no I am not aware of this. How bad??" (Respondent Exhibit 8)

30. Following Dean Somerville's directives, Grievant deleted all social media and did not make any formal statements aside from a written statement which she sent to Dr. Somerville and Dr. Antonsen in which she stated:

On September 15 I was a guest lecturer in part of the department-wide Biology of COVID 19 class, my contribution was to lecture on the origins and molecular evolution of SARS-CoV2 virus. During this lecture, I included a section on the aerosolization of the virus and the scientific basis for mask use. During this discussion I became emotional and expressed my frustrations. As someone who is immune-compromised, with parents in a nursing home, I have taken a lack of mask wearing very personally and voiced my opinion that being in a large group unmasked is a serious community health risk. I have however regretfully crossed the line when I made an emotionally inappropriate comment. As a rule, I try to keep politics out of my science and classes, unfortunately I

¹⁵ It was not confirmed that a student made the Twitter posts.

failed to do so on this day. I'm especially remorseful that this reflects so poorly on my Department and University.

(Respondent Exhibit 9)

31. On the morning of September 17, 2020, leaders of the Biology Department for the College of Sciences decided to immediately remove Dr. Mosher from the remaining class lectures scheduled for Special Topic: Biology of COVID 19 course. Biology Chair Brian Antonsen orally informed Grievant Mosher.

32. Grievant stated that she "completely understood why" she was being removed from remaining lectures for that course and that she "wasn't upset about it." She thought "that was a good move."

33. Dean Somerville contacted Ginny Painter in University Communications to notify her of the videos and emailed a brief statement from the College of Sciences to University Communications for review.

34. Grievant Mosher taught her Microbiology lecture on September 17 and a lecture for an Emerging Infectious Diseases class on September 18 from her on campus office. Nothing unusual occurred during either of those lectures.

35. On September 18, 2020, a *Notice of Investigation* was issued by Dr. Jaime Taylor, then Provost and Senior VP of Academic Affairs¹⁶ removing Grievant Mosher administratively from all teaching responsibilities pending investigation. The notice specifically stated:

Please be advised that it has come to the University's attention that you made inappropriate political statements concerning President Donald Trump during your lecture regarding COVID-19. While the University acknowledges that

¹⁶ During this period, Dr. Taylor was applying for positions at other universities. He took the position of President of Lamar University and is no longer employed at MU.

you have certain freedom of speech and academic freedom rights, it appears that your statements made during this lecture may have exceeded those rights.

(Respondent Exhibit 10) Grievant Mosher was surprised that she was placed on administrative leave from teaching all courses.

36. Grievant Mosher was informed by the Investigator, Shana L. O'Briant Thompson that a formal investigation was being conducted and Gave Grievant a notice of interview scheduled for September 22, 2020. (Respondent Exhibit 11)

37. A large volume of emails and phone call transcripts were sent to Investigator O'Briant Thompson from the University President and other administrative offices. These emails and phone calls were related to the statements made by Grievant Mosher which were posted on Twitter.

38. Investigator O'Briant Thompson wrote that the scope and purpose of her report was the following:

It was reported that on or about September 15, 2020, Dr. Mosher delivered a live, virtual lecture through Marshall University's BlackBoard Collaborate system wherein it is alleged "she made overt, inappropriate political comments concerning President Donald Trump while discussing the topic of COVID-19."

This report will address and determine whether it is more likely than not overt, inappropriate political statements reference above, or other political statements were made by Dr. Jennifer Mosher during her teaching duties at Marshall University.¹⁷

39. Investigator O'Briant Thompson did not interview or take statements from any of the students in the two classes in question to see what they heard, how they

¹⁷ Respondent Exhibit 1. Investigation report of Investigator O'Briant Thompson dated September 30, 2020.

reacted, or judge the general tenor of the class during or after the alleged statements were made. She felt her mission was only to determine if “overtly political” statements were made. She decided she could make that determination solely by viewing the video recording of each class which she did in their totality. It was not her mission to determine if students were offended by the comments or were likely to not take Grievant Mosher’s classes in the future. Ultimately, Investigator O’Briant Thompson interviewed two students from the classes solely because their parents complained to the MU President, and she was told by his office to look into their claims.

40. September 21, 2020, Robert Youther sent an email to the Marshall University President’s Office in response to the Twitter posts of Grievant Mosher’s lecture. Mr. Youther stated: “This is not an isolated one time with the professor either. My son had her as a professor last year she pushed her political agenda last year too.”

41. The investigator interviewed the son, Jared Youther, and viewed the video from the previous class. Grievant Mosher was speaking of antiprotozoal drugs, specifically chloroquine being anti-viral drugs and stated:

There is some question of whether they can even affect the coronavirus, but even the suggestion by some idiot who doesn’t know anything about science caused everyone to want to go out and buy them or order them so now some of these drugs are really hard to come by for those who actually need them.

42. Student Youther believed this to be a political statement but was not offended by it. He felt it was not appropriate for Grievant to address the President as an idiot. Grievant Mosher stated the comment referring to “idiot” was not a reference to any particular person, but rather a reference to “any idiot that doesn’t know anything about science.” The investigator determined that these comments were related to the subject

matter and not overtly political. (Respondent Exhibit 1) Student Youther was not offended by the comments made by Grievant Mosher on September 15, 2020 and did not notice any other students who were offended either.¹⁸

43. On September 22, 2020, Angela Thompson sent an email to the Marshall University President's Office regarding the lecture which was the subject of the Twitter posts. She stated that her son attended the lecture in question and "send an email immediately after dropping out of the lecture. He was offended by her rant..." The investigator decided to interview the student.

44. When she interviewed student Thompson, he stated that he had Microbiology class with Dr. Mosher just prior to the "Biology of COVID 19" class and that Dr. Mosher had made a "very great discussion" where she said "something politically motivated in that class, but, like, it wasn't anything like harmful, like, she said in the COVID class." He stated what prompted him to leave the "Biology of COVID 19" class was that he was thinking "this is happening again" but "it seemed like it was involving into something more." (Respondent Exhibit 1) Ultimately student Thompson said he was not offended by the comments and did not notice any other students who were offended.¹⁹

45. These were the only two students the investigator interviewed. She only interviewed them because she was forwarded the information from the Office of the President.

46. The investigator noted that there was a great deal of negative public sentiment regarding Grievant's comments which outweighed the public statements

¹⁸ Testimony of Investigator O'Briant Thompson

¹⁹ *Id.*

received in support of Dr. Mosher's statements. However, she did not investigate or find if the comments had any impact upon student attitudes toward Grievant Mosher or her teaching. The investigator also noted that Grievant Mosher has not been subjected to prior disciplinary action, warnings, or reprimands; her student evaluation and teaching performance reviews of Grievant Mosher's past courses have been favorable; and the Dr. Mosher express deep remorse for the situation and any disruption it caused.

47. Findings made by Investigator O'Briant Thompson relate to the comments made in the "SpTp: Biology of COVID-19," included the following:

- [W]hile some of these statements may have been slightly related to the content of the classroom materials at the onset of the discussion, the comments veered off course from the assigned classroom content as Dr. Mosher's comments continued and could be considered unnecessary to support the classroom content. ("SpTp: Biology of COVID-19," class)
- That these statements could be considered unnecessary to support the presentation of classroom content assigned as they had very limited relationship to the classroom materials from the onset of the discussion. (Microbiology class)

(Responded Exhibit 1)

48. Marshall University President, Dr. Jerome Gilbert, received a letter dated September 20, 2020, which was signed by State Senator Eric J. Tarr, Vice Chairman of the Senate Committees on Finance and Health and Human Resources addressed to the Presidents of WVU and MU. The names of sixteen other State Senators are listed below Senator Tarr's signature. Senator Tarr begins with the following statement:

I find it very disturbing that West Virginia University and Marshall University resources are being used to promote the very same hate speech that is inciting deadly and destructive riots, assassination of police officers, and denigration of our

Republic. West Virginia been very blessed that our citizens have not accepted this anarchic behavior. It does not mean we are immune to it.

Senator Tarr lays out the annual appropriations given WVU and MU expresses that:

A great many of those taxpayers I represent in the West Virginia Senate detest that those very hard-earned dollars are used to promote a domestic terrorist group on the helmets of West Virginia University athletes. Even further, it appears Marshall University professors are so brazen as to use Marshall technology system to call for the death of supporters and friends the United States President

Concludes as follows:

I asked that you, as University Presidents, take a very public and very demonstrative stand against such use of taxpayer resources that are meant to provide a better life for the citizens of West Virginia. The Universities with which you are charged a lead are the flagships of the great state of West Virginia. Please treat them as such, not as vehicles for anarchy or political propaganda.

49. In an email dated September 21, 2020, address to the MU Board of Governors and others, President Gilbert wrote, "I had a good exchange with Senator Tarr last week and told him that I would take appropriate action. That action will come after the investigation and after receiving a recommendation from the Provost." Attached to this email was an email from Senator Tarr to President Gilbert stating the following:

I very much appreciate that you have suspended the professor who felt comfortable enough to promote hate to Marshall students during Marshall University science class. I hope that as president, you take a very strong proactive action against this behavior so as to prevent it from ever happening again at Marshall University. Please find the attached letter that will also be released to the media today. I placed the original in the mail to you.²⁰

²⁰ The letter to the media was the one addressed in FOF 48 *supra*.

President Gilbert testified that he thought this letter was not so much a threat as “political grandstanding.” On the other hand, then Provost Taylor agreed that it was a “vague threat of a cut in funding.” He testified that he and President Gilbert took it seriously. President Gilbert testified that he may have told Senator Tarr that he fired Grievant after that action was taken.

50. Dr. Jamie Taylor, then MU Provost/Senior Vice President of Academic Affairs, sent a document titled *Intent to Give Written Notice of Dismissal* to Grievant Mosher stating that it was the intent MU to dismiss her from employment effective October 9, 2020. The document stated that the cause for dismissal was the following:

12.1.1 Conduct which directly and substantially impairs the individual’s fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices.²¹

Based upon the findings of the recently completed investigation, the reason for the dismissal is due to the inappropriate statements you made in your lecture held on 9/15/2020. Specifically, the statements you made in both your *Principles of Microbiology* course and department’s *Sp TP: Biology of COVID 19* course on that day.

51. By letter dated October 8, 2020, Provost Taylor gave Grievant Mosher a written *Notice of Dismissal for Cause*. Under the heading, *Cause for Dismissal* Provost Taylor wrote:

12.1.1 Conduct which directly or substantially impairs the individual’s fulfillment of institutional responsibilities.

It is unrefuted that on September 15, 2020, you made statements in your *Principles of Microbiology* course and department’s *Sp TP: Biology of COVID 19* course wherein you

²¹ See Grievant Exhibit 2, West Virginia Higher Education Policy Commission Procedural Rule, Title 133 Series 9 *Academic Freedom, Professional Responsibility, Promotion and Tenure* section 12.1.2 under the heading, *Causes for Dismissal*.

stated that you hope that certain individuals would contact COVID 19 and die.

Specifically, in the *Principles of Microbiology* course you stated:

all the large gatherings of certain groups of people holding rallies. Um, I'm like yeah, let Darwin take, do its job, or Darwinism., And hopefully they will all be dead by the election. [laughing]

In the department's *Sp TP: Biology of COVID 19* course you stated:

so, wearing a mask is serious... And I'm kind of, you know,. I think yesterday that he held one inside - nobody wore a mask and I've become the type of person where I hope they all get it and die. [laughing] I'm sorry, but that, I am so frustrated, just, I don't know what else to do. I - you can't argue with them you can't talk sense into them..., I, I said to somebody yesterday I hope they all died before the election. That's the only, that's the only saving hope I have right now.

Unfortunately, these statements cannot be unmade. Regardless of your political views, your expressed disdain and wishing death upon a particular group of people has placed you in a position where you cannot be effective in a Marshall University classroom or other settings interacting with students. Since teaching is a critical component of a university professor's job, you are no longer able to fulfill that responsibility.

(Responded Exhibit 17)

52. Department Chair Antonsen and Dean Somerville met with Provost Taylor prior to the issuance of the dismissal notice. They reiterated that Grievant Mosher was an excellent and valued Biology Associate Professor who is admired and respected by her colleagues and students. They expressed their belief that Grievant Mosher did not deserve to be dismissed from employment as a result of the comments she made in her

classes which they believed were ill-advised but appropriate to her topics. Accordingly, they requested that some lesser discipline be administered. Their comments were of no avail.

53. Nicole J. LoCascio PhD worked professionally at MU for 25 years. She was an Associate Professor of Biology and Dean of the MU Honors College when she retired. She has worked with Grievant Mosher as a colleague for seven years but they were not close personal friends. Because of her respect for Grievant's teaching Dr. LoCascio always sent the honors students to Grievant Mosher's classes.

54. Dr. LoCascio's honor students sometimes came to her to discuss political comments made in lectures, but none came to her regarding Grievant Mosher. She was presenting an on-line seminar when the news about Grievant's dismissal came out. Half of the participating students turned off their cameras because they were afraid of being recorded.

55. Dr. LoCascio taught a section of the COVID 19 class. (Grievant Exhibit 13) She watched the lectures at night after they were delivered. She saw Grievant's lecture as well as the clips that were posted on Twitter. She did not believe the comments were improper because condemning bad behavior can be an appropriate pedagogical technique.

56. She ran into then Provost Taylor on campus and expressed her dismay about Grievant receiving a notice of dismissal. She felt it was improper and politically motivated. She retired earlier than she had planned out of protest. She has been asked to return to teach Biology at MU because they need a professor after Grievant's dismissal.

She would not have a problem with returning but for the fear of political influences on her teaching.

57. Then Provost Taylor stated the dismissal decision was his to make. He stated that it was his *intuition* that this incident would irreversibly affect her ability to teach, and that Dr. Gilbert agreed. His determination that her statement would irreversibly affect her ability to teach was based on “[his] professional judgment and the fact that a student walked out of her class at the time.” He did not ask the investigator to determine if Grievant’s comments would “substantially impair her ability to teach” because he did not think the investigator “had the background to make that determination.” Dr. Taylor did not think it was important to talk to other students to see if they shared the same sentiments as the student who left the class. Then Provost Taylor admitted there is no evidence the statements would affect future students but based his determination solely upon “personal years of teaching experience” and the fact that one student walked out of the second lecture.

58. Upon cross-examination Provost Taylor agreed that if fifty people were in the class and 49 were in favor of Dr. Mosher and one student walked out, that would not rise to “substantially impairing her ability to teach.” The Special Topic COVID 19 class contained around 50 students and the transcript of the comments made by the students during the class showed that they were all supportive of Grievant Mosher’s comments. (Respondent Exhibit 4)

59. Tenure is a reward for professors who show their worth to the university through instruction and scholarship. Academic freedom and tenure are important because it protects professors from being influenced and disciplined because of opinions outside

of academia. Tenure protects a professor from being fired for teaching a controversial topic.²²

60. President Gilbert and Provost Taylor stated that they relied solely upon the investigator's report in their decision to dismiss Grievant Mosher. President Gilbert expressed his main concern was the ability for students to take Grievant Mosher's class and feel safe. He felt that putting Grievant Mosher in the classroom would be disruptive, and conservative students would avoid her classes. He did not cite any specific information from the report to support those conclusions. He too stated there is no evidence that bringing Mosher back would be disruptive, it is just an opinion based upon his years of teaching.

61. President Gilbert had the final decision regarding the dismissal of Grievant Mosher. He did not take into consideration her past performance and service. The decision to fire Grievant was made as soon as they received the investigative report. He was concerned that her presentation regarding mask wearing was not balanced. He testified that "In this [political] climate to tell people it is a bad thing not to wear masks would not be appropriate."

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.);

²² From combined testimony of Department Chair Antonsen, Provost Taylor and President Gilbert,

Darby v. Kanawha County Board of Education, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

W. Va. Dep’t of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a tenured Associate Professor of Micro-Biology. Respondent dismissed her from employment based upon comments she made in two of her lectures. West Virginia Higher Education Policy Commission Procedural Rule, Title 133 Series 9 *Academic Freedom, Professional Responsibility, Promotion and Tenure* set out the only causes for dismissal of a tenured professor in Section 12 as follows:

12.1. Cause for Dismissal: The dismissal of a faculty member shall be effected (sic) only pursuant to the procedures provided in these policies and only for one or more of the following reasons:

12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct;

12.1.2 Conduct which directly and substantially impairs the individual’s fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices;

12.1.3 Insubordination by refusal to abide by legitimate reasonable directions of administrators;

12.1.4 Physical or mental disability for which no reasonable accommodation can be made, and which makes the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties;

12.1.5 Substantial and manifest neglect of duty; and

12.1.6 Failure to return at the end of a leave of absence.

The sole basis cited by Respondent for dismissing Grievant Mosher is:

12.1.2 Conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities.²³

Then Provost Taylor summarizes Respondent's position in the dismissal letter as follows:

Regardless of your political views, your expressed disdain and wishing death upon a particular group of people has placed you in a position where you cannot be effective in a Marshall University classroom or other settings interacting with students. Since teaching is a critical component of a university Professor's job, you are no longer able to fulfill that responsibility.

Both Dr. Taylor and President Gilbert stated that they relied upon the investigation to reach their decision. Yet the only charge given to the investigator was to determine whether Dr. Mosher made "overtly political statements" in two recorded virtual lectures.²⁴ Dr. Taylor specifically stated that he did not charge the investigator to find whether the political statements, if made, "directly or substantially impair" Grievant's ability to fulfill her

²³ *Notice of Dismissal for Cause* letter, Respondent Exhibit 17. Dr. Taylor left off the ending of subsection which related to harassment and discriminatory practices which indicates that Grievant is not charged with such practices. Grievant also notes that Dr. Taylor misnumbered this subsection in the notice citing it a "12.1.1" instead of "12.1.2" This might have been a serious problem had Dr. Taylor also quoted the wrong section. However, he quoted the section Respondent is alleging was violated. Grievant received written notice of the alleged violation and was not harmed by the mistake in numbers.

²⁴ Undisputed testimony of Investigator O'Brian Thompson.

teaching duties. Additionally, the investigator only interviewed two students who were in the class because they were directed to her by the President's office. She did not interview any of the other students because it was unnecessary in fulfilling her stated charge. Rather, Dr. Taylor and President Gilbert agreed that there was no evidence to support their conclusion, but their conclusion regarding that determinative factor, based upon their years of experience in teaching college courses. Based upon this experience, Dr. Taylor concluded that Grievant alienated a group of students which she was now permanently unable to effectively teach.²⁵

Dean of the College of Science Charles Somerville also has extensive years of college classroom instruction, as does Biology Department Chair Brian Antonsen and Dean of the MU Honors College Nicole J. LoCascio. They all believe, based upon their years of experience, and Grievant's documented rapport with students, that she her ability to teach would not be substantially impaired. Dean Somerville noted that he had witnessed several public controversies in his tenure, and they all had a rather short shelf life and then faded away.

There was a reasonably large pool of people that the Provost and President could have drawn from to gauge the severity of the impact of Grievant's statements on present and future students in the classes. Yet, they made the considered opinion not to interview those students except the two whose parents complained. However, some conclusions can be drawn from the evidence presented.

Every person who viewed the lectures agreed that the discussion containing the statements in question lasted a couple of minutes. After that, the classes continued for

²⁵ Testimony of then Provost Taylor.

the remaining 70+ minutes without incident or further comment. The students who testified, did not notice anyone who was particularly disturbed, and the classes proceeded as normal. One of the two students referred to the investigator by the President's office said that he disconnected from the second class after hearing the early discussion. He told the investigator that he did not believe Grievant should be disrespectful of the US President, but he was not particularly offended by Grievant's comments.²⁶ Provost Taylor stated that he based his judgment that Grievant's ability to teach was permanently impaired upon his professional experience and *the fact that one student walked out of the class*, yet he made no effort to determine whether this student's reaction was prevalent or an anomaly. There was no testimony or evidence presented that the students attending the lectures were seriously alienated, let alone permanently. Any controversy that was created resulted from the upload of Twitter posts which consisted of short pieces of Grievant's statements taken out of context and edited specifically to be inflammatory, rather than Grievant Mosher's actual conduct.

It appears that the administration was more concerned with the external political fallout created by the Twitter posts than any effect Grievant Mosher's statements had on present or future students. These events occurred in September 2020 in the midst of a very contentious presidential campaign. One of the main issues was the country's response to the COVID 19 outbreak and resulting pandemic. As stated in the COVID 19 course syllabus, there was a great deal of pseudoscience and misinformation rapidly spreading throughout the public that was inconsistent with the actual science related to the disease and counter to public health measures to control its spread. Some groups

²⁶ Testimony of Investigator O'Briant Thompson.

strongly politicized these issues in hope of galvanizing support for particular candidates. It is not surprising then that the Twitter posts resulted in strong public reaction. This reaction seems to be what actually influence the Provost and President's actions more than specific concern for the students.

President Gilbert was significantly concerned by what he viewed as Grievant Mosher's failure to be even handed in her presentation and specifically stated that in the political climate that was prevailing at that time "to tell people it is a bad thing not to wear masks would not be appropriate." Dr. Gilbert was obviously concerned with the public political reactions to Grievant's statements more than any perceived future alienation of students. Her insistence that failure to follow public safety protocols was dangerous, significantly influenced his decision regarding discipline.

President Gilbert suggested that he was not swayed by the letter from the 16 State Senators demanding "very public and very demonstrative stand against" actions (specifically including Grievant's comments) which they viewed as use of flagship institutions "as vehicles for anarchy or political propaganda." Dr. Gilbert characterized it as political grandstanding rather than a threat to influence state funding. His actions, however, tell another story. He found it necessary to report to the MU Board of Governors that he had "I had a good exchange with Senator Tarr²⁷ last week and told him that I would take appropriate action . . . " to which he attached an email from Senator Tarr stating; "I very much appreciate that you have suspended the professor who felt comfortable enough to promote hate to Marshall students during Marshall University science class." It is more likely than not that he also called Senator Tarr after he Grievant

²⁷ The lead author of the letter from the Senators.

was fired to report the action taken. Provost Taylor, unlike President Gilbert, testified that that the letter was a “vague threat of a cut in funding” that he and President Gilbert took seriously. Because Dr. Gilbert’s statement that he was not influence by the Senators’ letter varies significantly from his actions at the time, and is at odds with Dr. Taylor’s testimony, his testimony on this issue is not credible.²⁸

Where an employee of a higher education institution holds a property interest in their continued employment, “the employee is entitled to nonarbitrary and noncapricious treatment by the public institution.” *West Virginia University v. Sauvageotk*, 408 S.E.2d 286, 185 W.Va. 534 (W. Va. 1991). As a tenured associate professor there is no doubt that Grievant Mosher has a both a property and liberty constitutional interest in her continued employment at Marshall University. *Clarke v. West Va. Bd. of Regents*, 166 W. Va. 702, 709-710, 279 S.E.2d 169, 175 (1981) The termination of her employment, therefore, cannot be based upon actions which are arbitrary and capricious.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County*

²⁸ The Grievance Board has applied the following factors to assess a witness’s testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness’ information. *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999). In this instance, Dr. Gilbert had a bias toward sustaining his decision, and his statements were inconsistent with his actions as well as the testimony of Dr. Taylor.

Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 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 employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Provost Taylor and President Gilbert agreed that that the reason Grievant was dismissed was their belief that she was substantially impaired from performing her teaching duties because her comments would make students feel unsafe in her class. They base their determination solely upon their past experience as instructors.²⁹ Dr. Taylor admitted that he had no actual evidence to support that conclusion but relied only on his intuition that it was true. Additionally, they did not explore a source for that information which was the students in the actual classes. Finally, there is an equal amount of speculation by other experience professors, including two deans and a department chair, that Grievant Mosher's comments would not substantially affect her ability to teach. Basing their decision solely upon speculation without any supporting proof is not relying on factors meant to be considered in the dismissal of a tenured professor. Indeed, it is

²⁹ Dr. Taylor added the fact that one student left the class on that day only.

more likely than not that Provost Taylor actually decided to fire Grievant Mosher based upon outside political pressure created by the heavily edited Twitter posts which was not the reason they cited in their dismissal letter. Accordingly, their action was arbitrary and capricious, and the charges were not proven by a preponderance of the evidence.

Even if the administration had based the dismissal on the reasons cited, Grievant Mosher's statements were constitutionally protected by First Amendment of the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I.³⁰

Respondent stresses as the reason for Grievant Mosher's dismissal that she "wish[ed] death upon a particular group of people" as if she truly wanted the people who were holding mass rallies while flaunting their disregard of appropriate public safety measure to get sick and die *en masse*. Given the context of the statements, the contentious times and Grievant's justifiable fears her statements were not a threat or even a true wish of harm to the President and his supporters. The statements were at worst crude and dark hyperbole stating opposition to the President and his supporters refusing to follow scientifically proven measures to promote public safety for perceived political gain. In that respect, this case is very similar to *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

³⁰ See also, W. VA. CONST. ART III, § 3-7, which protects freedom of speech and of the press.

In *Watts* a young man of draft age was prosecuted for allegedly threatening to shoot the President of the United States. The Court described the case as follows:

Taken in context, an 18-year-old boy's statement to a discussion group that he is not going to report for military induction, and that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," constitutes constitutionally protected political hyperbole, rather than a true "threat" against the President of the United States in violation of a federal statute prohibiting any person from knowingly and wilfully making any threat to take the life of, or to inflict bodily harm upon, the President of the United States (18 USC 871(a)), where both the boy and his audience laughed after the statement was made.

Watts v. United States, 394 U.S. 705, 705, 89 S. Ct. 1399, 1400, 22 L. Ed. 2d 664, 666, (1969).

The Supreme Court's decision in *Watts* has been followed in several Federal Court decisions to determine whether a statement was an actual threat or protected hyperbole.

In *United States v. Vandever*, 849 Fed. Appx. 69, 70-71, (2021) the Federal Court wrote:

In analyzing the parameters of the First Amendment's protection of threatening language in *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the Supreme Court identified four factors in determining that the statement at issue in that case was not a true threat. The Court noted that Watts' communication was: (1) made in jest; (2) to a public audience; (3) in political opposition to the President; and (4) conditioned upon an event the speaker himself vowed would never occur. *Id.* at 707-08; see also *United States v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004) (applying these four factors and finding that statement contained a true threat).

In analyzing Grievant Mosher's statement against the same factors, we find the following. First, Grievant's statements were made in jest. She and the students were talking about recent events concerning the spread of COVID 19 and one suggested to let Darwinism take its course. In that context, Grievant made her statement regarding hoping

the people leading and attending the unprotected rally would all catch the virus and die before the election. As in *Watts*, Grievant laughed and the students laughed. No one took her statements literally.³¹ Grievant apologized each time she made one of the statements noting that she had strayed into politics. Second, the statements were made publicly to an audience of approximately fifty young adults in each class. Third, the statements were made in opposition to a group of people who were flaunting their resistance to public health measures by attending political rallies held by the President. The rallies were to promote the President's re-election and the refusal to wear masks and socially distance was an obvious effort to curry political support. Fourth, Grievant did not believe her statements would come true and was expressing the need to follow public health guidelines to protect all Americans.

By applying these factors to the context of Grievant's statements it is obvious that they were hyperbolic statements intended to make the point about the difficulty of controlling the spread of a virus when people were dismissing science and refusing to take appropriate measures. Respondent argues that wishing death upon a group of people was extreme and not related to the material Grievant was presenting. To the contrary, the class was specifically intended to focus "on the facts behind the news, [and] how to distinguish science from pseudoscience or misinformation."³² These unmasked political rallies were headline news on all forms of media. The people who were attending and organizing the rallies were downplaying the science related to the spread of the virus and the potential for the rallies result in rapid spread of the disease. While Grievant's

³¹ The few students who did testify did not believe that Grievant wished harm on anyone by her statements but rather was using dark humor to make her point about public safety.

³² Respondent Exhibit 3.

comments were a rather crude and poor hyperbolic attempt at dark humor, they related to the topics set out for the course.

After watching replays of the classes, Dean LoCascio who was also an instructor for the COVID 19 course, noted that she did not believe the comments were improper because condemning bad behavior can be an appropriate pedagogical technique. Even Grievant believes that her comments were more political than she felt was proper. But they were delivered in a public space, and while they were in poor taste, they were not true threats and therefore Constitutionally protected.

Provost Taylor, President Gilbert, and Department Chair Antonsen agreed that academic freedom and tenure are important because it protects professor from being influenced and disciplined by opinions outside expressed of academia. Tenure protects professor from being fired for teaching a controversial topic. The West Virginia Higher Education Policy Commission expanded on the importance of academic freedom in its procedural rules:

“Academic freedom at public institutions of higher education in West Virginia under the jurisdiction of the Higher Education Policy Commission is necessary to enable the institutions to perform their societal obligations as established by the Legislature. The Commission recognizes that the vigilant protection of constitutional freedoms is nowhere more vital than in the institutions under its jurisdiction. Faculty member and students must always remain free to inquire, study, and evaluate.”

W. Va. Higher Education Policy Commission, Title 133, Series 9, Section 2.1. The Commission also states that “[E]ach faculty member is entitled to freedom in the classroom in discussing the subject taught.” *Id.* Section 2.2. The United States Supreme Court has also stressed the importance of this concept in writing:

“Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

It is undisputable that the science-based public safety measures for dealing with COVID 19 have been a matter of great controversy and public division. Grievant’s comments were regarding the large political rallies where people openly mocked the efforts to control the virus. While the statements were crude and unguarded, they were certainly related to the facts behind the news, misinformation regarding the virus, and the way the virus is spread throughout the population. Additionally, the statements were made in response to student questions and comments regarding the pandemic. Such events are examples of how ignoring the science related to viral spread affects the actual spread of the virus throughout the population. Provost Taylor was concerned that Grievant Mosher’s comments alienated a large sector of students, and the public in general, who were and remain adamantly opposed to science-based safeguards including wearing masks and vaccination. Like many controversial topics, a discussion of the science as opposed to strongly held conviction will inevitably alienate some people.³³ This according to Doctor’s Taylor, Gilbert, and Antonsen, is the very reason for the protections of academic freedom and tenure. Therefore, the comments were protected by Grievant’s tenure rights as well as her right to academic freedom and are not an appropriate cause for her dismissal.

³³ The scientific study of evolution is a prime example as explored in the film “Inherit the Wind” (produced and directed by Stanley Kramer 1960) depicting the Scopes “Monkey” Trial.

The West Virginia Supreme Court Appeals set out the standard by which the First Amendment is applied to the termination of a public-school employee in *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431; 675 S.E.2d 907 (2009).³⁴ The Court began the analysis by noting:

When this Court was previously confronted with analyzing a similar issue of free speech under the First Amendment, we relied on a case from the United States Supreme Court in holding: Under *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, *Pickering* recognized that the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute. *Syl. pt. 3, Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1984).

Alderson, supra, 223 W. Va. 431, 441.³⁵

Based upon their prior decisions, the Court specifically held there are restrictions to a public employee's exercise of free-speech rights. Those restrictions are addressed in three factors enumerated as follows:

First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment [protection].

The second factor that is invoked considers statements that are made with the knowledge that they were false or with reckless disregard of whether they were false, and such statements are not protected.

³⁴ The facts in *Alderman, supra* are significantly different than this matter but the factors and balancing test the Court set out based upon federal and state cases are applicable.

³⁵ See *Durstein v. Cabell County Bd. of Educ.* Docket No. 2017-1955-CabED (Sept. 22, 2017) for a discussion of the application of the constitutional standards relating to the dismissal of a public high school teacher for controversial Twitter posts.

The third factor that is invoked considers statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence, and such statements may not be protected.

Id.

Applying those factors to the present case, it first must be determined whether Grievant's in-class statements were made "as a citizen on a matter of public concern." It is undisputed that Grievant's post were made during the particularly contentious 2020 Presidential election and a COVID 19 pandemic. During this election, there was significant political debate over the national response to the virus and whether public safety protocols were necessary or effective. There were even suggestions in social and conventional media that no safety measures should be taken so that the virus would spread naturally and lead to "herd immunity." President Trump repeatedly mocked candidate Biden for wearing a mask in public settings consistent with the CDC guidelines and Candidate Biden accused President Trump of failing to protect American citizens by not implementing or following public safety procedures. The public was and remains strongly divided on these issues as demonstrated by vaccination skepticism leading to low immunization rates in many conservative leaning states.

Grievant's statements that she hoped people holding and participating in large rallies while flaunting public safety guidelines would die before the election, while offensive to many, were still part of that political discussion. Her comments were in direct reaction to national news stories about the rallies.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the United States Supreme Court overturned, without dissent, the conviction of a teen for burning a cross in the yard of an

African American family based upon a Minnesota law which the Court found to be constitutionally overly broad. The majority opinion noted: “[A state] may not prohibit, for example, only that obscenity which includes offensive political messages.” 505 U.S. at 388. Given this standard and the political context, Grievant’s statements were a citizen’s statements on matters of public concern and entitled to First Amendment protection.

The second factor is a determination of whether the statements are false or made with a reckless disregard for the truth. There is no dispute that the President was holding large political rallies in which the large majority of the participants were not taking any precautions to avoid contracting COVID 19 and spreading it to people who were not in attendance.³⁶ It is plain from the context that Grievant was not actually wishing death on these groups, but on the whole it cannot be found that Grievant made these statements with a reckless disregard for the truth.

The third factor is whether Grievant’s statements were made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence. Such statements are not protected. Grievant’s comments were not directed at specific people, with the possible exception of President Trump, with whom she has no personal contact. Rather they were aimed at an amorphous group of people who were attending the rallies unprotected. In fact, the comments were not directed at a political group, in as much as there were many Republicans and conservatives who were, and are, following science-based preventive measures. They certainly were not directed at students or anyone else who Grievant would encounter while teaching her classes.

³⁶ Such events were referred to by many in the media as “super spreaders.”

The Provost and President speculated that a large group of students would be so offended by Grievant's conduct they would feel unsafe attending her classes, which directly and substantially impaired Grievant's fulfillment of institutional responsibility to teach. However, no evidence was submitted to support that speculation.³⁷ There was a deluge of electronic and telephone messages protesting and supporting Grievant's remarks, but no efforts were made to determine how many were from students and whether any of them would be so concerned as to avoid Grievant's classes, even though as pointed out herein, such evidence was available. These was also speculation from highly regarded and equally experience professors that Grievant's comments would have no long-term effect on her ability to teach.³⁸ Thus, even if this speculation amounted to evidence, which it does not, it equally supports both side and Respondent does not meet its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The scant evidence submitted on this subject demonstrates that the classes continued without any problems and Grievant taught two classes later in the week with no disturbance or discord. One student left the virtual class and he indicated that he was not particularly offended by the comments. That is not sufficient evidence to support the conclusion that Grievant's comments affected Marshall University's interest in the efficient and orderly operation of its affairs.

³⁷ The Grievance Board has routinely held that speculation is not sufficient to meet the proof burden. See, *Coleman v. Dep't of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004).” *Wheeler v. Dep't of Environmental Protection & Div. of Per.*, Docket No. 2018-1122-DEP (Feb. 27, 2019).

³⁸ *Id.*

As noted herein, Marshall University has expressed a strong commitment to academic freedom through the application of W. Va. Higher Education Policy Commission, Title 133, Series 9. Additionally, the students attending the University are young adults who as part of their higher education will have their ideas and beliefs challenged. On balance, it was not proven that Grievant's exercise of her free speech rights, significantly interfered with Marshall University's interest in the efficient and orderly operation of its affairs. Accordingly. The grievance is **GRANTED**.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. “Academic freedom at public institutions of higher education in West Virginia under the jurisdiction of the Higher Education Policy Commission is necessary to enable the institutions to perform their societal obligations as established by the Legislature. The Commission recognizes that the vigilant protection of constitutional freedoms is nowhere more vital than in the institutions under its jurisdiction. Faculty member and students must always remain free to inquire, study, and evaluate.” W. Va. Higher Education Policy Commission, Title 133, Series 9, Section 2.1.

3. Where an employee of a higher education institution holds a property interest in their continued employment, “the employee is entitled to nonarbitrary and noncapricious treatment by the public institution.” *West Virginia University v. Sauvageot*, 408 S.E.2d 286, 185 W.Va. 534 (W. Va. 1991). As a tenured associate professor there is not doubt that Grievant Mosher has a both a property and liberty constitutional interest in her continued employment at Marshall University. *Clarke v. West Va. Bd. of Regents*, 166 W. Va. 702, 709-710, 279 S.E.2d 169, 175 (1981) The termination of her employment, therefore, cannot be based upon actions which are arbitrary and capricious.

4. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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)).

5. It is more likely than not that Provost Taylor actually decided to fire Grievant Mosher based upon outside political pressure created by the heavily edited Twitter posts which was not the reason Respondent cited in its dismissal letter. Accordingly, Respondent's action was arbitrary and capricious.

6. In analyzing the parameters of the First Amendment's protection of threatening language in *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the Supreme Court identified four factors in determining that the statement at issue in that case was not a true threat. The Court noted that Watts' communication was: (1) made in jest; (2) to a public audience; (3) in political opposition to the President; and (4) conditioned upon an event the speaker himself vowed would never occur. *Id.* at 707-08; see also *United States v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004) (applying these four factors and finding that statement contained a true threat). *United States v. Vandever*, 849 Fed. Appx. 69, 70-71, (2021).

7. Grievant's comments were delivered in public, and while the comments were in poor taste, they were not true threats and therefore Constitutionally protected.

8. "Academic freedom at public institutions of higher education in West Virginia under the jurisdiction of the Higher Education Policy Commission is necessary to enable the institutions to perform their societal obligations as established by the Legislature. The Commission recognizes that the vigilant protection of constitutional freedoms is nowhere more vital than in the institutions under its jurisdiction. Faculty member and students must always remain free to inquire, study, and evaluate." W. Va. Higher Education Policy

Commission, Title 133, Series 9, Section 2.1. “[E]ach faculty member in entitled to freedom in the classroom in discussing the subject taught.” *Id.* Section 2.2.

9. “Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

10. Grievant’s comments were protected by her tenure rights as well her right to academic freedom and not an appropriate cause for her dismissal.

11. Public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Syl. pt. 3, Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1984).

12. The West Virginia Supreme Court set out restrictions that apply to a public employee’s exercise of free-speech rights:

First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment [protection].

The second factor that is invoked considers statements that are made with the knowledge that they were false or with reckless disregard of whether they were false, and such statements are not protected.

The third factor that is invoked considers statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence, and such statements may not be protected.

Alderman v. Pocahontas County Bd. of Educ., 223 W. Va. 431; 675 S.E.2d 907 (2009).

13. In applying the *Pickering v. Board of Education* factors, to the evidence presented, it was not proven that Grievant's exercise of her free speech rights, significantly interfered with Marshall University's interest in the efficient and orderly operation of its affairs.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to immediately reinstate Grievant to her employment as an Associate Professor of Biology, with back pay and statutory interest to the date she was dismissed, as well as all benefits she would have accrued had her employment not been terminated.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2018).

DATE: December 9, 2021.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE