HARALD WIESNER,

Grievant

v. **Docket No. 97-BOD-185**

BOARD OF DIRECTORS/WEST LIBERTY STATE COLLEGE,

Respondent

D E C I S I O N

Grievant, Harald Wiesner, employed by the Board of Directors as a professor in the music department at West Liberty State College (WLSC or Respondent), filed a level one grievance dated February 17, 1997, in which he contested a letter of reprimand issued to him by Vice President and Academic Dean Stephen D. Rowe, on January 27, 1997. The letter had been issued after an investigation of a sexual harassment complaint filed by two students, and apparently both parties considered it to be level one of the grievance procedure. Following an evidentiary hearing, WLSC President Ronald M. Zaccari upheld the placement of the letter in Grievant's personnel file, but deleted the requirement that Grievant meet with the WLSC Human Resources Administrator to review and discuss WLSC Policy No. 32. President Zaccari also advised Grievant of his right to file a rebuttal, and to petition the removal of the letter in no less than twelve months. An appeal was filed at level four on April 17, 1997, and evidentiary hearings were held on July 28 and October 8, 1997. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law, with responses, on December 9, 1997.

DISCUSSION

This grievance arises from a series of three incidents which occurred during the second half of the Fall 1996 semester. After a formal complaint was filed by the students, WLSC Human Resources Administrator Brian Warmuth conducted an investigation, and made a recommendation to Vice President Rowe. By letter dated January 27, 1997, Vice President Rowe advised Grievant that he had reviewed the investigative report, as well as the comments of Mark Williams, Music Department Chair, and a third student. Based upon this information,

he developed the following findings of fact and conclusions:

FINDINGS OF FACT

1. In the Fall 1996 semester, you did make a comment about student attire in the presence of Williams[,] M.B. and E.K. The comment was directed at one or both of the female students. (See footnote 1)

2. Your comment about the students' attire did elicit a response from your department chair, Mr. Mark Williams. Your chair specifically asked you to refrain from such comments.

3. There was an incident involving students of the WLSC Music Department in which unflattering comments of a sexual nature were directed by a student regarding M.B. You did become involved in the subsequent reactions of students to this incident.

4. You did converse with students M.B. and E.K. in your office after the completion of the Fall 1996 final examinations. In your conversation, you did refer to personal rather than academic matters between you and these students.

5. You did converse alone with student M.B. in your office after Fall 1996 final grades had been determined. In this conversation, you did make a flippant remark about her not having to grant you a sexual favor in order to earn a final grade which she was assigned by you. This comment was made by you after your department chair had spoken with you about comments to students. That could be interrupted [sic] as inappropriate.

CONCLUSIONS

1. M.B. and E.K. have stated their opinions that aspects of your behavior towards them in the Fall 1996 semester were unwelcome and offensive.

2. You had notice from your department chair that certain comments directed to E.K.

and M.B. were inappropriate, and you made at least one such comment to M.B. after this admonition from your department chair.

3. You were aware that there was an interpersonal situation concerning Music Department students and that this situation involved student M.B.

4. You imprudently referred to the above student situation in your final grade remark to M.B.

Vice President Rowe continued in pertinent part:

The WLSC Sexual Harassment Policy does charge employees to '...avoid behavior that might be construed as sexual harassment....' It appears that you have not calculated to gain favors from the complaining students, but you have contributed to the discomfiture of students M.B. and E.K. by your behavior and certain comments, even after having been askedby your department chair to refrain. You must be aware of the effect your actions have had on these two female students, and you must be made aware of the potentially serious consequences should you continue in this mode of behavior. Accordingly, this letter does constitute an official administrative warning that you have violated the spirit of WLSC Policy # 32 . . . .

This letter will be placed in your official personnel file. In accordance with West Virginia State College personnel policy, you may petition the Vice President to remove this warning letter no less than twelve (12) months after the letter's inclusion . . . .

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §18-29-6; 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).

The evidence in this matter consists of the written complaints filed by the students, Grievant's written response, and the testimony of numerous individuals, including M.B., M.L.,

Grievant, Mark Williams, and Vice President Rowe. The written statements are reproduced, in pertinent part, as follows:

Letter of M.B. 12/30/96

At Mid-term a sheet, which listed times forthe Music Department Juries, was posted on the bulletin board. My friend E.K. and I were looking at our scheduled times and conversing among ourselves on what to wear to these juries. The two of us were discussing 'professional attire' for this performance and our conversation was overheard by Dr. Harald Wiesner. Dr. Wiesner suggested that I wear 'A black lace garter belt and black high heels.' I was offended by this comment, but decided that he may have been joking. I thought to myself 'There can't be any other explanation for a professor to say something like that to a student, so he must of been joking, although I was still offended.'

On a Tuesday, December 10, a student by the name of M.L., who I do not even know as a friend, said something to Dr. Wiesner which was unprofessional, degrading towards me, and said out of jealousy. She told Dr. Wiesner that I like to give 'head' and that I 'hum' in the process. Dr. Wiesner's response was, 'Well tell her that I want to see her privately in my office.' And snickered afterward. I was appalled by the behavior of both individuals and went straight to the Chairperson of the Music Department, Mark Williams . . . .

On Wednesday, December 11 I had to take a final in Ear Training Class . . . As the end of the day neared, E.K. and I went to see our scores on the final in that class. [At that time, Grievant] also said, 'I do not know why I was reprimanded by Mr. Williams.' 'I said that I wanted to see you in my office to tell you that someone was spreading horrible gossip about you'. . . I felt better about the whole situation but a lot of things did not fit together. The snicker after his comment told me that the previous conversation was a bit 'fishy.' I let it pass because Mr. Williams said that nothing would be mentioned by Dr. Wiesner of the whole horrible situation ever again.

On Friday, December 13 I went to Dr. Wiesner'soffice to receive the results of my Theory III class final. I knew that if I received a 96% or higher on my final I would receive an 'A' in the class overall. My friend M.S. and I went into Dr. Wiesner's office together to pick up our grades and after Dr. Wiesner passed out M.S.'s grades he asked M.S. to leave. After M.S. left

Dr. Wiesner said 'M.B. I just wanted to let you know that you got a 99% on your final.' I was so excited! Dr. Wiesner continued to speak, 'You have an 'A' in my Theory class and you didn't even have to 'hum' for it.' That was it! He had crossed the line too many times and I knew that I was just making excuses for him before because he was my Professor.

I no longer feel comfortable around this professor and I do not want to be in a situation where I am alone with him . . . .

Letter of E.K. 1/8/97

The week of finals (December 1996) M.B. and I were in the hall way [sic] of the fine arts building discussing juries. We saw Mr. Mark Williams in the hall way and we asked what we should wear. Mr. Williams said something professional. Dr. Weisner was in the hall way [sic] overhearing. When M.B. and I asked what professional attire was considered, Dr. Weisner bent down to touch his knee and told us professional attire was black stalkings [sic] 'high healed shoes' and 'garter belts.' That was what he told M.B. and I to wear for our juries. . . .

Letter of E.K. received 1/6/97

I will get straight to the point. I am sure you are aware of the incident that occurred between Dr. Harold Wiesner and M.B. I am the third person that was involved in the situation. I was with M.B. in Dr. Weisner's office when we confronted him about what M.L. said. M.B. and I explained to Dr. Weisnerwhat we thought sexual harassment was. . . .When we were talking with him he seemed to get rather defensive and by the way he spoke he obviously knew his rights. He knew how to say things without actually saying something sexual. The made me recall ALL the other time he 'commented' on our attire or our personalities.

Such incidents:

1. M.B. and I were asking Mark Williams in the hall of the fine arts building as to what we should wear for the jurie[sic]-dress up or casual? Dr. Weisner over heard and said, what type of professional, the ones that wear 'garter belts' and 'black high heels.' Mr. Williams had to remind Dr. Weisner to not be so bold and open with his thoughts. . . .

3. After the Ear Training test M.B., D.V. and I went to get our test results from Dr. Weisner.

We got our tests and he told D.V. to leave and close the door behind us. This was when he told us how he would never intentionally sexually harass us and how he would be pleased to have daughters like us. I then felt comfortable around him.

I left to go home the Thursday of finals week. When I came back Saturday for graduation I was stunned, hurt and angry when M.B. revealed her story to me. I do not wish to have what happened to her, happen to me . . . .

Response of Grievant, filed 1/9/97

[Sometime during the period of December 5-9] I was walking through the Music Department hallway and encountered a group of maybe 6 or 8 music majors who where [sic] having a very animated conversation in front of the student lounge. For a reason I cannot remember, I stopped to listen or to chat or to speak to one of those students. Suddenly one of the girls . . . volunteered this comment (directed primarily toward me); (paraphrase) 'Did you know that M.B. has been telling people that she hums when she gives --- ---(oral sex) to guys? ' Everyone laughed. I said something like 'You are kidding!?' The girl assured me that she was not kidding. I proceeded to my office where I thought about this and decided that M.B. should know about being quoted in this manner, because she might want to either stop making such statements to others or might want to confront the situation before further potential embarrassment to her might come about. Thus, on my way to get a cup of coffee a few minutes later, I walked past (essentially) the same group of students and asked them to tell M.B. that I wanted to see her in my office.

Later that day or the next day, M.B. and E.K. came to see me in my office. They told me that someone had told M.B. about the events which had taken place in the hallway and that M.B. was very upset about being quoted falsely. They then wanted to proceed to an appropriate official of the College in order to initiate actions against the girl who had made the comments in the hallway. I advised them to see Mr. Williams first to try to pursue the matter 'in house' and to, maybe, resolve the matter in a simple manner. They agreed and went to the Chairman's office. I called Mr. Williams and relayed what had taken place and stated that he would be consulted by the two girls in a minute.

On the next morning Mr. Williams came to see me in my office to have 'a short but official meeting' with me. He indicated a few things to me (which his records will doubtlessly show):
1. that he thought he might be able to clear up the whole thing that day.
2. that M.B. had expressed great respect for and did not want to cause any problems for me.
3. that we (i.e. faculty members) must be very circumspect about making any comments to students that could be interpreted as inappropriate. . . .

On Friday, the last day of exam week . . . M.B. came to see me in my office . . . byherself on this occasion, to find out how she had one on her final tests and for the semester. I told her . . . [that in Theory she had earned a 90.7% average] enough for s semester grade of 'A'. She was elated and I was proud of and happy for her. I added (in retrospect, ill-advisedly, I suppose): 'So you see, you didn't have to hum for your 'A'. She responded (obviously flustered): 'Ah, I would have - ah, I mean I wouldn't have' (obviously she had misspoken first). She turned away to leave my office and added: 'I am not that kind of girl.' I said loudly: ' -and I am not that kind of guy!' I don't know if she heard that last response of mine.

Grievant added several Addenda to his statement after reviewing the written complaints. In these responses he stated that he did not recall making the comments regarding attire for departmental juries, but acknowledged that "I could have well made them as an intended funny comment, but would have been likely to do so in front of more people. . . ." Grievant also conceded that "in an attempt not to be seen as an over-the-hill fuddy-duddy I am occasionally responding to very crude, sexually explicit statements of students in a joking and, by some standards, risque manner. This I realize now, I must be much more careful with in the future."

Grievant insisted that any comments made to M.B. were never intended to be degrading or hurtful, and that based upon prior conversations with her and E.K., did not believe that they "were emotionally fragile to any type of risque banter I engaged in . . . ." Grievant asserted that during his meeting with M.B. and E.K.he "had absolutely no inkling that I might have caused any problem for the girls or that any of their frustrations or anger was directed toward me" and claimed that he was unaware of the degree to which he was involved in this matter until January 7, 1997.

Mark Williams, Steven Rowe, and Patrick Smith provided particularly apposite testimony at level two. Mr. Williams recalled the incident in which Grievant made a comment regarding the type of attire to be worn by the students to have been made in a light-hearted manner, but that he informally suggested to Grievant that such comments might not be appropriate. Mr. Williams confirmed Grievant's testimony that he called the Chair on December 10, 1996 to advise him that the students were en route to discuss the second incident, in which M.L. made the "humming" comment to Grievant. He observed the students to be very concerned about the comment made by their fellow student, and perceived they were preoccupied with "getting even" with the student. Some concern was also stated that Grievant had made a joke or comment about the situation. Mr. Williams stated that he subsequently met with Grievant officially, and advised him that he must watch or stop all banter with the students. When advised on December 14, 1996, of Grievant's third comment to M.B. regarding her humming for a grade, Mr. Williams stated that he advised the students of their options, and they elected to file a formal complaint.

Vice President Rowe testified that upon his review of thematter, he concluded that the comments attributed to Grievant were unintentional and foolish, but he did not perceive them to have been intended to be insulting. He explained that he was concerned that after Grievant had been warned by Mr. Williams regarding making certain types of statements to students, he had made a subsequent statement of that nature to M.B., and that M.B. found that Grievant's actions were creating an offensive atmosphere. Mr. Rowe opined that Grievant should have been more aware of M.B.'s sensitivity to the subject, and concluded that he had not sufficiently weighed the effects of his comments. Overall, the Vice President characterized Grievant's actions as having violated the spirit of the policy, and stated that the letter of reprimand was intended to impress upon Grievant the potentially serious nature of such actions.

P. S., a WLSC student, testified that he was present when M.L. made the humming comment to Grievant, and that Grievant appeared taken aback, but made no comment or gestures, and simply returned to his office. P. S. stated that he remained present a few minutes later when Grievant returned and asked the students to tell M.B. to come to his office.

The testimony offered by Grievant at levels two and four, as well as that of M.B., and M.L.

at level four, essentially restates the information provided in the written statements, and does not require a detailed review. Sexual harassment is an egregious form of behavior prohibited by law, and in the present matter, by the policies of both the Board of Directors and WLSC. It is defined by WLSC Policy Number 9 as: (See footnote 2)

Unwelcome or unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment or academic advancement;

- submission to or rejection of such conduct by an individual is used as the basis for decisions affecting an individual's employment or academic standing;

- such conduct has the purpose or effect of unreasonably interfering with a person's work or academic performance or creating an intimidating, hostile or offensive work, learning or social environment.

Individuals involved in a teacher-student relationship must be particularly careful not to exhibit behavior which may be considered sexual harassment due to their role in developing and educating immature members of our society. See generally Harry v. Marion County Bd. of Educ., Docket Nos. 95-24- 575/96-24-111 (Sept. 23, 1996); Shaffer v. Preston County Bd. of Educ., Docket Nos. 94- 39-1127/95-39-030 (Aug. 25, 1995). While individuals should beencouraged to exercise their rights to file valid sexual harassment claims, by the same measure, the severity of the charges requires close scrutiny to ensure that the action was in fact sexual harassment, and not some lesser offense. This grievance presents a particularly troublesome scenario in making that determination. The three incidents cited by Respondent in the letter of reprimand will be addressed in order.

In the matter in which Grievant interjected himself into a conversation regarding what was considered appropriate attire for a music department function, the evidence establishes no clear record as to what was actually said. Grievant does not recall his statement. Mr. Williams did not recall specifically what was said. M.B. indicated that she interpreted Grievant's comment as a suggestion that she wear provocative clothing, but she then determined that he

was joking. E.K. offered two differing accounts. First, that Grievant suggested they wear provocative clothing, and second, an inquiry as to what type of professional, the one who wears such clothing. Thus, the evidence regarding this incident is scant, conflicting, and indicative that ultimately no offense was really taken. It is important to note, however, that Grievant was advised to exercise caution in making such comments.

Addressing the second incident in which Grievant spoke to the students about the information provided him by M.L., Mr. Williams' testimony indicates that M.B.'s primary concern was with M.L., whowas broadcasting the offensive statement. His statements regarding her concern with Grievant were vague and leaves the impression they were not considered serious. M.B.'s written statement indicates that she was primarily offended because Grievant snickered and said he wanted to see her in his office when he heard the comment. At level four, she stated that "several students" had told her of Grievant's reaction. Because the formal rules of evidence are not applied in level four grievance proceedings, W. Va. Code §18-29-6, hearsay testimony is generally admissible.

Factors which may be used when allocating weight to hearsay evidence include: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarants' out- of-court statements were in writing, were signed or were in affidavit form; the agency's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statement can otherwise be found in the agency's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. Borinkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

In the present matter, it appears that the students wereavailable to testify, their statements were not offered in written form, and it appears that they may not have been disinterested witnesses. Further, this testimony was directly contradicted by that of P. S. who stated that was not the case. M.B. indicated that she experienced no ill-will with P. S., but suggested that they were competitive. Nevertheless, there is no evidence that P. S.'s testimony was not truthful, and it will be accorded more weight than the hearsay evidence of other students.

Therefore, the complaint regarding this incident is invalid, because it was based upon incorrect information and belief of M.B.

There is no dispute as to what occurred in the third incident because Grievant admits to making the comment with which he was charged. This charge remains the only basis for the letter of reprimand.

Upon first review of this matter, a determination that Grievant engaged in sexual harassment might be made because the underlying incident is clearly based upon a sexual issue, and because M.B. found that Grievant's actions relating to the underlying incident were offensive to her. However, upon closer evaluation, it must be determined that Grievant's credibility in this matter was equal to M.B.'s. Grievant's testimony in this matter is internally consistent and supported by outside facts. Thus, absent any evidence to the contrary, Grievant's explanation that his comment to M.B., that she did not have to hum for a goodgrade, had been intended to reassure her about the entire matter, is accepted. Of course, Grievant's intent is not controlling. It is entirely possible to engage in conduct which constitutes sexual harassment without the specific intent to achieve that effect.

While Grievant's final comment to M.B. demonstrates poor judgment, a lack of sensitivity, and a continued failure to understand and/or follow his Chair's instruction to exercise caution in his communication with students, it does not constitute sexual harassment as defined by WLSC policy. Although the underlying matter was sexually oriented, Grievant did not initiate its broadcast, and did not use it in an attempt to procure sexual favors or as a term or condition of M.B.'s academic advancement.

Although Grievant's comment was offensive in a general sense, it does not meet the definition of sexual harassment set forth in WLSC policy. A charge of sexual harassment is one of serious nature and should not be imposed unless the behavior clearly meets the definition of the controlling policy. While the present situation is muddied by the underlying sexual comments circulated by the students, it is determined that the sole valid basis for the letter of reprimand did not constitute sexual harassment. **(See footnote 3)**

In addition to the foregoing discussion 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 and has been a member of the Music Department at West Liberty State College for over twenty-nine (29) years.

2. In December 1996 and January 1997, two female students filed sexual harassment complaints against Grievant, citing the same three incidents.

3. Following an investigation into the complaints, the Human Resources Administrator recommended that Grievant be disciplined.

4. After reviewing the matter, Vice President Steven Rowe concluded that Grievant had violated the spirit of the WLSC sexual harassment policy, and placed a letter of reprimand in his file.

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 §18-29-6; 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. WLSC policy defines sexual harassment as:

Unwelcome or unwanted sexual advances, requests for sexual favors, and other verbalor physical conduct of a sexual nature constitute sexual harassment when:

- submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment or academic advancement;

- submission to or rejection of such conduct by an individual is used as the basis for decisions affecting an individual's employment or academic standing;

- such conduct has the purpose or effect of unreasonably interfering with a person's work or academic performance or creating an intimidating, hostile or offensive work, learning or social environment.

3. Two of the charges brought by the students were invalid.

4. Although a comment to a student that she did not have to engage in sexual activity to receive a high grade was offensive to the student because of related events, it did not constitute sexual harassment as defined by WLSC policy.

Accordingly, the grievance is GRANTED, and Respondent Ordered to remove the January 27, 1997, letter from all official records.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: February 27, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Consistent with Grievance Board practice, only the initials of the students will be used.

Footnote: 2

Apparently Policies 9 and 32 both address sexual harassment and one may have superceded the other.

Footnote: 3

It is unnecessary to address procedural issues raised by Grievant in light of the ruling on the merits of this matter.