WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PHILIP CARTER,
Grievant,

v. **Docket No. 2009-0691-MU**

MARSHALL UNIVERSITY,
Respondent.

D E C I S I O N

Grievant, Philip Carter, filed a grievance against his employer Marshall University ("Marshall" or "MU"), Respondent, on November 14, 2008, protesting disciplinary measures taken against him allegedly as a result of conduct in violation of Marshall University code of conduct applicable to all employees.[1] Grievant's statement provides:

> **Statement of Grievance:** On or about October 24, 2008, Grievant received a letter of warning regarding his conduct at a September 13, 2008, Marshall University football game. Grievant asserts that said letter is discriminatory, arbitrary and capricious, and/or clearly wrong. Additionally, Grievant asserts that his employer does not have the authority to discipline him for alleged behavior that was not related to his employment and/or job duties.
>
> **Relief Sought**: Grievant seeks for said letter of warning to be expunged from record; to be made whole; and any other relief the grievance examiner deems appropriate.

A conference was held at level one on December 10, 2008, and the grievance was denied at that level on December 15, 2008. Grievant appealed to level two on December 18, 2008, and a mediation session was held on March 27, 2009. After a requested period of abeyance, Grievant appealed to level three on May 26, 2009. A level three hearing was held before the undersigned Administrative Law Judge on December 9, 2009, in the Grievance Board's Charleston office. Grievant appeared in person and by representative

---

[1] Specifically, the "Marshall University Statement of Professional Ethics for all Employees."

Christine Barr, AFT-West Virginia/AFL-CIO. Respondent was represented by Jendonnae L. Houdyschell, Senior Assistant Attorney General.

This case became mature for decision on January 29, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant is an African-American professor employed at Marshall University. Immediately prior to a home football game, an incident transpired among Stadium authorities, guest(s) of Grievant, Law Enforcement officers and Grievant. Respondent maintains that the manner in which Grievant conducted himself violated "Marshall University Statement of Professional Ethics for All Employees." The incident was beyond traditional communication. Authorities were diligently performing their assigned duties. Grievant expressed a strong opinion that certain individuals were racist. Grievant's demeanor was emotionally charged and allegedly confrontational. Respondent ultimately presented Grievant with a written warning letter which provided that the action taken was part of a progressive disciplinary process. Should additional unacceptable conduct of this type continue, Grievant was subject to further disciplinary action including, but not limited to, termination. Grievant protests this disciplinary action.

The relevant circumstances of this grievance extend beyond one isolated encounter. Subsequent to the stadium incident, independent intervening actions transpired escalating turmoil. There is a recognized nexus between Grievant's conduct at a MU function and his employment as a professor with the University; however, the disciplinary action of

Respondent, subsequent to Grievant's expression of disdain, is dubious. It is not found that the ill-advised behavior of Grievant reached a level of behavior which constituted a sanctionable violation of Marshall University Professional Ethics. This grievance is granted.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a faculty member in the Social Work department in the College of Health Professions (COHP) at Marshall University. Grievant's primary duties are teaching, advising, and research/scholarly activity.

2. As a professor, Grievant's direct supervisor is the Dean of COHP; the Dean reports to Dr. Charles McKown, Vice President for Health Sciences.

3. Grievant made significant donations to the Big Green Scholarship Foundation, Inc., a fund-raising booster organization of Marshall University. As a result of these donations, Grievant acquired the necessary credentials to gain access to the "chair back seating" section for Marshall University athletic events.

4. On September 13, 2008, Grievant attended a Marshall University home game at the Joan C. Edwards Stadium, (Marshall-Memphis game).

5. It is not unusual for Grievant to invite friends, associates, colleagues and others to share with him the enjoyment of a Marshall University home football game. Grievant had provided tickets to four individuals as his invited guests. Grievant and all of his guests had the credentials for access to the "chair back seating" section (priority seating).

6. Grievant and one of his guests, then Huntington Mayor David Felinton, arrived earlier than Grievant's other guests. Grievant and Mayor Felinton were in the designated seating section.

7. Grievant's other three guests were in the line for the elevator to gain access to the "chair back seating" section.[2]

8. Three young males (two Caucasians and one African-American) presented elevator passes in an attempt to gain access to the elevators.

9. A confrontational incident occurred.

10. John F. Smith, Director, External Affairs, Big Green Scholarship Foundation, Inc., inquired as to their entitlement to elevator passes. Among Director Smith's many duties with the Big Green Foundation, he performs athletic game day duties which includes monitoring and controlling access to certain premium Stadium areas.

11. The credentials to the elevator have been identified as "elevator access cards," issued by the Big Green office. The passes presented by the young men are normally issued to disabled, handicapped or injured chair back holders to enable them to use the elevator to access their chair back seats. (Exhibit R-4).

12. Able-bodied individuals holding tickets to the chair back seats can gain access to those seats by using the vomitorium[3] to gain access to the stairs.

---

[2] It is a point of contention whether the three individuals were together. It seems to depend upon one's definition of together. They were in a close proximity of one another. Proximity is not consistently conveyed by all parties.

[3] An opening, as in a stadium or theater, permitting large numbers of people to enter or leave.

13. Director Smith attempted to confiscate the passes.

14. The two Caucasian gentlemen surrendered their passes. The other individual, an African-American gentleman, who was later identified as Brian Wallace, did not immediately surrender his.

15. Director Smith challenged Wallace's entitlement to an elevator pass. He specifically inquired as to the origins and justification for its possession.

16. Brian Wallace is a graduate of Marshall University. At the time of this event, Wallace was a 35-year-old African-American male with an A.A.S., and a B.A., and a M.S. degree, all from Marshall University.

17. Mr. Wallace refused to surrender the pass and Director Smith radioed for assistance from law enforcement.

18. Law enforcement authorities from the Marshall University Police Department and the City of Huntington Police Department arrived and became involved in the situation.

19. Mr. Wallace contacted Grievant using a mobile telephone and communicated among other things that there was a situation, individuals would not let him in, and they were trying to take his tickets.

20. Grievant went to Wallace's location and became involved in the situation.

21. Accounts of what transpired after Grievant's arrival vary; however, it is undisputed that emotions were high, voices were raised, words were exchanged and accusations were made.

22. Director Smith tried to explain to Grievant that no game tickets had been taken. He was requesting that the elevator passes be surrendered. Grievant proceeded to where police officers were located.

23. Grievant's communication with Campus Security Officer, James E. Terry, was not productive. This exchange was above the tone of normal conversation and was confrontational. Marshall University Office of Public Safety (Campus Security) and Grievant have history.

24. Grievant's demeanor was emotionally charged and exaggerated. Grievant is an African American male over 6' 6" tall. It is recognized that Grievant's physical stature is formidable. It is physically impossible for the individuals involved in this scenario to be in a nose to nose discussion with Grievant unless standing on some apparatus or Grievant stoops to converse. Grievant's height and weight create a notable presence whether he is being aggressive or not. Grievant's attitude and tone were unsettling to those in his immediate presence.

25. Captain Mike Albers, City of Huntington Police Department, communicated with Grievant and the two of them were able to establish rapport. After Captain Albers' interaction with Grievant and other individuals participating in this confrontation, the situation was defused.

26. Captain Albers was instrumental in effectively implementing a tone more conducive to resolving the immediate issue(s). The professionalism of Captain Albers was readily apparent in the circumstances of this confrontation and subsequent actions.

27. Eventually, some elevator passes were either surrendered by or taken from Grievant's guests, and all were permitted entrance to the special seating section for the ballgame; albeit, some entered via the stairway.

28. At no point was anyone's game ticket confiscated. No one was ever denied access to the game and no one was ejected from the game.

29. Subsequent to the events at the Joan C. Edwards Stadium (Marshall-Memphis game), Mr. Wallace drafted a five-page single-spaced document regarding his perception of events. (Exhibit R-9).

30. The document drafted by Mr. Wallace was entitled:

Marshall University and The Big Green's September 13, 2008, Racist Attack:
The Experience of an African American Male Alumnus
Inside of The Joan C. Edwards Football Stadium

31. On September 14, 2008, there was a Conference that took place on Marshall's campus (University's Conference on Race Issues in West Virginia Politics). This Conference encompassed an event reportedly entitled a "Forum on Racism in Politics."[4]

32. The document drafted by Mr. Wallace was distributed at this function. This Forum was open to the public and was attended by influential individuals of the community and the University alike. This function as a symposium was attended by various members of the public who were sensitive to racial issues.

33. The document, released in mass, was not flattering to Marshall University. It encompassed several allegations of racism, was inflammatory and designed to invoke visceral reaction. The document was also sent out via e-mail.

34. The document as written was an attack on the integrity of Marshall University.[5]

---

[4] The Conference was sponsored in association with the then upcoming National Elections. The topic was a hot button issue.

[5] It is not established nor alleged that Grievant was instrumental in drafting or distributing the document in discussion.

35. Subsequent to the September 14, 2008, Forum-Symposium, authorities of Marshall University were made aware of Mr. Wallace's document and the context of the document circulated in mass. Marshall University was contacted by individuals well outside the territorial border of West Virginia, expressing interest in the information presented and the allegations expressed.

36. Charles H. McKown, Jr., M.D., Vice President for Health Sciences, did not witness the September 13, 2008 incident, but was made aware of the incident at the Stadium by the administration of Marshall University.

37. Upon request from their administrative superiors, Director Smith and Officer Terry drafted memos and/or written complaints regarding the events of September 13, 2008.

38. After consultation with Layton Cottrill,[6] Michelle Douglas,[7] and others, Dr. McKown drafted and issued a letter of warning to Grievant dated October 9, 2008 alleging that Grievant's conduct at the September 13, 2008, Marshall University football game violated the Marshall University Statement of Professional Ethics for All Employees. (Exhibit R-7). The October 9, 2008 document is the official Warning Letter. (Exhibit R-5).

39. Marshall University's Faculty Handbook generally referenced as the "*Greenbook*" delineates, among other crucial information, the guidelines, policy, and procedure for the employment of faculty. (Exhibit R-6) Marshall University Statement of Professional Ethics states, in part, that;

---

[6] Layton Cottrill is General Counsel and Senior Vice President for Executive Affairs, Marshall University.

[7] Michelle Douglas is Director of Equity Programs, Marshall University.

> The faculty, staff, and administrators of Marshall University share a commitment to professional ethics as an obligation to our students, to the citizens of the state of West Virginia, and to each other as colleagues.
>
> . . .
>
> All employees of the university should strive to adhere to the . . . guiding principles derived from the above {omitted} documents. . . . [S]tandards included in those documents.
>
> · Honesty and Trustworthiness in all professional dealings with others.
>
> · Fairness and Equity require that one does not discriminate or harass others.
>
> · Respect for the opinions, needs, goals, and responsibilities of others.
>
> · Full and open communications between and among colleagues, students, staff, and administrators.
>
> · Impartiality in all professional decision making.
>
> · Keeping primary the interests of both students and the institution.
>
> · Acceptance and fulfillment of responsibility in the shared governance of the university.
>
> · Integrity in all interactions with others.
>
> · Confidentiality of information where appropriate.
>
> · Adherence to the ethical standards of ones discipline or field.
>
> All employees are duty bound to maintain these ethical standards as well as to call attention to situations where these standards may have been violated.

(Exhibit R-6 and R-7)

40. In addition to the official Warning Letter, Dr. McKown sent a separate and distinct letter dated October 14, 2008 regarding the September 13, 2008 incident to Grievant. (Exhibit R-8).

41. Dr. McKown issued two letters to Grievant. An official letter to be placed in Grievant's faculty personnel file (Exhibit R-5) and a letter more of a personal nature, but a document nevertheless noting dissatisfaction with Grievant's conduct and suggesting alternative attitude and behavior in the future. (Exhibit R-8).

42. Grievant did not file a written complaint with Marshall University regarding the events of September 13, 2008; however, he did verbally contact Equity Officer Michelle Douglas on the first regular business day following the event and relayed his belief that individuals under the auspice of the University had treated him in an inappropriate or discriminatory manner.

43. Subsequent to the September 13, 2008 event, there have been alterations in Marshall University's credential process for acquiring and dispensing elevator access passes.

Discussion

As this grievance involves a disciplinary matter, Respondent has the burden of proving its case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent specifically determined that Grievant violated *Marshall University Statement of Professional Ethics for All Employees*. (Exhibit R-5). In pertinent part,

Marshall University Statement of Professional Ethics, which employees are duty bound to maintain, provides that "all employees of the university should strive to. . . [respect] . . .the opinions, needs, goals and responsibilities of others" and should demonstrate "Integrity in all interactions with others." (Exhibit R-7). This language could be viewed, to some extent, as catch-all terminology which serves to impose the obligation on Marshall employees that they serve as positive role models. In full context, the principles outlined do not specify that Marshall faculty must be complacent and agree with an authority figure, at all times, to be a positive role model. (Exhibit R-6 and R-7).

Respondent avers Grievant's conduct of September 13, 2008, failed to show respect toward Director Smith and Officer Terry's goals and responsibilities at the Marshall-Memphis game. Among Director Smith's many responsibilities, he is charged with monitoring the use of the elevators. Only individuals legitimately holding the proper credentials are to use the elevator. Respondent contends Grievant's conduct showed lack of integrity in interactions with authorities. Grievant states in his grievance that Marshall did not have the authority to discipline him for alleged behavior that was not related to his employment and/or job duties.[8]

It is unfortunate that the issue of race is an element in this situation; however, it is a significant factor prevalent throughout the course of relevant events. The issue of race relations is not easily discussed. Further, the significance of race is not necessarily consistent and may have been perceived innocuous and/or over exaggerated by various individuals. Perception, ego and institutional integrity are also factors of this matter.

---

[8] Grievant further alleges that the letter is discriminatory, arbitrary and capricious, and/or clearly wrong. Discussed infra p.15.

RATIONAL NEXUS

In order to discipline an employee for acts performed at a time and place separate from his employment, the employer must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. A rational nexus exists if the conduct directly affects the performance of the occupational responsibilities of the employee, or, if without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the responsibilities of the position. *Rogliano v. Fayette County Bd. of Educ.,* 176 W. Va. 700, 347 S.E.2d 220 (1986); *see also*, *Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981);*Thurmond v. Steele* 159 W. Va. 630, 225 S.E.2d 210 (1976)*; Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006).

Grievant was continually identified in this situation as a "professor at Marshall" especially by Wallace who was accompanying him. Grievant is a long standing member of Marshall alumni. He is a person of both physical and social stature, and the conduct in review was on University property. Simply put, the demonstrative actions of a faculty member, visible to students, alumni, and the general public, in a loud exaggerated dispute with Law Enforcement Officials and University authorities, attempting to perform their assigned duties, at a University event, is a legitimate concern of Respondent. There is a recognized nexus between Grievant's conduct at a University function and his employment as professor with Marshall University. To argue the converse is unpersuasive. What is debatable is if Grievant's conduct reached a level of unreasonable behavior which justifies the disciplinary action of Respondent.

Director Smith testified that three young men approached the elevator and none appeared to be disabled. He inquired as to their disability. Two of the men stated they were not disabled and accessed their seats the same as other able-bodied individuals. One of the men, Brian Wallace, refused to surrender his elevator pass and proceeded to contact Grievant. Wallace's testimony regarding the events differs in detail but is consistent with the forgoing in context, e.g., Wallace notes that he alone was originally singled out regarding use of the elevator and that the three of them were not together but in proximity of one another (individuals with the same presidential campaign paraphernalia).

Grievant and Brian Wallace are African-Americans. The other two young men, who were likewise denied access to the elevators and asked to return their passes, were white. Perception is effected by numerous factors; environment, time, context, and past experience to name but a few. Diversity, be it age, social status, race, or sensibility, may effect one's reaction to a given situation. The same or similar denial of a benefit is not necessarily perceived consistently. Wallace, for one reason or another, believed he was singled out and discriminated against. He conveyed this information to Grievant. It is noted that Director Smith radioed for assistance from security personnel predicated upon Wallace's refusal to surrender the elevator pass and prior to Grievant's arrival. (Level III Testimony of John Smith, James Terry, Jack Ferrell & Exhibits R-2 and R-4). Grievant's subsequent behavior was not established as the justification for Director Smith's call for assistance.

Grievant accused Director Smith and Officer Terry of being racists. He claimed that Terry and Smith had colluded against him over the years. This behavior was conspicuous.

See Findings of Fact 21 - 25. He also made reference to Terry as a murderer.[9] This confrontation was vexatious and it is unfortunate that Wallace and Grievant perceived the situation as a slight against them, individually or as members of a particular ethnic group. Whether this perception is over exaggerated or just exacerbated by the political climate, its existence in fact is denied by the officials evolved in the dilemma.

There is no evidence of record which demonstrates that Respondent's agents were doing anything other than their assigned duties. These duties are to be performed uniformly without respect to social status, political affiliation or race.

Likewise, in accepting employment, with an established code of conduct, or in agreeing to the fine print on the back of a sporting event ticket, one does not waive his rights as a citizen of the United States of America. Grievant contended, among other consideration, that his statements are protected speech. The point is not lost on the undersigned, but while some statements may be lawful, they may also be actionable.[10] As

---

[9] There had been a highly publicized local tragedy which resulted in the death of a minority youth during an encounter with law enforcement officials. It is not clear whether Marshall University Police Department was directly involved. Details were not explained, but the event was readily known to the parties.

[10] Generally, "public employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983)(*citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .". *Orr,* 315 S.E.2d at 601. Three threshold issues were identified in *Pickering* when an employee asserts a free speech violation. First, for this speech to be protected it "must be made with regard to a matter of public concern." Second, statements made "'with the knowledge [that they]. . . were false or with reckless disregard to whether [they were]. . . false or not' are not protected." *Orr* at 602 (*citing Pickering* at 569). Third, statements "about persons with whom [the speaker has] close personal contact which would disrupt 'discipline. . . or harmony among co-workers' or destroy 'personal loyalty and confidence' may not be protected." *Id.* The undersigned

previously highlighted, what is debatable is if Grievant's conduct reached a level of behavior which supports the disciplinary action of Respondent. Lawful resistance of an unlawful practice is a cornerstone of our civil liberties. The responsibility to be a positive role model does not nullify a citizen's right to *'properly'* question inequitable application of procedure by authority figures.

WARNING LETTER

Grievant debates on several fronts whether Respondent can and did properly sanction him for conduct that transpired outside of Grievant's employment duties. Grievant alleges that the warning letter is discriminatory, arbitrary and capricious, and/or clearly wrong. Respondent must prove, by a preponderance of the evidence, that the written reprimand issued to Grievant was justified.

In terms of discipline, a warning letter is not necessarily a severe sanction. It highlights conduct deemed inappropriate and notifies the recipient that additional more severe disciplinary action can or will follow if the same or similar type of behavior is repeated. Progressive disciplinary procedure is invoked. Generally, the purpose of progressive discipline is to correct behavior, requiring that the employees know what they did wrong, what they should have done, future expectations, and the consequences of future violations. Therein lays the complication. If an employee does not protest unwarranted disciplinary action, the action stands as credible in subsequent proceeding(s).

---

concludes that while Grievant's statements may address a matter of public concern, if true, however, Grievant's statements were arguably made without regard to truth or falsity, and could be described as disruptive or detrimental to the harmony of MU campus. Grievant's utterances were not protected statements pursuant to *Pickering* analysis.

Employees, who do not challenge dubious disciplinary measures, in a timely fashion, are saddled with the weight of such proceeding whether fully accurate or not. Grievant contends Respondent has impermissibly sanctioned him for conduct that does not properly warrant disciplinary action.

There is no dispute that there was a loud verbal confrontation between Grievant, a Marshall University Faculty Member, Director John Smith and Chief James "Jim" Terry at the September 13, 2008, Marshall-Memphis game. There is a rational nexus between Grievant's conduct on his employer's property and his employment in the facts of this case. However, the undersigned is not convinced Respondent's disciplinary actions were truly predicated upon Grievant's behavior at a Saturday evening football game.

After the initial events at the Stadium, Brian Wallace saw fit to memorialize his perception of events. This was lawful but not necessarily prudent. Wallace was a former student at Marshall, he proceeded to fan the flames of discord. This was done at a forum attended by influential individuals inclined to be sensitive to racial issues. Wallace was not susceptible to disciplinary measures by Respondent and to a large degree insulated from potential repercussions.

It is clear that after the independent actions of Wallace, the stakes were raised. Wallace's actions were only one of several reactions that transpired after the September 13, 2008 Stadium confrontation. Marshall Administration received inquiries from numerous sources after the document drafted by Mr. Wallace was distributed. Alumni, political activists, boosters and others expressed interest in the specifics of the event, University policies, and the state of race relations in Huntington. Subsequently, upon request from

their administrative superiors, Director Smith and Officer Terry drafted memos and/or written complaints regarding the events of September 13, 2008.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions 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)). The relevant circumstances of this grievance exceed beyond one isolated encounter at a college football game.

The undersigned does not read the wording of *Marshall University Statement of Professional Ethics*, in context, to mean an individual employed at Marshall must agree with an authority figure, at all times, to be a positive role model. (Exhibit R-6 and R-7). Further, there is nothing invalid about a rule or code of conduct that prohibits disorderly behavior or that imposes reasonable requirements of behavior in the interest of maintaining order. There is nothing unlawful about such an ordinance on its face. However, many people leap from that fact to the erroneous conclusion that conduct in conflict with such a

standard necessarily is improper and should therefore be condemned. That conclusion overlooks a well established proposition of law that a rule or statute that is valid on its face may be administered in an unfair way and may consequently be invalid as applied. Harrison Tweed, Bernard Segal, & Herbert L. Packer, *Civil Rights and Disobedience to Law* in Civil Disobedience: Theory and Practice 93 (Hugo Adam Bedau ed., 1985).

The ramifications of educated and influential individuals acting in a counterproductive manner, repeatedly, is detrimental to everyone; effective issue resolution, employer-employee relationships, and the University community. Grievant's actions may not have been the ideal example of an optimum Saturday evening of college football; however, it is not established that the conduct demonstrated at the stadium was sufficient to substantiate that Grievant actually engaged in "prohibited" conduct. Grievant's conduct was ill-advised. However, it is not established that his conduct was, in fact, a violation of Marshall University Statement of Professional Ethics. Further, the undersigned, fact finder, is convinced that Respondent's decision to proceed with disciplinary action against Grievant was significantly influenced by the independent actions of individuals not answerable to Marshall University authority.

The above-discussion is supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is of greater weight

or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a "'rational nexus' exists in at least two circumstances:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position." *Id.* [347 S.E.2d] at 224." (Citations omitted.)

3. In order to discipline a school employee for acts performed at a time and place separate from his employment, there needs to be a "rational nexus" between the conduct performed and the duties the employee is to perform. A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006)*; Also see*, *Rogliano v. Fayette County Bd. of Educ.,* 176 W. Va. 700, 347 S.E.2d 220 (1986); *Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981);*Thurmond v. Steele* 159 W. Va. 630, 225 S.E. 2d 210 (1976).

4. A rational nexus exists between Grievant's responsibilities as a University Professor and his public conduct toward duly authorized (law) officials lawfully performing their assigned duties on University property.

5. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. It is not established that Respondent discriminated against Grievant.

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

8. In the circumstances of this grievance, it was not established by a preponderance of the evidence that Grievant's behavior reached a level of behavior which constituted a sanctionable violation of Marshall University Professional Ethics.

9. Respondent failed to prove by a preponderance of the evidence that Grievant violated "Marshall University Statement of Professional Ethics for all Employees."

Accordingly, this grievance is **GRANTED**. The warning letter issued to Grievant on or about October 9, 2008 is **ORDERED** to be removed from his personnel file. No other relief is granted by this Order.

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 (2008).

Date: May 21, 2010

Landon R. Brown
Administrative Law Judge