JOHN W. HATTMAN,

Grievant,

v. **Docket No. 95-BOD-265R**

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Dr. John W. Hattman, employed as a Professor of English at West Liberty State College (Respondent), initiated these proceedings on April 24, 1995, when he requested presidential review of disciplinary action taken against him on April 13, 1995. On a level two grievance form dated May 24, 1995, Grievant stated, “I have been found guilty of violating a non-existent college policy (do not write down your private thoughts), and I have been improperly found guilty of sexual harassment. I request relief of the reversal of the convictions and the removal of all sanctions based on these convictions.” A level two hearing was conducted on June 1, 1995, and on the date the decision was due, Dr. Linda O. McGinley, Grievant's colleague who had filed the sexual harassment complaint, but had not been informed of when the hearing would be conducted, requested that she be permitted to intervene. The request was granted to allow Dr. McGinley the opportunity to present her position, and the decision was issued June 14, 1995. On June 9, 1995, Grievant claimed that Respondent had defaulted by not issuing a decision within five days of the hearing. Grievant advanced his complaint to level four, requesting an order of default. The level four administrative law judge declined to grant the request, and Grievant proceeded to the Circuit Court of Ohio County, which issued a writ of mandamus directing a default be entered.

Respondent appealed to the West Virginia Supreme Court of Appeals, whichreversed the order of the Circuit Court, finding that Respondent had a sound reason for the delay, and to have issued the decision within the statutory time lines would have deprived Dr. McGinley of an opportunity to be heard and due process of law. (See footnote 1) Subsequent to this ruling, a level four hearing was held for review of the merits of the case on April 9, 1998. The matter became mature for decision upon receipt of final post-hearing submissions on May 11, 1998. (See footnote 2)

Background

The evidence of record establishes that dissent arose in the Humanities Department during the 1991-92 academic year over the issue of whether to recommend Dr. David Thomas for tenure. Certain members of the promotion and tenure committee, including Dr. McGinley, believed him to be an inappropriate candidate. Other members were in favor of the award. Grievant was a strong supporter of Dr. Thomas. By all accounts a degree of animosity developed among the faculty, and continued at such a level that Vice President and Academic Dean Steven Rowe met with the members and issued three memoranda in 1994, the most recent dated October 24, 1994, reminding the faculty that any individual found to have engaged in harassment would be subject to appropriate discipline, up to and including dismissal.

Grievant is faculty advisor for a fraternity, and in this role receives mail on behalf of the organization. Apparently in or about mid-February 1995, Grievant received an advertisement from a company which produced a product which it proposed could be soldas a fund raising event. The product was a type of male underwear referred to as “boxer shorts”. The flier included pictures of five pairs of the shorts, which were available in a number of colors and prints, and could be ordered with a fraternity logo imprint. The other unique feature of the garment was that it included a small pocket in which to carry a condom. “Serious Fun” was in large print with the following text in smaller type: Safe sex is a serious subject in this decade. There are important decisions to be made.

Abstinence is one answer. However, if abstinence is not your answer, the only other option is to wear a condom.

To encourage safe sex we've designed a condom pocket into Decades Boxer Shorts so you always have a condom where and when you need it.

So, if abstinence is not your answer, have fun, just wear the boxer with a condom.

A picture of a young man appeared beside each paragraph of text. In the first picture he is shown wearing a shirt, shoes, and trousers, which are unzipped and lowered to his hips to reveal the product. In the second photo, the trousers have slipped to knee level. In the third pose, the trousers are at his ankles and he is withdrawing a condom from the pocket. In the last picture, the trousers are

completely removed, his shirt is unbuttoned and slipped off one shoulder, and he is holding the condom.

By his own admission, Grievant wrote on the advertisement, “[i]nstead of Girl Scout cookies Linda is taking orders for these.” He then placed the flier in Dr. Thomas' mailbox. Descriptions of these mailboxes indicate they were “pigeonholes”, or open slots, with no doors or other security features. The mailboxes were in the Humanities Departmentoffice, a small room open to the public, and described as a high traffic area. (See footnote 3)

On February 27, 1995, Dr. McGinley called campus police to report an incident of sexual harassment. Grievant was listed as the suspect on the report completed by the investigating officer. On March 3, 1995, Dr. McGinley filed the following report:

On Monday, February 27, at 11:25 Bill Boyer came into my office and asked me if I was selling underwear. When I did said no [sic] and that I didn't know what he meant, he said that he thought I should come to the Humanities office where he had just seen a flyer about underwear with a note on it saying that I was selling it. He said the note appeared to have been written by Jack Hattman. Mr. Boyer said he had picked it up to look at it because he thought it was a serious announcement.

I went with Mr. Boyer to the Humanities office and saw the flyer lying on the work table opposite the door, the place where work study students normally work and where papers, announcements, etc. are sometimes left. I saw the folded flyer and the handwriting, which I also identified as being Jack Hattman's. I did not pick the flyer up but scooped it up on a piece of paper which I folded around it. (See footnote 4) I later made several Xerox copies, again without touching it. I showed the original, and later the copy, to several other colleagues, first to Ms. Coyne and Dr. Leonard and both identified the writing as Jack Hattman's without my prompting.

Jack Hattman was in the vicinity of the office at the time the flyer was left. I went to the machine room, at the end of the office hall, between the secretary's office and Dr. Hattman's office, to xerox some papers right after my 10:00 class, at approx. 10:50; I had taken the papers to my class and had come across the hall from L. 19 right after class to Xerox. At that time, the secretary Janet had already left the office to attend a class at 11:00 and the work study students had left also, so the office was unattended. While I was Xeroxing, I heard someone in the office hall and heard Dr. Gold, who wasexiting from the office, and Dr. Hattman, who was coming into the office complex, greet

each, Dr. Hattman speaking first to Dr. Gold who replied; each called the other by name. I looked up and saw Dr. Gold exiting and Dr. Hattman coming down the hall, past the machine room. I especially noted this exchange. Dr. Hattman had not left his office when I finished my Xeroxing and left, somewhere shortly before or after 11:00. I stopped in the office long enough to look in my mailbox, near the work table; there was noting [sic] on the worktable at that time.

I believe the handwriting to be Jack Hattman's. In 27 years in the department with him, I have had many opportunities to see his handwriting.

Campus police also secured statements from two witnesses. Dr. Virginia Leonard stated:
I viewed the advertisement for male underwear left in the Humanities Dept. office during the [unreadable] of Feb. 27- Mar. 3. A handwritten caption slurred Dr. Linda McGinley and, I believe also attacked her equally innocent daughter as well as maligned the Girl Scouts. I have had numerous handwritten correspondence from Dr. Jack Hattman in my possession. I immediately recognized the handwritten slur, something about Linda now selling 'this' (i.e. male underwear and condoms) instead of Girl Scout cookies, as Dr. Jack Hattman's handwriting. No one said to me whose it was. I was not prompted. Jack's handwriting is immediately recognizable. I viewed the material with repugnance and saw it as a sexual assault.

Department Chair William Boyer filed the following report:
On Monday, February 27, 1995 at about 11:25 a.m., I entered the Humanities Department office and found a folded leaflet on the table. On it were pictured two young men in brightly- colored underwear. I picked up the leaflet and noticed that someone had written on it, something to the effect that Linda McGinley would be selling underwear this year, rather than girl scout cookies. I immediately went to Linda's office and asked her if, in fact, she was selling underwear, and she told me she was not. I gave her the leaflet and told her that the handwriting on it looked like that of Dr. Jack Hattman, and she agreed.

Campus police officer Bob Oliver submitted this information to Respondent's Human Resources Director Brian Warmuth on March 7, 1995. Dr. McGinley filed a formal complaint with Mr. Warmuth on March 20, 1995, including four pages of Grievant's handwriting samples. Dr. McGinley stated that she found the advertisement “blatantly sexual in content, showing men stripping for sex and discussing the need to have a condom available at all times. It clearly advocate[s] a lifestyle of

engaging in sexual intercourse anywhere, anytime, with anyone." Dr. McGinley stated that she perceived the place and timing of the "attack" to have been specifically designed to damage her reputation when she was preparing her portfolio in support of her nomination for the Exemplary Professor award. She demanded that Grievant's employment be terminated.

Mr. Warmuth conducted an investigation, and filed a report with Vice President Rowe on April 3, 1995. After reviewing Mr. Warmuth's report and recommendations, Dr. Rowe advised Grievant, by letter dated April 13, 1995, in part:

I find that I agree with the conclusion of Mr. Brian Warmuth that regardless of your intent in penning the [comments on the flyer], you could not control the ultimate disposition of the advertisement and are therefore responsible for the effect which discovery would entail. I further find that, given the state of personal relationships in the Humanities Department, your authorship of such a comment was irresponsible and contrary to requests for moderation made by the Dean of Liberal Arts, the Vice President/Academic Dean, and President of the College. Members of the WLSC Humanities Department have been requested privately, publicly, formally, and officially to temper activities which could be provocative or inflammatory in the exercise of professional duties within the Department. You [sic] action in this event indicates that you have ignored these administrative admonitions.

I further agree with the conclusion of Mr. Warmuth that your comment could be construed and actually has actually been so construed as sexually harassing. The comment is seen asharassment of a sexual nature under Sections 14-A.1 and 14- A.3.3 of WLSC Policy Bulletin #32. Professor McGinley has found your comment to be harassing, hostile, disruptive and offensive. The comment can be understood to create an offensive work environment for Professor McGinley.

Dr. Rowe determined Grievant's action warranted discipline by permanently placing a letter of formal reprimand in Grievant's personnel file, placement on administrative probation until May 15, 1996, enjoinment for a period of two years from engaging in behavior or action which may be construed as harassment of members of the Humanities Department, and required that he attend an approved training session on sexual harassment on or before October 1, 1995.

Following the level two hearing, WLSC President Clyde D. Campbell revised the discipline to allow Grievant the right to petition for removal of the letter of reprimand from his file after a period of one year, and rescinded the directive that Grievant attend approved training on sexual harassment. The

sanctions relating to administrative probation and enjoinment from behavior which could be construed as harassment for a period of two years, were retained.

Argument

Respondent argues that Grievant's action, which he does not deny, was in violation of Sections 14-A.1 and 14-A.3.3 of the WLSC Sexual Harassment Policy.

Section 14-A.1 states:

All members of the College community are expected to support an environment of mutual respect and sensitivity, free from all forms of verbal or physical conduct which might be construed as harassing, hostile, disruptive, or offensive to others. Any form of sexual harassment is unacceptable behavior and engagement in such conduct is subject to appropriate disciplinary sanctions.

Section 14-A.3 defines sexual harassment in part as:

The Guidelines define sexual harassment in very broad terms. 'Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are considered sexual harassment when:

* * *

3) such conduct has the purpose of substantially interfering with an individuals's academic or work performance or creating an intimidating, hostile, or offensive employment, educational, or living environment.

___Respondent further asserts that the sanctions have expired, and that the letter of reprimand will be removed from Grievant's personnel file, at his request. Respondent states that the only remedy available to Grievant at this time would be to declare the level two decision erroneous, rendering the decision a declaratory opinion which is beyond the authority of the Grievance Board.

Addressing the merits of the claim, Respondent argues that Grievant did, in fact, interfere with a colleague's work performance by creating a hostile and offensive employment environment. Respondent further notes that the action followed repeated warnings to the members of the Department of Humanities to act in a professional, courteous, and non-offensive manner toward their colleagues. Respondent concludes that because Grievant engaged in such offensive behavior, in the face of repeated warnings, the grievance must be denied.

Grievant argues that Respondent's sexual harassment policy, which prohibits conduct having the effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive work environment, is unconstitutionally vague as applied to him. Grievant also argues the policy is unconstitutional because the findingthat he violated the policy was based solely on the perception of the person who claimed to have been sexually harassed. Grievant argues that to establish a hostile environment sexual harassment claim, it must be established the subject conduct adversely affected the work performance and well-being of both a reasonable person and the alleged victim, considering all the circumstances.

Grievant next argues that there was no finding that his conduct met Respondent's test, as stated in the level two decision, for a hostile environment sexual harassment claim, i.e., proof of a pattern of offensive conduct. Grievant asserts that he was without notice that Respondent's policy would be applied in such a way as to punish a written comment which was not intended to be offensive or insulting, or even to be seen by the person who claimed to have been sexually harassed, or would be applied to a single, isolated act.

Grievant argues that to prove a claim of sexual harassment, Respondent must establish that the subject conduct was based on the sex of the alleged victim, i.e., but for the fact of her sex, the alleged victim would not have been the object of harassment. Further, Grievant asserts, the conduct must not merely be tinged with offensive sexual connotations, and that the simple use of words with some sexual content or connotation does not automatically constitute sexual harassment. Because there is no evidence that the conduct was based on the fact of Dr. McGinley's sex or gender, Grievant claims the written comment did not constitute sexual harassment, and did not violate Respondent's sexual harassment policy.

Discussion

Dr. McGinley testified at level four that she is well-known on campus for her work with the Girl Scouts, and that she perceived the advertisement and comment to be a slapin the face. While she generally found the leaflet offensive, the fact that her name was attached enhanced her anger. She interpreted the advertisement to promote a lifestyle which she does not advocate. Dr. McGinley stated that as a result of this incident she developed extreme stress symptoms. She described a dread of returning to work, of vomiting in the parking lot at school for days, grinding her teeth to the point of developing temporomandibular joint (TMJ) syndrome which required professional care.

Because she cried with little motivation, was irritable, and found it difficult to concentrate on her work, Grievant stated that she attended therapy for several semesters and took anti-depressant medication daily, for a period of months. Even at the level four hearing, some three years later, Dr. McGinley stated that she was “shaking” and was upset about going back to work. On cross-examination, Dr. McGinley revealed that she may be viewed as a leader of a socially conscious group for women, and with some other individuals, has kept pink notebooks detailing incidents which may have previously been overlooked prior to their having been sensitized to these matters.

Grievant also testified at level four. Consistent throughout this procedure, Grievant admitted that he wrote the note and placed it in Dr. Thomas's mailbox. He denied any knowledge of how the material came to be on the worktable. Grievant explained that he wrote the comment believing Dr. Thomas would find it humorous because there had been some question regarding Dr. McGinley selling the Girl Scout cookies on campus. Grievant stated that while he had no real problem with her activity, it might be perceived as inappropriate if the students felt pressured to buy the cookies. In any event, his claim that the material was intended only for Dr.Thomas was not questioned by Respondent. Grievant stated that it did not occur to him that anyone would remove the paper from amailbox, and that faculty generally considered the contents so secure that some individuals received their paychecks at that location. Grievant concedes that Dr. McGinley could find the note offensive, but argues that it did not create a hostile work environment because one was already in existence.

While Respondent's vigilant protection of its employees from sexual harassment is to be applauded, it cannot be determined that Grievant has acted in violation of the cited sections of WLSC Policy Bulletin #32. Section 14-A.1 is a general statement of policy, advising employees to avoid “all forms of verbal or physical conduct which might be construed as harassing, hostile, disruptive, or offensive to others.” This provision appears to apply to behavior in general, because the following sentence specifically addresses sexual harassment as unacceptable behavior. The initial admonition is so general that it defies application. Certainly <u>any</u> act might be construed by someone as harassing, hostile, disruptive, or offensive. Then there is the question of what standard is to be applied. Respondent appears to find a violation if the complaining individual is offended. Since one individual may not find an action to be offensive at all, and another individual may find the same action to be very offensive, there are no guidelines. Employees have no notice of what might be construed as offensive. Because this section is so vague, it cannot be used as the basis for the

imposition of discipline.

Section 14-A.3 provides a more precise definition of sexual harassment. Respondent relies upon the third paragraph of that section for the discipline imposed upon Grievant. The clear and unambiguous language of the paragraph establishes that “such conduct has the purpose of substantially interfering . . . or creating an intimidating, hostile, or offensive . . . environment.” Grievant's undisputed testimony was that he was sharingwhat he considered to be a humorous advertisement, which he had embellished, for the entertainment of himself and a friend. It is true that the humor was created at Dr. McGinley's expense, and that she found it to be particularly offensive. However, there is no claim, or any evidence, that Grievant engaged in the conduct with the purpose of creating a hostile or offensive employment environment for Dr. McGinley. Therefore, there was no violation of Policy Bulletin #32, Section 14-A.3.3.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant is employed by the Board of Directors as a Professor of English at West Liberty State College. He has been a member of the faculty since 1964.

2. Dr. Linda McGinley is also employed as a Professor of English at West Liberty State College.

3. During the 1991-92 academic year Grievant and Dr. McGinley served on the Humanities Department promotion and tenure committee. Members of the committee split on the decision of whether to recommend another Department member for tenure. Grievant and Dr. McGinley were on opposite sides of this issue.

4. Animosity which developed during the 1991-92 year continued to escalate until 1994 when Vice President Rowe met with the faculty and issued a number of memoranda regarding the hostility among the faculty in the Humanities Department.

5. In February 1995 Grievant received an advertisement for boxer shorts with a condom pocket. On this flyer he wrote, “[i]nstead of Girl Scout Cookies Linda is taking orders for these.” Grievant placed the material in the unsecured mailbox of a colleague. 6. On February 27, 1995, the Department Chair asked Dr. McGinley if she was selling mens underwear, and told her of the flyer lying on a worktable in the Department office.

7. Grievant found the advertisement with the note referencing her to be very offensive and reported the matter to campus police. She later filed a sexual harassment claim with the Director of Human Resources.

8. As a result of the investigation it was determined that Grievant had violated WLSC Policy Bulletin #32 (Sexual harassment), and a number of sanctions were imposed.

9. Grievant had penned the note for the purpose of a humorous exchange to his colleague, Dr. Thomas, and did not intend, or expect, Dr. McGinley to see the advertisement.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §18-9-6; Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997); Crowder v. Bd. of Trustees/ Marshall Univ., Docket No. 95-BOT-320 (Mar. 31, 1997). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. Grievant did not engage in sexual harassment as it is defined by WLSC Policy Bulletin #32.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to remove the letter of reprimand from Grievant's file.

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 such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: July 13, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Hattman v. Darnton, 497 S.E.2d 348 (W.Va. 1997).

Footnote: 2

Grievant was represented by Lester C. Hess, Jr., Esq. and Elizabeth A. Delk, Esq. Respondent was represented by Assistant Attorney General Samuel Spatafore.

Footnote: 3

The mailboxes have since been removed.

Footnote: 4

Dr. McGinley later stated that she had preserved the evidence for fingerprinting, should it have been necessary.