THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

L. A.,

Grievant,

v. **DOCKET NO. 2013-1720-MU**

MARSHALL UNIVERSITY,

Respondent.

DECISION

This grievance was filed directly at Level Three of the grievance procedure on April 12, 2013, by L. A.[1] ("Grievant") challenging her termination from employment by Marshall University ("Respondent" or "MU"). An evidentiary hearing was held before the undersigned Administrative Law Judge on October 3, 2013, in Charleston, West Virginia. Grievant appeared *pro se,* and Respondent was represented by Charles Houdyschell, Jr., Senior Assistant Attorney General. This matter became mature for decision on November 4, 2013, the deadline for filing post-hearing arguments.[2]

Synopsis

Grievant was terminated from her position as a tenured Professor in Marshall University's Lewis College of Business based upon her failure to present medical certification of her ability to resume her teaching duties following the expiration of an

[1] Due to the sensitive nature of the personal medical information discussed in this grievance, Grievant will be referred to by her initials only. *See D. H. v. Div. of Rehab. Svcs*., Docket No. 2011-0792-DEA (June 17, 2013). *See also Dr. P. E. v. Marshall Univ*., Docket No. 06-HE-216 (Mar. 5, 2008).

[2] Grievant attached numerous documents, not previously introduced into evidence, to her post-hearing argument. These documents were not considered in arriving at a decision on this grievance because the Grievance Board's procedures do not permit additional evidence to be introduced after the Level Three hearing is closed. *See Redd v. McDowell County Bd. of Educ*., Docket No. 2012-1419-McDED (July 18, 2012); *Hedinger v. Wyoming County Bd. of Educ*., Docket No. 2010-0589-WyoED (Mar. 4, 2011).

approved Medical Leave of Absence, as provided in a Return to Work Agreement which Grievant signed nine months earlier. Although Grievant demonstrated that she made efforts to comply with the terms of the Return to Work Agreement, the nature of her medical conditions effectively prevented her from attaining compliance. Thus, Grievant's actions were not "willful" to support a charge of insubordination. Nonetheless, MU's determination that Grievant should be terminated after having taken leaves of absence extending for more than 18 months was not unreasonable, nor arbitrary and capricious, and was permissible in the circumstances presented.

Based upon a thorough and complete review of the record developed at the Level Three hearing, the following Findings of Fact are made based upon a preponderance of the credible and relevant evidence presented:

Findings of Fact

1. Grievant was employed by MU as a tenured Professor in its Lewis College of Business.

2. Dr. Gayle Ormiston is employed by MU as its Provost and Senior Vice President for Academic Affairs.

3. Michelle Douglas has been employed by MU as its Director of Human Resource Services since January 2010. Prior to assuming that position, Ms. Douglas was employed by MU as its Director of Equity Programs, beginning in 2007.

4. In or around March 2008, Ms. Douglas discussed a personnel concern involving Grievant with MU's General Counsel, Layton Cottrill. Shortly thereafter,

Grievant was placed on a brief Medical Leave of Absence to deal with unspecified stress-related issues. *See* R Ex 46.

5. In September 2009, Grievant met with Ms. Douglas and agreed to schedule an appointment with her physician, Dr. Savory, and begin a regimen of regular treatment to address a medical issue that had arisen. R Ex 46.

6. Grievant was subsequently placed on a Medical Leave of Absence with pay. Ms. Douglas made multiple attempts to have Grievant obtain necessary medical treatment and provide evidence of her ability to return to her regular duties. Generally, Grievant was not cooperative with her private physicians. *See, e.g.*, R Exs 10, 43, 42, 41 & 44.

7. Michael Farrell is an attorney engaged in the private practice of law in Huntington, West Virginia. Mr. Farrell served on the Board of Trustees for state colleges and universities from 1998 to 2001, then as Vice Chairman of the Higher Education Interim Governing Board and as Acting Chairman in 2001-2002, and was then appointed to the MU Board of Governors. While serving a new term on the MU Board of Governors, Mr. Farrell resigned from the Board in late 2004 and was appointed to serve as Interim President of MU, commencing in January 2005. After his Interim Presidency ended in July 2005, Mr. Farrell was reappointed to the MU Board of Governors, and served in that capacity until 2013, when he was appointed to the Higher Education Policy Commission in West Virginia.

8. On March 29, 2011, Ms. Douglas issued a written warning to Grievant which stated as follows:

> This letter serves as formal written notification of a concern regarding your conduct as an employee of Marshall University. It has recently come to my attention that you have attempted to contact Mr. Mike Farrell, a member of the Marshall University Board of Governors. This is in violation of a no-contact directive that was initially communicated to you in 2008.
>
> On numerous occasions since 2008, but as recently as Fall 2010, you have been instructed to cease all contact with Mr. Farrell. This contact includes, telephone, e-mail, hardcopy document and in person. Despite these verbal reprimands the behavior has continued.
>
> On Tuesday, March 29, 2011 you again violated this directive by attempting to contact Mr. Farrell via telephone. This behavior is harassing in nature as he does not want you to contact him. The behavior must stop.
>
> Any such efforts to contact Mr. Farrell will make you subject to the University's disciplinary process and will subsequently have an adverse impact on your continued employment at Marshall University.
>
> If you are uncertain about the information in this letter or wish to discuss this matter I may be contacted at [phone number redacted]. I would ask that you please recognize the seriousness of this concern and adhere to the directives.

R Ex 45.

9. Prior to 2006, when concerns regarding Grievant's behavior first arose, Grievant's work record at MU could be characterized as "stellar," according to Ms. Douglas.

10. Although Grievant considered Ms. Douglas' March 29 warning letter to represent an unwarranted and illegal disciplinary reprimand, she did not file a grievance challenging this action.

11. On July 8, 2011, Dr. Chong Kim, Dean of MU's College of Business, wrote to Grievant advising her that she would not be permitted to resume her teaching duties for the Fall semester until she received medical clearance. Dr. Kim encouraged

Grievant to work with Ms. Douglas to facilitate assessment of Grievant's "psychological fitness." *See* R Ex 43.

12. On August 11, 2011, Grievant signed a release authorizing Ms. Douglas to access her medical records to obtain "medical evaluation and certification of fitness to return to work." R Ex 40-A. On or about that same day, Grievant signed a release authorizing MU to release medical information and leave status to D.A., her ex-husband. R Ex 40.

13. Ms. Douglas thereafter communicated with Grievant through D.A., in an effort to schedule meetings and medical appointments. *See* R Exs 18 & 22.

14. On August 1, 2011, Ms. Douglas wrote to Grievant advising her that she would not be returning to teaching duties in the Fall, and would be removed from the payroll, effective August 17, 2011, based upon her noncompliance with the medical clearance process. *See* R Ex 41.

15. In August 2011, Grievant requested a medical leave of absence from August 16, 2011 through December 31, 2011. R Ex 39.

16. On August 29, 2011, Dr. Kim approved various non-teaching duties for Grievant to perform during MU's fall semester. *See* R Ex 36.

17. From on or about August 9, 2011, to on or about August 30, 2011, Grievant was hospitalized at St. Mary's Medical Center. *See* R Exs 34 & 37. While Grievant was a patient at St. Mary's, she was treated by Dr. David Walker.

18. On August 30, 2011, Dr. Walker signed a hand-written statement on a prescription pad which stated: "[Redacted] has been a patient of mine from 8/9/11 through 8/30/11 inclusive. She is able to return to work on 9/6/11." R Ex 34.

19. Ms. Douglas sought a more complete medical opinion from Dr. Walker regarding Grievant's medical condition and ability to return to her normal duties. *See* R Ex 35.

20. On September 12, 2011, Dr. Walker responded to Ms. Douglas indicating that he had diagnosed Grievant as having "Major Depressive Disorder with Psychotic features." Dr. Walker observed that Grievant "has a history of resuming her delusional thinking, and there is no guarantee that this will not happen again." R Ex 34.

21. On October 4, 2011, Ms. Douglas wrote to Dr. Savory requesting an updated letter detailing Grievant's medical condition and current treatment plan. *See* R Ex 33.

22. On December 5, 2011, Ms. Douglas wrote to Grievant advising her of a medical appointment which was scheduled with Dr. Savory for December 7, 2011. Ms. Douglas explained in that correspondence: "[I]t is imperative that you are examined by Dr. Savory as soon as possible in order to return to work. If you do not follow up with this requirement you will not be allowed to return to your teaching duties in the Spring and will be taken off the payroll." R Ex 32.

23. On December 16, 2011, Dr. Savory wrote to Ms. Douglas discussing her interaction with Grievant in regard to her medical treatment. Dr. Savory concluded by stating that "I would have to say that she is not able to return to teaching at this time." R Ex 31.

24. On December 22, 2011, Dr. Savory wrote to Ms. Douglas, stating that Grievant "will not be able to return to work." However, Dr. Savory went on to state that "I still hold out some limited hope that she might pursue her career." R Ex 29.

25. On January 9, 2012, Ms. Douglas wrote to Grievant notifying her that she was being removed from the MU payroll, effective January 17, 2012. Ms. Douglas further notified Grievant that she was being placed on leave without pay status in accordance with the Family Medical Leave Act. *See* R Ex 28.

26. On January 13, 2012, Dr. Kim approved removing Grievant from the payroll, effective January 17, 2012. *See* R Ex 27. Grievant did not file a timely grievance challenging this status change.

27. On March 12, 2012, Ms. Douglas wrote to Grievant advising her that MU would cooperate in the process which Grievant had initiated to obtain a disability under her insurance policy, and that MU needed a statement from Grievant concerning her intent to return to work. *See* R Ex 25.

28. On March 12, 2012, Ms. Douglas also wrote to Dr. Savory requesting an update on Grievant's medical condition and current treatment plan. *See* R Ex 24.

29. On March 28, 2012, Dr. Samuel Januszkiewicz with University Physicians and Surgeons in Huntington, West Virginia, wrote to Grievant advising her that they were terminating their physician-patient relationship with her due to her failure to show for two appointments, and multiple cancellations of appointments since 2008. Dr. Januszkiewicz further noted: "We do agree that you have mental health issues which would benefit from continued psychiatric care." R Ex 23.

30. On March 29, 2012, Dr. Savory responded to Ms. Douglas advising that Grievant did not keep an appointment with Dr. Sinko, a psychiatrist at University Psychiatric Associates, on March 26, 2012, but had indicated a willingness to see her psychologist and do whatever was necessary to facilitate her return to teaching. *See* R Ex 44.

31. On April 2, 2012, Ms. Douglas met with Grievant, reminding her that she needed a statement of medical fitness from her primary physician, in order to return to teaching duties at MU. *See* R Ex 21.

32. On April 5, 2012, Ms. Douglas wrote to Grievant advising that Grievant's physician would need to certify compliance with treatment and fitness to return to work. *See* R Ex 21.

33. On May 3, 2012, Grievant's insurance administrator advised Grievant that her claim for long-term disability benefits had been approved, with payments to begin (retroactively) on January 1, 2012. *See* R Ex 16.

34. On May 30, 2012, Grievant wrote to Ms. Douglas seeking to revoke the authority she had granted her ex-husband, D.A., to receive information regarding Grievant's status at MU. R Ex 15.

35. On June 1, 2012, Ms. Douglas wrote to Grievant advising her that MU would no longer communicate with D.A. regarding any issues pertaining to Grievant's employment status, as requested. *See* R Ex 14.

36. On June 8, 2012, Grievant wrote to Ms. Douglas in an effort to reinstate her former spouse's authority to communicate information regarding dates and times for proposed meetings, but not to participate in such meetings or have access to Grievant's status at MU. *See* R Ex 12.

37. On June 21, 2012, Grievant signed a Return to Work Agreement with MU which provided as follows:

> You are presently on a medical Leave (*sic*.) of absence without pay per the Modified Duties for Nine-Month Faculty policy (MUBOG-AA-43). It has been determined that you will remain on an unpaid leave of absence until March 31, 2013.
>
> As you are under doctor's care, it is expected that you will continue under your doctor's care during this period and submit timely reports of said compliance. At the end of this period you will be required to have a medical fitness examination to aid in our determination of whether you are able to perform the essential functions of your position. Based upon the results of this examination, a decision will be made about your continued employment with Marshall University.
>
> > □ You must submit to Michelle Douglas, Director of Human Resource Services, your contact information, to include a home mailing address; home or cell phone number; and e-mail address. **<u>Due date</u>: June 28, 2012**

> □ In addition, should any of this information change during the time of this agreement, you must notify Michelle Douglas within seven (7) business days of said change.
>
> **The following protocol shall be followed to confirm that you continue to be under a doctor's care:**
>
> □ Submit to Michelle Douglas a statement from your treating physician affirming his/her status as your physician of record and detailing your treatment plan. **Due date: July 12, 2012.**
>
> □ Submit to Michelle Douglas documentation affirming your attendance at all medical appointments associated with the treatment plan. **Due date(s): August 1, 2012; September 3, 2012; October 1, 2012; November 1, 2012; December 3, 2012; January 2, 2013; February 1, 2013; March 1, 2013**
>
> If there is any change in your physician or treatment plan it will be your responsibility to contact Michelle Douglas within seven (7) business days of such a change, with documentation updating either the physician and/or the treatment plan.
>
> Please be advised that your failure to adhere to any part of this agreement, at any time, may result in your immediate separation from employment with Marshall University.

R Ex 7 (emphasis in original).

38. Although Grievant subsequently asserted that she entered into this Return to Work Agreement "under duress," Grievant did not file a grievance challenging the requirements contained in the Agreement.

39. Grievant misunderstood the requirement to inform Ms. Douglas of her home and cell phone numbers and e-mail address to represent an affirmative requirement to obtain or maintain a cell phone and e-mail account. Nonetheless, Grievant fully complied with this particular provision in the Return to Work Agreement

dated June 21, 2012, by providing Ms. Douglas with her home address and home phone number within the required time limit.

40. On August 13, 2012, Ms. Douglas sent a certified letter to Grievant notifying Grievant that Grievant had not complied with the Return to Work Agreement dated June 21, 2012, because she had not yet submitted a statement from her treating physician affirming his/her status as her physician of record, or documentation affirming Grievant's attendance at all medical appointments associated with the treatment plan, in particular regard to the August 1, 2012 due date for such documentation. *See* R Ex 6.

41. On August 27, 2012, Dr. Savory wrote to Ms. Douglas advising that a counselor who evaluated Grievant believed that Grievant needed counseling and medication. However, Grievant did not return for further care and was unwilling to take medication. *See* R Ex 10.

42. On March 8, 2013, Gayle Ormiston, MU's Provost and Senior Vice President, notified Grievant of his intent to terminate her employment in correspondence which stated as follows:

> Please be advised that pursuant to 133 CSR 9 § 12.3 Marshall University is hereby notifying you of its intention to terminate your employment effective **Friday, May 17, 2013**.
>
> As you are aware, on June 21, 2012, you entered into a "Return to Work Agreement" outlining certain conditions which were required to be met in order for you to Return to Work at Marshall. A copy of the Return to Work Agreement is attached for your reference.

> Please be advised that to date, you have failed to fulfill any of the protocols to confirm that you have continued under a doctor's care. Further as stated in the letter, "your failure to adhere to any part of this agreement, at any time, may result in your immediate separation from employment from Marshall University." Therefore, your failure to provide this information not only violates the terms of this agreement, but also constitutes insubordination.
>
> Please be further advised that your pre-termination meeting has been scheduled for **Thursday, March 28 at 10:00 am** in the Human Resource Conference Room. The purpose of this meeting is to provide you with an opportunity to refute the allegations contained in this letter. If you are unable to appear at this time, please contact Michelle Douglas, Director of Human Resources no later than Monday, March 25, 2013 at [redacted] to reschedule the same.
>
> As previously stated, this letter serves as a notice of intent to dismiss. You will receive an official letter of termination under separate cover. Please contact the Director of Human Resources or myself if you have any questions.

R Ex 4 (emphasis in original).

43. Provost Ormiston consulted with Ms. Douglas in MU's Human Resources office, before deciding to initiate the termination action set forth above in Finding of Fact No. 42. Provost Ormiston had no contact with Mr. Ferrell regarding this decision.

44. In response to Provost Ormiston's termination notice, Grievant responded to Dr. Ormiston in correspondence dated March 14, 2013, as follows:

> I am in receipt of your letter. Please be advised that I absolutely refute my termination. I can unequivocally prove that I have been harassed. If Marshall chooses to terminate me, it will be very unpleasant for all concerned.
>
> I will attend the meeting at 10:00 on March 28th.

R Ex 3.

45. In further response to Provost Ormiston's termination notice, Grievant responded to Ms. Douglas in separate correspondence dated March 14, 2013, as follows:

> I am in receipt of Dr. Ormiston's letter. While I will attend the meeting on March 28th at 10:00, please be aware I absolutely refute my termination.
>
> Michelle, I can unequivocally prove beyond a shadow of a doubt that I have been harassed for years in the most hideous fashion by Tammy White and the other perpetrators. I have scads of proof. There will be no doubt in your mind if you simply allow me a chance to prove it. I have never had delusional thinking with regards to what I have alleged for years.

R Ex 2.

46. Following the pre-termination conference, Provost Ormiston issued a decision terminating Grievant's employment in correspondence dated March 29, 2013, stating in pertinent part:

> Thank you for meeting with Michelle Douglas and I on March 28th for your pre-termination conference. However, after careful review of the information presented, I regret to inform you that your employment with Marshall University as a Professor in the College of Business will terminate effective at the close of business on Friday, May 17, 2013.
>
> As previously stated in the Notice of Intent to Terminate letter dated March 8, 2013, the cause for this action is your failure to comply with a Return to Work agreement (attached) that you signed on June 21, 2012. Significantly, during your pre-termination conference on March 28, 2013 you failed to provide any information or documentation that evidenced your compliance with the agreement. As such the institution will move forward with the termination proceedings.
>
> * * *

R Ex 1.

Discussion

This grievance involves Grievant's involuntary termination from employment for failing to comply with the terms of a "Return to Work Agreement." Such termination constitutes a disciplinary matter in which Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See* Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Bachman v. Potomac State College of WVU*, Docket No. 07-HE-198 (Jan. 17, 2008); *Clark v. W. Va. Dep't of Military Affairs & Public Safety*, Docket No. 99-DJS-428 (Nov. 29, 1999). "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). "The 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 Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Certain facts surrounding the events which led to Grievant's termination were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No.

95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Grievant asserts that the warning letter or reprimand she received in March 2011 for violating a directive not to contact MU Board of Directors Member Mike Farrell was not justified. However, the jurisprudence of this Grievance Board provides that the merits of previous disciplinary actions which Grievant failed to timely grieve when they were administered may not be contested in a subsequent grievance proceeding. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). Indeed, all such information contained in the employer's documentation of an employee's prior discipline that was not timely challenged will ordinarily be accepted as true. *Aglinsky, supra*. *See Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994). Consistent with these precedents, there was no evidence that Grievant filed a timely

grievance in 2011 when this letter was issued by Ms. Douglas. Therefore, the statements contained therein will be accepted as factually accurate.

In Provost Ormiston's March 8, 2013 letter advising Grievant of his intent to terminate her employment, MU described Grievant's failure to comply with the terms of the Return to Work Agreement she signed in June 2012 as "insubordination." Ordinarily, insubordination involves a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor. *Gill v. W. Va. Dep't of Commerce*, Docket No. COMM-88-031 (Dec. 23, 1988). Insubordination may also involve a flagrant or willful disregard for implied directions of an employer. *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988). More particularly, the West Virginia Supreme Court of Appeals has held that, "for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). In addition, *Butts* explains that the disobedience must be willful, meaning that the motivation for the disobedience was contumaciousness or a defiance of, or contempt for authority. *See Dyke v. Div. of Corrections*, Docket No. 2012-0346-MAPS (Oct. 16, 2012), *citing Butts*, *supra*, at 213, 460.

Although this grievance involves what must necessarily be categorized as a disciplinary matter, MU's decision to label Grievant's conduct as "insubordination" is perplexing, given that Grievant's termination was primarily based upon her inability to

satisfactorily demonstrate that she is medically fit to return to performing her normal teaching duties. That is the essence of the Return to Work Agreement which Grievant signed in June 2012. The Return to Work Agreement culminated a series of events which were generated by a medical condition that interferes with Grievant's ability to perform her teaching duties.

At the time MU initiated this action, the employer was aware Grievant had been granted a disability under the standard disability insurance policy covering faculty and staff. MU was also well aware of Grievant's employment history. More particularly, prior to the onset of these medical issues, Grievant performed her assigned duties in a "stellar" manner, rising through the academic ranks to hold the status of a full Professor and the responsible position of an Assistant Dean. Further, evidence presented by both parties convincingly demonstrated that the particular nature of Grievant's medical condition includes an inability to place her trust in the medical profession, the only entity which may have the expertise and experience to resolve her issues, and restore her to her rightful place in the academic community. Given this context, asserting that a disabled employee is "insubordinate" because she does not produce evidence that her disabling condition has been resolved simply defies both law and logic.[3]

Accordingly, Grievant's conduct in this situation, as established by a preponderance of the evidence, was not insubordinate. Grievant's failure to comply with the directive was inextricably intertwined with the medical situation she was then experiencing, which circumstance kept her from trusting the medical providers which

[3] This matter is readily distinguishable from *Bachman v. Potomac State College*, Docket No. 07-HE-198 (Jan. 17, 2008), cited by Respondent. Certainly, Professor Bachman was not known by his employer to be disabled at the time he failed to report for work as ordered.

MU encouraged her to see for treatment. In these circumstances, Grievant's failure to meet with these physicians and other health care providers, and allow them to continue relating the results of these interactions to her employer, represents neither an act of defiance nor a willful refusal to obey an order. *See Butts, supra*; *Wallace v. Dep't of Health & Human Res*., Docket No. 2011-1868-DHHR (May 24, 2012); *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995); *Sexton*, *supra*.

Nonetheless, Respondent demonstrated that it made every reasonable effort to connect Grievant with the medical providers who were most likely to have the capability to obtain a favorable outcome for Grievant. Not only was Grievant given a medical leave of absence, with pay, to seek assistance, MU took the extra step of making the necessary medical appointments, and obtaining Grievant's agreement to meet those appointments as a condition of continued employment. These actions were taken in good faith, in a genuine effort to restore Grievant to her former employment status. Unfortunately, these efforts were insufficient.

MU was not required to leave Grievant's position vacant indefinitely but could reasonably expect her to return to work after an approved Medical Leave of Absence. *See Bogard v. Div. of Veteran's Affairs*, Docket No. 2011-0562-MAPS (June 7, 2011); *Hayden v. Dep't of Health & Human Res*., Docket No. 98-HHR-133 (Nov. 30, 1999); *Cook v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-298 (Nov. 30, 1999). Thus, it was not unreasonable for MU to set a date certain by which Grievant needed to produce satisfactory evidence of her medical ability to resume her teaching duties.

MU's decision to terminate may also be reviewed to determine whether the action taken was arbitrary and capricious. In reviewing an agency action to determine whether it is arbitrary and capricious, consideration should be given to whether the agency relied on prohibited factors, entirely ignored important aspects of the issue to be decided, explained its decision contrary to the available evidence, or whether the decision is so implausible it cannot be ascribed to a difference in view. *See Bedford County Memorial Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985); *Woolridge v. Dep't of Transp*., Docket No. 2008-0416-DOT (Jan. 23, 2009). Although 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 his judgment for that of the employer. *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). Ultimately, the arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid, as long as the decision is supported by substantial evidence, or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

In this matter, MU presented a rational explanation for its decision, and the University exercised its discretionary authority in a plausible manner, given the information it had before it at the time. Therefore, it was not shown that MU acted on an arbitrary and capricious basis when the decision was reached to terminate Grievant's employment status.

Grievant's defense to this termination essentially consisted of anecdotal evidence[4] to establish that various inexplicable, bizarre and adverse events relating to her personal life, family and property, actually occurred and, as result of certain events and experiences, she was unable to find a legitimate medical provider she could trust to the degree necessary to obtain either appropriate treatment or an honest assessment of her condition. Unfortunately, Grievant's inability to comply with her employer's reasonable requirement to provide medical evidence that she is able to return to teaching, where there is no credible evidence that the employer actively participated in preventing Grievant from obtaining such medical clearance, is not a defense to the termination action, nor has Grievant set forth any viable legal basis for overturning MU's decision.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Bachman v. Potomac State College of WVU*, Docket No. 07-HE-198 (Jan. 17, 2008); *Olmsted v. Bd. of Directors*, Docket No. 98-BOD-108 (Oct. 21, 1998). *See* Procedural Rule of the W. Va. Public Employees

[4] Grievant presented correspondence from prior creditors, as well as businesses with which she reportedly had no transactional relationships, dunning her for questionable, erroneous or nonexistent bill payments (G Exs 1-14, 18-19, 21, 31, 51-54), numerous newspaper clippings including various anomalies such as crossword puzzles with obvious errors, recipes with mathematical errors in the list of ingredients, and news reports containing names of persons which Grievant did not believe were accurate, or contained apparent typographical errors (G Exs 29, 42-44, 55-93, 100-101, 106-111), a lengthy hand-written "harassment diary" containing 997 numbered entrees on approximately 422 pages (G Ex 95), and approximately 265 photographs depicting various kinds of damage to her residence and personal property, and numerous anomalies Grievant has observed which may or may not be related to various events which Grievant has experienced (G Ex 112). Some of the correspondence which Grievant questioned appeared to represent what is normally termed as "junk mail."

Grievance Bd., 156 C.S.R. 1 § 3 (2008). "The 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, the employer has not met its burden. *Id*.

2. "A tenured teacher has a protected property interest in his/her position, which raises constitutional due process considerations when a teacher is faced with termination of his/her employment." Syl. pt. 4, *Trimble v. W. Va. Bd. of Directors*, 209 W. Va. 420, 549 S.E.2d 294 (2001).

3. The West Virginia Supreme Court of Appeals has held that, "for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). In addition, the disobedience must be willful, meaning that the motivation for the disobedience was contumaciousness or a defiance of, or contempt for authority. *Id*. at 213, 460.

4. MU failed to establish that Grievant's failure to fully comply with the terms of a Return to Work Agreement between the parties constituted prohibited insubordination. See *Dyke v. Div. of Corrections*, Docket No. 2012-0346-MAPS (Oct. 16, 2012). *Accord*, *Butts*, *supra*.

5. An employer is not required to hold a position vacant indefinitely but may reasonably expect an employee who has been granted a Medical Leave of Absence to return to work with satisfactory medical evidence of ability to perform the essential duties of the position. *See Bogard v. Div. of Veteran's Affairs*, Docket No. 2011-0562-MAPS (June 7, 2011); *Hayden v. Dep't of Health & Human Res*., Docket No. 98-HHR-133 (Nov. 30, 1999); *Cook v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-298 (Nov. 30, 1999).

6. The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *See* Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). 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 & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985).

7. Grievant failed to demonstrate that MU acted arbitrarily and capriciously when it terminated her employment for failing to provide medical certification of her ability to resume her teaching duties as provided in a written Return to Work Agreement which Grievant had signed nine months earlier.

Accordingly, this grievance is **DENIED.**

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: November 21, 2013

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LEWIS G. BREWER
Administrative Law Judge