DISMISSAL REVIEW COMMITTEE
CLARK COLLEGE

In re the Matter of: JAMES CRAVEN, Appellant.	MEMORANDUM OF JAMES CRAVEN IN OPPOSITION TO CLARK COLLEGE'S MOTION IN LIMINE

1. **Introduction**

Professor James Craven submits this memorandum in opposition to the College's Motion in Limine to exclude any evidence or testimony whatsoever regarding the College's unilateral decision to move Prof. Craven's office to a satellite campus. In addition, Prof. Craven anticipates that the College may object to other testimony or evidence regarding the College's animus towards Prof. Craven and his marginalization. That is, it appears that the College believes that testimony in this case should be limited to the single email that triggered the recommendation for dismissal. Accordingly, these arguments are relevant to similar evidentiary objections, should they arise.

2. **The Unique Nature of this Proceeding Requires that Prof. Craven be Given Wide Latitude to Present His Case**

In filing its Motion in Limine, the Attorney General, in effect, seeks to convert this administrative hearing before the Dismissal Review Committee into a court trial. This is inappropriate. The dismissal review process being followed here is unique. While the specific procedures are set out in the collective bargaining agreement, the process is mandated by

statute. RCW 28B.50.861-864. It differs from a more typical contract arbitration – including just cause grievances – because the appeal is heard by a committee made up of colleagues and other members of the College community, not an independent third party. This reflects the fact that institutions of higher education are structured to ensure that faculty members have a say in key employment decisions, among other issues of governance. Thus, tenure recommendations are made by a committee made up primarily of faculty. RCW 28B.50.851(7). So too is a dismissal recommendation. Again, this shared governance is established by statute. The collective bargaining agreement simply incorporates that statute and adds implementing details.

This distinction is essential. The Dismissal Review Committee (DRC) has not previously been called upon to review the reasonableness of any prior discipline, or the history of College's mistreatment of Prof. Craven. Certainly, the College can testify to the "fact" of discipline and whether that discipline had been challenged. But Prof. Craven must be allowed to present evidence about why the prior discipline was unreasonable and how it was part of a pattern of conduct designed to lead to his termination. In doing so, he should be allowed to present his own testimony as well as that of colleagues who have observed the animosity and can speak to his marginalization. Stated simply, the DRC should have the benefit of the full record in order to determine whether "sufficient cause" exists to dismiss this extremely talented and committed educator.

It is also bears emphasis that this is *not* a court trial. The rules of evidence and the civil rules of procedures do not apply. Certainly, the contract gives the Hearing Examiner authority

to make rulings as necessary to ensure an orderly hearing, but the fact remains that this is a non-judicial proceeding before a lay committee.

3. **The Assignment of Teaching Load and Relocation of Faculty Office is Relevant to the Ultimate Question Presented -- Should Prof. Craven be Fired?**

In its motion, the College appears to believe that the only evidence that is relevant relates to the last email in question. This is because evidence relating to the College's animus, disrespect and marginalization does not bear on the question of whether the language in the email is "disparaging" toward Prof. Hamideh and "undermines his authority." Memo, p. 1-2. Of course, that is not the question before the DRC. Again, the role of an arbitrator or trial judge in reviewing an employment action is fundamentally different than that of the DRC. An arbitrator or judge is charged with determining whether the *employer* had grounds for the discipline it had imposed. The DRC's role is to independently determine whether there is "sufficient cause" to terminate a tenured faculty member. Article III.B. This inquiry calls on the Committee to review all of the facts in light of their experiences and as members of the College community. There is no deference given to the employer, given the shared governance structure. Stated differently, there is no set definition of "sufficient cause," no established elements of a claim, no pattern jury instructions. The College may want to focus only on the last incident, but there is nothing that limits the DRC's inquiry to that one incident.

4. **Estoppel Does Not Apply**

The College next argues that Craven is estopped from presenting any evidence regarding his objection to his office move or assignment of teaching load because it was

"grieved and conclusively resolved through the AHE grievance procedure in 2012. Memo, p. 2. This is because the Association did not advance the grievance to arbitration. This argument demonstrates a fundamental misunderstanding of the grievance process, and also misses the fact that Prof. Craven has a right to this dismissal review proceeding, independent of the collective bargaining agreement.

In *Christensen v. Grant County Hosp. Distr. No. 1,* 152 Wn2d 299, 307-308 (2004), the Washington Supreme Court held that a party could be barred from re-litigating an issue that had been fully litigated in an administrative proceeding. But in order to do so, the Court held that the party seeking issue preclusion must establish that:

1. the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding;

2. the earlier proceeding ended in a judgment on the merits;

3. the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding;

4. the application of collateral estoppel does not work an injustice on the party against whom it is applied.

Where the matter was resolved in an administrative proceeding, the court required consideration of three additional factors:

5. whether the agency acted within its competence;

6. the differences between procedures in the administrative proceeding and court procedures; and

7. public policy considerations.

Christenson, supra., 152 Wn2d at 307-308.

Application of those standards here proves fatal to the College's claim. First, the issue in any grievance dispute is whether the contract has been violated. The question of whether the office move and assignment of teaching load is evidence of the College's animus towards Prof. Craven is entirely separate. Therefore, the grievance process cannot be given preclusive effect. This is so even if Prof. Craven made similar arguments in his grievance submission.

Second, there has been no "judgment on the merits." The fact that a union does not take a matter to arbitration does not mean that it abandons the issues or concedes that the employer is right. There can be a whole host of reasons why enormously objectionable conduct does not go to arbitration, including cost and an assessment of whether the union would win. Here, the College claimed that it had the management right to assign offices and classes. Attachment F. Without conceding that is a correct analysis of the contract, the union could well decide that it would not proceed to arbitration because of fears that it would lose. But even assuming the College had the "management right" to move offices, that conduct could still be evidence of "adverse action" and animus.

Third, there is no privity between the parties. In contract grievances, the Association ultimately "owns" the contract and determines whether to proceed. But because this dismissal process is a creature of both statute and contract, Prof. Craven has an independent right.

5. Prof. Craven Is Sensitive to the Desire to Complete the Case Within the Time Allotted

Prof. Craven is cognizant of the limited time available for this hearing and the desire to finish in the week allotted. We anticipate that Prof. Craven will be the primary witness,

offering explanations and rebuttals to particular actions, as well as placing the College's actions in context. We anticipate calling approximately five or six additional witnesses at this time to testify about the College's animus towards Prof. Craven, the reasonableness of the substance of Prof. Craven's concerns, and his skills as a teacher. In other words, we do not anticipate that allowing Prof. Craven to present his case will necessarily cause the hearing to last longer than a week.

6. Conclusion

This case involves the termination of a passionately committed and effective tenured faculty member from Clark College. It may be a cliche, but it is also true, to say that the College's action here is the functional equivalent to "capital punishment" in the employment context. The legislature and the collective bargaining agreement recognize the import of this decision and have set out a review process that reflects the shared governance structure in higher education. This is not a court trial, or even a classic arbitration. Collateral estoppel does not apply, and evidence relating to animus and the pattern of conduct that marginalized Prof. Craven is relevant to the only question before the Committee: is there sufficient cause to terminate Prof. Craven. Prof. Craven should be given wide latitude to present his case.

Dated April 13, 2014.

Respectfully submitted,
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