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OCT 22 2010

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 287017

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OF THE STATE OF WASHINGTON**

ALPHONSO R. LEE,

Appellant,

v.

YAKIMA VALLEY COMMUNITY COLLEGE,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case concerns judicial review of an administrative order by respondent Yakima Valley Community College (College) dismissing appellant Alphonso Lee (Lee) from his position as a tenured counselor. The procedures related to granting and removing tenure are governed by statute, RCW 28B.50.861-864, and are echoed in the local collective bargaining agreement between the College and its' faculty.

The College administration initiated dismissal proceedings against Lee. Lee was entitled to, and received, an adjudicative proceeding before a hearing committee and hearing officer governed by the Administrative Procedures Act (APA). The hearing officer issued a recommendation to the College Board of Trustees that the College had proved sufficient cause for dismissal. The final agency action was a decision and order by the College Board of Trustees dismissing Lee from his position as a tenured counselor.

Lee sought judicial review in Superior Court for Yakima County. The court upheld Lee's dismissal, Lee now appeals to this Court. The issue for this Court to decide is in fact straightforward: Was Lee's dismissal consistent with the Administrative Procedures Act under the standards applicable to judicial review? The answer is also straightforward: It was.

The respondent, Yakima Valley Community College, respectfully requests that this Court affirm the final agency decision dismissing Alphonso Lee from his position as a tenured counselor.

II. COUNTERSTATEMENT OF THE ISSUES.

- A. Should The Final Administrative Action Dismissing Lee Be Upheld Where The College Correctly Applied RCW 28B.50.861-864 And Chapter 34.05 RCW And Substantial Evidence Supported Dismissing Lee From His Tenured Employment?**
- B. Should Lee Be Denied The Additional Relief He Seeks Because He Has Raised No Valid Claims That Are Properly Before This Court?**

III. COUNTERSTATEMENT OF THE CASE

- A. The College Provided Lee The Formal Hearing He Was Entitled To By Statute.**

The College convened formal adjudicative proceedings before a hearing officer over nine days in August 2007.¹ This formal hearing was also conducted before a review committee according to RCW 28B.50.851(7) and, RCW 28B.50.863. During the formal hearing the evidence established that Lee held a full-time faculty tenured position as a counselor with the College;² he also served as an adjunct faculty member

¹ AP at 141-65. For purposes of this brief, "AP" refers to "Administrative Papers" which contain documents from the administrative hearing which was certified and forwarded to the Superior Court by the College as the Certified Record of Administrative Proceedings, and is contained in the Clerk's Papers. The numbers following the designation refers to the "AP" page numbers as set forth in the Certified Record of Administrative Proceedings.

² Tr., 8/20/07 at 264; 8/31/07 at 143. All "Tr." citations are to the "Verbatim Transcript of Proceedings" which contains the hearing transcript(s) which was certified and forwarded to the Superior Court by the College as the Certified Record of

in the College Speech Department.³ The facts below demonstrating the basis of the College's disciplinary action and the processes followed were established during that formal hearing.

B. The Administrative Record Below Demonstrated A Years-Long History Of Inappropriate Behavior By Lee Prior To The College Initiating Dismissal Proceedings.

Budget cutbacks occurred at the College in 2000.⁴ As a result, staff changes were instituted and Lee was notified in the spring of 2000 that he was being transferred to the Grandview campus.⁵ This transfer triggered a series of ongoing complaints and attacks on peers by Lee that culminated in the initiation of dismissal proceedings against him on February 9, 2007.⁶

Lee maintained that his transfer to the College's Grandview campus was retaliatory in nature and motivated by discriminatory animus.⁷ Lee subsequently filed multiple charges, as well as grievances, against College faculty and staff, including the following:

Administrative Proceedings pursuant to RCW 34.05.566, and is contained in the Clerk's Papers. The numbers following the designation refers to the date of the testimony and page number(s).

³ Tr., 8/24/07 at 42. Much of Lee's inappropriate behavior took place in the context of his activities as an adjunct faculty member. However, the statutory dismissal procedures do not limit the College's ability to address inappropriate and unethical behavior by a tenured instructor simply because the instructor engages in that behavior in a different "forum" of the College than the department in which he carries tenure.

⁴ Exhibit (Ex) 6 at 18. For purposes of this brief, "Ex." Refers to Exhibits from the formal hearing contained in the "Certified Record of Administrative Proceeding," which was certified and forwarded to the Superior Court by the College and is contained in the Clerk's Papers. The number following the designation refers to the exhibit, and where applicable the page number.

⁵ Ex. 6 at 3.

⁶ Ex. 44.

⁷ Ex. 6.

1. Assault charges with the Yakima Police Department against Director of Human Resources Mark Rogstad. Lee alleged that Mr. Rogstad had assaulted him when he shook his hand on the day he was informed of his transfer.⁸
2. A sexual harassment/discrimination complaint against the College President, Dr. Linda Kaminski.⁹
3. A complaint of hostile working environment (sexual harassment) against Ludvina Donaldson, his assigned office assistant. This included claims by Lee that he was the subject of a hostile work environment because of Ms. Donaldson's poor work product, and allegations that Ms. Donaldson engaged in retaliatory conduct against him after he filed his complaint.¹⁰
4. A complaint of hostile work environment/racial discrimination against Kathryn Bauer, another counselor, who also served as an adjunct in the Speech department. This included allegations that the cancellation of Lee's summer Speech 180 class was racially based, because Ms. Bauer was allowed to teach the same class. Also included was an allegation of racial discrimination because Ms. Bauer had been scheduled to teach Speech 180 in the winter and spring quarters and Lee had not.¹¹

Ms. Donaldson also filed a hostile work environment complaint against Lee. Ms. Donaldson contended that Lee treated her in a demeaning and condescending manner, including being rude, raising his voice and yelling at her.¹²

⁸ Ex. 8.

⁹ Ex. 38.

¹⁰ Ex. 6 at 7.

¹¹ Ex. 6 at 13.

¹² Ex. 6 at 9.

Normally, these complaints would have been investigated by the Human Resource Department. However, because Lee had filed a complaint against the Director of Human Resources, the College retained an outside investigator, Seattle attorney Sheryl J. Willert.¹³

Ms. Willert found that all of Lee's allegations of discrimination were baseless.¹⁴ Ms. Willert did conclude that Lee had engaged in conduct that could be interpreted as creating a hostile work environment, particularly with respect to the manner in which Lee addressed Ms. Donaldson.¹⁵ Ms. Willert further concluded that Lee was an individual who was not accepting of differential views or differing approaches and that if someone took a different approach or a different view from the view that he held, one of the mechanisms that he used to respond to these differences was to file a complaint.¹⁶

C. The College Began Progressively Disciplining Lee in December 2000.

On December 14, 2000, as a result of the Willert investigation, the College concluded that Lee had repeatedly engaged in conduct that was reasonably interpreted by co-workers as rude and/or unprofessional to the point that it created a hostile work environment.¹⁷ The College, through

¹³ Ex. 7, Tr., 8/20/07 at 53.

¹⁴ Ex. 6 at 21.

¹⁵ Ex. 6.

¹⁶ Tr., 8/20/07 at 100.

¹⁷ Ex. 10.

Karen Judge, Vice-President for Administrative Services, issued a letter formally warning Lee to desist in unprofessional actions against co-workers and detailing the types of actions the College considered unprofessional.¹⁸ The letter offered Lee thirty days to provide written rebuttal, and indicated that the letter would be placed in his personnel file. Lee failed to provide a rebuttal letter or to otherwise respond to the written warning letter.¹⁹

Lee's inappropriate and unprofessional interpersonal behavior continued unabated. Lee engaged in an ever-increasing pattern of inappropriate conduct and unprofessional behavior. In October 2001, Lee threatened the College with charges if the College did not give him an increase in salary.²⁰ On February 24, 2004, Lee filed a discrimination and retaliation complaint with the Equal Employment Opportunities Commission (EEOC) regarding his transfer to the College's Grandview Campus. After an investigation, the EEOC closed the claim as being, "[u]nable to conclude that the information obtained established a violation of the statutes."²¹

Concurrently, Lee began an unrelenting campaign against colleague Kathryn Bauer maintaining that she was unqualified to teach

¹⁸ Id.

¹⁹ Tr., 8/20/07 at 226.

²⁰ Tr., 8/20/07 at 231; Ex. 11.

²¹ Ex. 21 at 4.

Speech 180 classes. Yet, Lee conceded in writing in 2002 and again in 2004 that Ms. Bauer *was* qualified to teach Speech 180.²²

In 2004, Lee filed a formal discrimination and hostile work environment complaint against Ms. Bauer and Mr. James McCormick, Chair of the Speech Department. Lee alleged in his complaint that he should be given priority as an adjunct instructor for Speech 180 and referred to Ms. Bauer as a “lesser qualified white female.”²³

Lee’s claims that Ms. Bauer was less qualified to teach Speech 180 had been raised, investigated, and disposed of previously by both the College and the Washington State Human Rights Commission (HRC). A similar grievance had also been investigated and rejected.²⁴

On January 21, 2005, Lee also filed a complaint with the EEOC alleging race discrimination and retaliation in the assignment of Speech classes. His allegations included that he was more qualified to teach Speech 180 than Ms. Bauer, who is white. This complaint was almost identical to Lee’s November 22, 2004, complaint to the College alleging discrimination against Ms. Bauer and Mr. McCormick.²⁵ The EEOC dismissed this complaint in June 2005.²⁶

The College’s Human Resources and Affirmative Action Officer, Mark Rogstad, conducted an investigation into Lee’s complaint to the

²² Ex. 60, 61.

²³ Ex. 34 at 3.

²⁴ Ex. 12.

²⁵ Ex. 14 at 2.

²⁶ Ex. 21 at 5.

College. Mr. Rogstad issued a full investigative report on February 28, 2005.²⁷ The report concluded that the facts did not support Lee's claim that he had been retaliated against. The report also noted that Lee's allegations against other individuals were very serious claims. When interviewed, some of these same individuals stated they felt intimidated and harassed by Lee's accusations of discriminatory action. Lee was cautioned against falsely accusing others of racism or discrimination. However, when this caution was raised, Lee then threatened more and broader public claims that could damage professional reputations and/or increase the feeling among his colleagues that he accuses others of racial bias as a means of exercising control over their actions.²⁸ Lee was warned against continuing these types of actions.²⁹

Lee further attacked Ms. Bauer and Mr. McCormick at the College's Board of Trustees meeting of March 10, 2005. During the public comment portion of the meeting, Lee attacked the qualifications of Ms. Bauer and the professionalism of Mr. McCormick.³⁰

Lee challenged the Rogstad report in a letter dated April 4, 2005.³¹ In this letter Lee continued to challenge the qualifications of Ms. Bauer to teach Speech 180. He also attacked the professionalism of Mr. McCormick and set forth the assertion that: "[M]s. Bauer is pushing for

²⁷ Ex. 12.

²⁸ Ex. 12 at 8.

²⁹ Id.

³⁰ Ex. 35; Tr., 8/20/07 at 276.

³¹ Ex. 58.

the white majority to give her the white privilege of more than the black man.”³²

On May 31, 2005, Mr. McCormick filed a formal complaint with the College’s Human Resources Department against Lee for causing a hostile work environment and for public and private harassment.³³ After Mr. McCormick’s complaint, Lee made multiple requests for records from Mr. McCormick’s personnel file.³⁴

From July through October of 2005, Lee continued to dispute his colleagues’ qualifications and accuse them and the College of racist motives. He continued to assail Ms. Bauer’s qualifications.³⁵ Lee alleged that Mr. McCormick “runs the Speech Department like an old plantation in the South where the blacks have their place and they are not to question white leadership.” He also stated, “I believe both Kathryn Bauer and James McCormick need cultural competency training. Kathryn Bauer has for years always had a white Dean to give her what she wants and she has had numerous conflicts in the Counseling Department because of her white privilege attitude.”³⁶

On October 25, 2005, Lee drew media attention when he picketed on the sidewalk just outside Mr. McCormick’s classroom while class was in session, claiming racial bias in the assignment of less qualified instructors. Mr. McCormick testified that the picketing disrupted his class

³² Ex. 58 at 5.

³³ Ex. 22; Tr., 8/21/07 at 210.

³⁴ Ex. 23.

³⁵ Ex. 36.

³⁶ Ex. 24.

and damaged his reputation.³⁷ He also testified that Lee's actions had an adverse impact on his health.³⁸

On January 5, 2006, Mr. Rogstad completed his investigative report regarding Mr. McCormick's May 31, 2005, complaint against Lee.³⁹ Mr. Rogstad concluded that Lee's pattern of alternatively challenging colleagues' qualifications and claiming bias in assigning adjunct teaching jobs despite investigations debunking these claims was harassing and contrary to the College's policy on Ethical Conduct.⁴⁰ The report also found Lee had demonstrated a pattern of intimidating colleagues despite repeated warnings by supervisors against this behavior.⁴¹ The conclusion section of the report included the following:

Absent a discriminatory nexus, which has not been established, the college is not bound to offer Lee, or any other adjunct instructor, speech 180, 280 or any other adjunct teaching assignments. . . .

In this case, while Lee can request adjunct teaching assignments and/or raise questions about the qualifications of any faculty member, once the matter has been resolved further accusations can legitimately be considered harassment, including a violation of policy No. 1.05 – Ethical Conduct and policy No. 4.00 – Affirmative Action.⁴²

³⁷ Tr., 8/21/07 at 223.

³⁸ Tr., 8/21/07 at 208-9.

³⁹ Ex. 14.

⁴⁰ Id.

⁴¹ Id.

⁴² Ex. 14 at 9.

D. The College Increased Progressive Sanctions By Suspending Lee for Three Days With Pay in 2006.

Dean of Students Tomas Ybarra reviewed the Rogstad report on Mr. McCormick's complaint at the request of College President Dr. Kaminski. Mr. Ybarra was Lee's supervisor with respect to full-time employment during the period of time covered in the McCormick complaint.⁴³

Mr. Ybarra sent a letter to Lee on February 13, 2006, concerning the McCormick complaint and investigation.⁴⁴ Mr. Ybarra made findings and conclusions regarding Lee's performance as an academic employee of the College. Mr. Ybarra concluded that Lee's conduct towards his colleagues failed to meet Board Policy Standards of Ethical Conduct No. 1.05 and was unacceptable from an academic employee of the College.⁴⁵ Mr. Ybarra then recommended to Dr. Kaminski that Lee be suspended for three days with pay.⁴⁶

As a result of Lee's actions, the falsely accused faculty members reported that they felt intimidated and harassed by Lee's pattern of behavior and, that his allegations had threatened to place their professional reputations at risk.⁴⁷ In addition, Lee's actions were having a deleterious impact on the morale of the campus generally.⁴⁸ On February 27, 2006,

⁴³ Ex. 39.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Tr., 8/24/07 at 15-16.

⁴⁷ Tr., 8/24/07 at 13.

⁴⁸ Tr., 8/24/07 at 14.

Dr. Kaminski sent a letter to Lee confirming his three day suspension as recommended by Mr. Ybarra.⁴⁹ Dr. Kaminski's letter states, in part:

Your e-mail of February 15th challenges Dean Ybarra's authority to review the matter and recommend appropriate action. In this case, your work as a part-time speech instructor is not in question. It is your behavior as a full-time academic employee that continues to be objectionable despite repeated warnings and investigatory findings. As your supervising dean, it is appropriate that Mr. Ybarra would review this matter and make a recommendation to me. It should also be clear that I am considering only the written complaint of 5/31/05 regarding your actions against your colleagues, as previous matters related to your adjunct teaching assignments have been fully investigated and closed through multiple venues.

I find that you ignored repeated warnings that you not make knowingly false accusations against other faculty members as discussed in Dean Ybarra's recommendation. . . .

It is my hope that you will cease and desist from continuing to assert these allegations against your colleagues, which have been investigated and found without merit.⁵⁰

Dr. Kaminski confirmed that this discipline was progressive in nature with regards to action which was previously taken.⁵¹ Dr. Kaminski further confirmed that Lee's actions and behavior which resulted in the three day suspension was simply a continuation of the behavior that Lee was warned against in his 2000 warning letter.⁵²

⁴⁹ Ex. 41; Tr., 8/23/07 at 272.

⁵⁰ Ex. 41.

⁵¹ Tr., 8/23/07 at 273.

⁵² Tr., 8/23/07 at 276.

E. Following His Suspension, Lee Continued Harassing His Colleagues Unabated.

Lee's harassment did not stop with his three day suspension. On May 16, 2006, Mr. McCormick directed a letter to Mr. Rogstad noting yet another request from Lee for the credentials and qualifications of adjunct faculty members in the Speech Department.⁵³

Lee requested that Ms. Bauer have her state license revoked by the State Board overseeing Counselors and Social Workers.⁵⁴ In his complaint to the State Board, Lee raised the exact same allegations against Ms. Bauer that he had asserted against her as early as 1999 and 2000 regarding her credentials to teach in the Speech Department.⁵⁵ There was no merit to the allegations raised by Lee.⁵⁶

Next, in August 2006, Lee e-mailed a complaint to the College's Human Resources Office. This complaint alleged that an African American student, Paul Luckett, had been assaulted by Mr. McCormick some eight years previously.⁵⁷ Lee stated that the alleged assault was grounds for Mr. McCormick's dismissal, and also that Nick Esparza was witness to the incident.⁵⁸

⁵³ Ex. 18.

⁵⁴ Id.

⁵⁵ Tr., 8/23/07 at 166-67.

⁵⁶ Tr., 8/23/07 at 167.

⁵⁷ Tr., 8/21/07 at 12-13.

⁵⁸ Ex. 19 attachment 1 at 14.

This matter was then investigated by Dean Judy Kjellman, Director of Human Resources Mr. Rogstad, and Assistant Director of Human Resources Phyllis Strain. Dean Kjellman was involved in the investigation because she was the interim Dean for Arts and Sciences and was Mr. McCormick's supervising Dean.⁵⁹ Ms. Strain was involved because the initial complaint was sent to her. On November 3, 2006, a written report concerning the investigative findings from Lee's August 2, 2006, complaint was completed by Dean Kjellman and Mr. Rogstad.⁶⁰

During the investigation Lee specifically stated: "[o]f course I filed the complaint. I have lost over \$5,000, what else should I do?"⁶¹ Lee again raised claims with Dean Kjellman and Mr. Ybarra that Ms. Bauer was unqualified and that another colleague, Maria Cuevas, was unqualified to teach the Speech 280 course Lee believed he should be assigned to teach, despite these claims having no relation to the allegations regarding Mr. McCormick and Mr. Luckett.⁶²

On October 12, 2006, the College shared with Lee the initial results of their investigation. On October 16, 2006, Lee asserted that his current issues with Mr. McCormick were another example that "blacks

⁵⁹ Ex. 19 at 2.

⁶⁰ Ex. 19.

⁶¹ Tr., 8/21/07 at 22.

⁶² Tr., 8/21/07 at 29-30.

have received different treatment from Mr. McCormick.”⁶³ Then, Lee threatened that news teams and reporters would come out to the College because the “black community is upset.”⁶⁴ He also implied that failure to take action may result in a filing of a complaint during an upcoming accreditation visit.⁶⁵

The investigation report reached five conclusions. First, that while it was probable that something occurred between Mr. McCormick and Mr. Lockett involving McCormick questioning Mr. Lockett about writing on Mr. Lockett’s hand, there was no known legal or contractual means of redress eight years later, even if Lee’s claims were taken as true. Second, that Lee’s involvement in formulating the complaint while he was in dispute with Mr. McCormick demonstrated he prompted the belated pursuit of the complaint. Third, that the complaint appeared motivated by Lee’s desire to pressure or retaliate against Mr. McCormick. Fourth, that Lee’s inclusion of challenges to Ms. Bauer’s credentials appeared to be aimed against Ms. Bauer because Lee viewed her as competition for classes he wished to teach. Finally, that because Lee had previously been warned about using discrimination charges to support contractual

⁶³ Tr., 8/21/07 at 33.

⁶⁴ Tr., 8/21/07 at 34.

⁶⁵ Id.

grievances, his use of the complaint process to target Mr. McCormick and Ms. Bauer should be independently investigated.⁶⁶

On November 16, 2006, Mr. Rogstad initiated a disciplinary complaint against Lee with Marc Coomer, the interim Dean for Arts and Sciences.⁶⁷ In his complaint Mr. Rogstad raised Lee's e-mail complaint to Dean Kjellman challenging the qualifications of Ms. Cuevas and alleging that Mr. McCormick's appointment of Ms. Cuevas instead of Lee was retaliation for raising the Lockett allegations against Mr. McCormick. Mr. Rogstad pointed out Lee's previous warnings and suspension for repeated accusations against other colleagues to intimidate or harass them. Mr. Rogstad indicated Lee appeared to have ignored the prior discipline and warnings by filing another complaint against Mr. McCormick, involving a former student and prompting the student to complain, and claiming that Ms. Cuevas and/or Mr. McCormick had discriminated on the basis of sex, race, and disability (of the former student).⁶⁸

Under the terms of the Collective Bargaining Agreement (CBA), Dean Coomer would have an obligation to contact Lee to try and get his

⁶⁶ Ex. 19 at 13.

⁶⁷ Ex. 20; Tr., 8/21/07 at 50.

⁶⁸ Ex. 20.

response to the complaint and try to resolve it informally. However, Lee refused to meet at any time with Dean Coomer.⁶⁹

Lee's refusal to meet informally with Dean Coomer, precluded his ability to receive any information from Lee and thus attempt to resolve this matter informally.⁷⁰

On January 3, 2007, Dean Coomer submitted to Mr. Ybarra, Interim Vice President of Instruction and Student Services, his memorandum regarding the investigation of the November 16, 2006, complaint from Mr. Rogstad and Dean Kjellman against Lee.⁷¹ Dean Coomer concluded that Lee had continued to and was still continuing to assert unfounded allegations against co-workers, and that disciplinary steps to date had been ineffective to deter such baseless claims. Dean Coomer recommended that further progressive discipline be administered.⁷² Lee then filed a grievance against Dean Coomer, after Dean Coomer had completed his investigation.⁷³

On August 22, 2006, Mr. Ybarra was appointed Vice President for Instruction and Student Services. His responsibilities included providing administrative leadership for all the College's instructional and student

⁶⁹ Ex. 50.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Tr., 8/27/07 at 68.

services programs.⁷⁴ On January 10, 2007, Mr. Ybarra wrote a letter to Dr. Kaminski regarding the Coomer investigation and supporting documentation from both the Rogstad and Lee complaints.⁷⁵

Mr. Ybarra specifically noted that the current complaint against Lee was based on his continuing to engage in a pattern of behavior against which he had been warned by the College. This behavior had harmful effects on the individuals concerned as well as the College generally. It was further noted that the College had previously taken disciplinary action against Lee and it was now appropriate to take the next step by recommending that Lee be terminated or dismissed from his position with the College.⁷⁶

Mr. Ybarra noted in his letter that the College found that Lee violated the ethical standards of the College, according to Board policy 1.05, Standards of Ethical Conduct. Mr. Ybarra further noted that it was apparent that Lee was resolved to ignore repeated warnings from the College, and has established a pattern of personal conduct that fails to meet acceptable standards for an academic employee of the College, as

⁷⁴ Tr., 8/24/07 at 4-5.

⁷⁵ Tr., 8/24/07 at 18; Ex. 46.

⁷⁶ Ex. 46 at 13.

recognized in the faculty CBA. Mr. Ybarra than forwarded his recommendations to Dr. Kaminski.⁷⁷

Dr. Kaminski reviewed the report and recommendation for progressive discipline from Mr. Ybarra.⁷⁸ She then sent a letter to Lee, dated January 11, 2007, regarding an informal meeting to discuss potential discipline.⁷⁹ A meeting was then held on January 25, 2007.⁸⁰ During this meeting Lee provided additional information.⁸¹ He was also provided with the opportunity to submit further written information for Dr. Kaminski's consideration.⁸² Dr. Kaminski testified that she ultimately reached the decision that Lee should be dismissed from his position at the College, however, this decision was not reached until after she had reviewed all of the information provided at the meeting and subsequent to the meeting by Lee.⁸³ Dr. Kaminski then submitted a letter to Lee dated February 9, 2007, which was a notice of dismissal.⁸⁴

Lee then made a formal request for a hearing to appeal the College's decision to dismiss him. A formal hearing was held before a hearing officer on August 20, 21, 23, 24, 27, 28, 29, 30 and 31, 2007.

⁷⁷ Tr., 8/24/07 at 42-43.

⁷⁸ Tr., 8/23/07 at 281.

⁷⁹ Id.; Ex. 43.

⁸⁰ Tr., 8/23/07 at 283.

⁸¹ Id.

⁸² Tr., 8/23/07 at 284.

⁸³ Id.

⁸⁴ Tr., 8/23/07 at 285.

This formal hearing was also conducted before a review committee constituted according to RCW 28B.50.851(7), as required by RCW 28B.50.863. On December 12, 2007, the review committee submitted their recommendation that Lee be dismissed from the College as outlined in the February 9, 2007, notice of dismissal.⁸⁵

On December 17, 2007, the hearing officer issued her Proposed Findings of Fact and Conclusions of Law.⁸⁶ After giving reasonable consideration to the recommendations of the review committee and the hearing officer, the College Board of Trustees adopted the Proposed Findings of Fact and Conclusions of Law and entered additional Findings and Conclusions as its final decision in this instant appeal on February 7, 2008.⁸⁷

F. Superior Court

On March 7, 2008, Lee filed a Notice of Appeal with the Superior Court for Yakima County.⁸⁸ Per Findings of Fact, Conclusions of Law, and Judgment dated January 15, 2010, the Honorable David Elofson

⁸⁵ AP at 140.

⁸⁶ AP at 141-165.

⁸⁷ AP at 320-26.

⁸⁸ Clerk's Papers (CP) at 820.

affirmed the College Board's Findings of Fact, Conclusions of Law and Decision.⁸⁹ Thereafter, Lee filed a Notice of Appeal with this court.

IV. STANDARD AND SCOPE OF REVIEW

Judicial review of an agency decision is controlled by Washington's Administrative Procedure Act (APA).⁹⁰ RCW 34.05.510. "In reviewing administrative actions, [the] Court sits in the same position as the superior court, applying the standards of the APA directly to the record before the agency." *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Unless a condition for taking new evidence is established, the court's review is confined to the agency record for judicial review. RCW 34.05.558. The agency's decision is deemed *prima facie* correct and the burden of proving it to be erroneous rests upon the party attacking it. *Schuffenhauer v. Dep't of Employment Sec.*, 86 Wn.2d 233, 235, 543 P.2d 343 (1975).

A. Findings Of Facts: Substantial Evidence Standard.

In reviewing the agency's determination, the court is to apply the factual and legal standards of review found in RCW 34.05.570(3). Questions of fact are reviewed under the "substantial evidence" test of

⁸⁹ CP at 17-20.

⁹⁰ Pursuant to RCW 34.05.010(2), "Agency" includes Institutions of higher education, including YVCC. *See also* RCW 34.05.010(7).

RCW 34.05.570(3)(e), under which a court is to grant relief from an agency order only upon a determination that:

The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.

RCW 34.05.570(3)(e).

Findings of fact to which no error is assigned become verities on appeal. *In re Smith*, 46 Wn. App. 647, 653, 731 P.2d 1149, *review denied*, 108 Wn.2d 1006 (1987). The hearing officer's and Board of Trustee's explicit factual findings have not been assigned error and, therefore, should be treated as verities by this court under case law and the Rules of Appellate Procedure (RAP). RAP 10.3(g) requires a party to include in his or her brief "[a] separate assignment of error for each finding of fact a party contends was improperly made or refused [.]" *See also* RAP 10.4(c). This rule was applied to an appeal from an administrative decision in *Fuller v. Dep't of Employment Sec.*, 52 Wn. App. 603, 762 P.2d 367 (1988) *review denied*, 113 Wn.2d 1005 (1989). Specifically, the *Fuller* court stated:

We hold that where, as here, a party fails to assign error properly to the findings of an administrative agency under RAP 10.3(g) and 10.4(c), such findings will be treated as verities on appeal. We will thus limit our review to

determine whether the findings support the conclusions of law.

Id. at 606.⁹¹

Therefore, the College requests that the Court consider the hearing officer's and Board of Trustees' findings of fact verities on appeal and the established facts of the case.

B. Questions Of Law: Error Of Law Standard.

Pure questions of law are subject to *de novo* review by the court. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113, *cert. denied*, 459 U.S. 1106 (1983). This review, however, is subject to "substantial weight" being given to the agency's construction of statutory language and legislative intent. *Macey v. Employment. Sec. Dep't.*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

C. Mixed Question of Law And Fact.

Issues which call into question the propriety of both the factual inferences and the legal conclusions drawn by the agency are reviewed as mixed questions of law and fact. Review of mixed questions calls for the court to determine whether substantial evidence supports the finding of the

⁹¹ See also *Wells v. Dep't of Employment Sec.*, 61 Wn. App. 306, 314 n.8, 809 P.2d 1386 (1991) (“[t]his court must take the findings in the record as verities and may not reweigh the credibility of evidence upon which those findings are based.”); *Tapper*, 122 Wn.2d at 407 (“[b]ecause Tapper did not attack any of these findings in her appeal, except to claim that the Commissioner had no legal authority to modify the findings made by the ALJ, we treat them as verities.”).

agency and then apply a *de novo* determination of the correct law (subject to the deference discussed above) to that finding. *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). In reviewing a mixed question, the court is not free to substitute its judgment for that of the agency as to the facts.

D. Arbitrary Or Capricious Standard.

The question of whether or not the agency's decision is "arbitrary or capricious" calls for the court to determine whether the agency's decision is a "willful and unreasonable action, without consideration and a disregard of facts or circumstances." *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 439, 836 P.2d 235 (1992) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972)). Even if the Court believes that the agency's decision is erroneous, the decision is not arbitrary or capricious if it is reached after due consideration of the facts; or, more simply, where there is room for two opinions, the agency's decision must prevail. *Id.*

V. SUMMARY OF ARGUMENT

The College Board of Trustees adopted findings of fact which were based on substantial evidence presented at hearing and which support their conclusions of law and decision.

In the instant appeal, the hearing officer made a factual determination that:

Overwhelming evidence exists to support the allegations outlined against Mr. Lee in the February 9, 2007, Notice of Dismissal. Mr. Lee ignored the repeated warnings and discipline implemented against him and he continued to engage in a pattern of harassment and intimidation against his colleagues. Mr. Lee clearly used the complaint process to coerce, intimidate, or retaliate against individuals for things other than the discrimination he was asserting. Although Mr. Lee contended that he was subjected to repeated acts of discrimination and retaliation based upon race, he presented no credible evidence in this case that the College Administration, or other faculty members, were motivated by racial or ethnic animus, or that they engaged in any conspiracy against him, retaliatory, racial or otherwise. He also failed to present any significant evidence that his actions were reasonable and not motivated by his own self-interest.”⁹²

Lee does not assign error to any of the hearing officer’s or Board of Trustees’ explicit factual findings. Adequate consideration of the facts and circumstances was given in making the decision to dismiss Lee from his tenured employment at the College. Because the Board of Trustees’ decision was based on substantial evidence and in accordance with the applicable CBA and with applicable law, this appeal should be denied.

⁹² AP at 159-60.

VI. ARGUMENT

The College correctly applied the CBA and the applicable law to the established facts in dismissing Lee from his employment with the College as set forth in the February 9, 2007, notice of dismissal.

A. **Substantial Evidence In The Record Supports The College's Action Dismissing Lee.**

1. **Lee Was Dismissed For Sufficient Cause.**

The evidence in the record overwhelmingly maintains and supports that Lee was properly dismissed from his employment with the College. The record clearly and repeatedly indicates that Lee's dismissal was the result of his continued and repeated; "Willful neglect of duty; Gross misconduct and Willful violation of published District rules and regulations".⁹³ Despite Lee's apparent argument to the contrary, neither the CBA or the published District rules and regulations allow an employee of the College to engage in the destructive and self-serving activities which were advanced by Lee.

In response, Lee apparently argues that he cannot be dismissed due to the fact that the disciplinary action stemmed from his activities as an adjunct instructor in the Speech Department, rather than in the course of his primary assignment of Counselor. In other words, Lee claims that he

⁹³ Ex. 44 at 4.

may not be disciplined because his disruptive and unprofessional behavior was not directed to his fellow counselors in Grandview.

This argument has no merit and may be easily dismissed. Neither the CBA nor District rules distinguish between teaching and counseling assignments in proscribing corrosive, unprofessional conduct. Similarly, workplace rules and expectations do not proscribe such conduct against some categories of employees but allow it against others.

Lee further asserts that “The Court of Appeals must find that the evidence from the Administrative record is not sufficient cause to dismiss a tenured Counselor based on RCW 28B.50.861 dismissal only for sufficient cause.”⁹⁴ The certified record fully supports that there was sufficient cause to dismiss Lee from his employment with the College. The hearing officer’s findings of fact A5 and A6⁹⁵ set forth the reasons for dismissal pursuant to the CBA and Board Policy. Several pages of uncontested findings of fact form the factual basis for Lee’s dismissal. The hearing officer then provided specific Conclusions of Law supported by her uncontested Factual Findings.⁹⁶

Pursuant to RCW 28B.50.861 a tenured faculty member may be dismissed for sufficient cause. Simply put, sufficient cause can be defined

⁹⁴ Br. Appellant at 33.

⁹⁵ AP at 145-48.

⁹⁶ AP at 161.

as a reasonable ground for removal that is not arbitrary or capricious. *Sinnott v. Skagit Valley College*, 49 Wn. App. 878, 888-89, 746 P.2d 1213 (1987). The State's interest in maintaining harmony among, co-workers, curtailing conduct impeding faculty members of their daily duties, and preventing activities disruptive of the educational process and providing for the orderly functioning of the institution is sufficient to support dismissal. *Stastny v. Central Washington University*, 32 Wn. App. 239, 251, 647 P.2d 496 (1982).

2. The Hearing Officer Properly Addressed All Of Lee's Motions.

Without citation to the record, legal authority or clear explanation of his logic, Lee notes a series of motions before the hearing officer and questions in his assignment of error whether the hearing officer properly ruled on these motions.⁹⁷

During the administrative hearing, the hearing officer specifically acknowledged that she addressed all of Lee's Motions.⁹⁸ In fact, Lee himself confirmed that there were no further motions for the hearing officer to rule on.⁹⁹ Lee's argument lacks merit and the record clearly

⁹⁷ Br. Appellant at Assignment of Error 1 and pgs. 2-3.

⁹⁸ Tr., 8/31/07 at 25.

⁹⁹ Tr., 8/31/07 at 28.

demonstrates that the numerous motions filed by Lee were properly considered and addressed by the hearing officer.¹⁰⁰

Lee fails to present any citation to the record or authority to which the College can respond. Lee's motions had no basis in fact and consisted entirely of argument which was properly addressed by the hearing officer.

3. The College's Disciplinary Actions Against Lee, Including But Not limited To The Initiation Of Dismissal Proceedings, Was Done In Accordance With The Applicable Provisions Of The CBA.

The rights and responsibilities of all academic employees and the College are set-forth in the relevant articles of the applicable CBA.¹⁰¹ Much of Lee's argument in his Brief of Appellant stems from his belief that his dismissal did not follow the articles of the relevant CBA. The certified record clearly supports the fact that all of the action taken by the College concerning Lee was done pursuant to the relevant provisions of the applicable CBA.

B. The College Followed All Procedural Requirements.

1. The Court's Review Is Confined To The Agency Record For Judicial Review.

As discussed *supra*, pursuant to RCW 34.05.558, unless a condition for taking new evidence is established, the court's review is

¹⁰⁰ Tr., 8/20/07 at 7-42.

¹⁰¹ Ex. 1-4. Ex. 4 contains the CBA which was in place at the time of Lee's dismissal.

confined to the agency record for judicial review. In order for an issue to be properly raised before an agency, there must be more than a hint or slight reference to the issue in the record. *King County v. Boundary Review Board*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).

Several of the issues raised by Lee in his Brief of Appellant were not raised and preserved by evidence presented in the agency record. These issues include Lee's argument of not having an Arts and Sciences Dean at the dismissal hearing,¹⁰² Lee's newly-raised contention that he was denied access to his personnel file¹⁰³ and his assertion that he "never received a disciplinary hearing because the Department of Health did not find misconduct."¹⁰⁴

Lee's briefing fails to reference any citation to the certified record regarding the requirement of having an Arts and Sciences' Dean on the Hearing Committee. Regardless, the applicable article of the CBA clearly does not require that an Arts and Sciences Dean serve on the hearing committee.¹⁰⁵

The record does not support Lee's contention that the College denied Lee access to his personnel file. Lee's sole basis in support of this misrepresentation is his subjective interpretation of a July 11, 2007, e-mail

¹⁰² Br. Appellant at 3.

¹⁰³ Id.

¹⁰⁴ Br. Appellant at 34.

¹⁰⁵ Ex. 4 at 20 Article 9.12.

between the College's attorney and Mr. Rogstad advising that Lee was requesting that all corrective actions be removed from his personnel file.¹⁰⁶ The July 11, 2007, e-mail was not part of the administrative record and was presented to Lee in 2008 in response to a public records request, as evidenced by the notation in the lower-right hand corner of the document which designates that it was provided in response to a 2008 public records request (PRR). Even if this recently disclosed document is considered, it does not support Lee's contention that he was denied access to his personnel file. There is no evidence in the certified record to support Lee's contention that he was denied access to his personnel file at any time.

Similarly, there is no evidence in the certified record regarding a disciplinary hearing with the Department of Health other than the March 11, 2008, letter cited by Lee which is not part of the certified record of administrative proceedings and was not even generated until after the administrative hearing was closed.¹⁰⁷ Regardless, a letter from the Department of Health over a year after Lee's dismissal letter had absolutely no relevance to his dismissal from the College.

2. The Record Shows That The College Followed Progressive Discipline.

¹⁰⁶ CP at 343.

¹⁰⁷ CP at 907.

Contrary to Lee's assertions, the record clearly supports that the College applied progressive discipline to Lee. The Findings of Fact contains thirteen pages of findings which illustrate how progressive discipline was applied.¹⁰⁸ Again, Lee fails to take exception to any of these explicit findings. There were four different CBA's between the year 2000 and the date of Lee's dismissal.¹⁰⁹ At the time of the initial warning letter, the applicable CBA is contained at Exhibit 1. Exhibit 1 at article 15.4 states that "Discipline shall be only for just cause and shall be progressive as applied to the specific facts of the case involved." On the date of the three day suspension, the applicable CBA is set forth as Exhibit 3. Exhibit 3 is identical to Exhibit 1 regarding discipline and is also referenced as article 15.4. It should be noted that neither Exhibit 1 or Exhibit 3 has an article concerning "corrective action," discipline is noted simply to be progressive in nature. On the date of Lee's dismissal letter from the College, the applicable CBA was set forth as Exhibit 4. Exhibit 4 sets forth "corrective measures" however, it should be noted that by the time Lee received the dismissal letter he had already received both a warning letter and a three day suspension, both of which were in compliance with the applicable CBA. The College was not required to go from a formal disciplinary action (as set forth in section 9.6 of Exhibit 4)

¹⁰⁸ AP at 148-60.

¹⁰⁹ Ex. 1-4.

to a corrective action, as such a backward movement would defeat the purpose of progressive discipline. The College did exactly what it was required to do pursuant to the applicable articles set forth in the CBA.

3. The Record Shows That The Proper Supervising Administrator Issued The 2000 Warning Letter And 2006 Suspension Of Lee.

There is no evidence in the record to support Lee's contentions that he was disciplined by an inappropriate administrator or that Dean Rozdilsky had informally resolved the McCormick complaint.¹¹⁰

Mr. Rogstad testified extensively with regards to why Vice-President Karen Judge authored the 2000 written warning.¹¹¹ Furthermore, there is extensive evidence in the record to support the fact that Mr. Ybarra had authority to discipline Lee when he issued the suspension letter in 2006.¹¹² In addition, the unchallenged findings of fact explain why Mr. Ybarra was the proper Dean to rule on the McCormick complaint.¹¹³

Lee's assertion that Dean Rozdilsky resolved the McCormick complaint informally is incorrect and not supported by the record. What the record clearly shows is that the parties had a verbal agreement to try and involve an outside mediator. However, before that could be done, Lee sent an incendiary and caustic letter which forced Mr. McCormick to

¹¹⁰ Br. Appellant at 22.

¹¹¹ Tr., 8/20/07 at 218-19.

¹¹² Tr., 8/20/07 at 297-99; Tr., 8/21/07 at 121-136; 170-74. Tr., 8/23/07 at 92-93.

¹¹³ AP at 154 Finding of Fact 19.

determine that the matter could not be resolved informally.¹¹⁴ The testimony and evidence presented very clearly shows that Dean Rozdilsky never resolved the complaint informally due to Lee's actions.¹¹⁵

4. The Record And Applicable CBA Does Not Support Lee's Assertions Regarding Removal of the 2000 Warning Letter.

Lee's argument that failure to remove the 2000 warning letter from his personnel file was obstruction of justice is likewise without merit.¹¹⁶ As discussed above, Lee was never denied access to his personnel file. The record shows that Lee received his dismissal letter from the College on February 9, 2007.¹¹⁷ The administrative record clearly indicates that it was not until July 2007, several months following his dismissal, that Lee first requested that the 2000 warning letter be removed from his personnel file.¹¹⁸ The year 2000 warning letter had been utilized as a basis for progressive discipline for years prior to Lee requesting that it be removed. Lee failed to request the removal of the letter at any time prior to his dismissal from the College.

Lee's dismissal was predicated upon the proper application of the CBA upon his acts and behavior which ultimately ended with his

¹¹⁴ Tr., 8/21/07 at 136-42.

¹¹⁵ Tr., 8/31/07 at 194-95.

¹¹⁶ Br. Appellant Assignment of Error 2; pgs. 3-5.

¹¹⁷ Ex. 44.

¹¹⁸ Tr., 8/20/07 at 227-29.

dismissal. Assuming, *in arguendo*, that Lee did request that the 2000 warning letter be removed from his personnel file, *prior to* the dismissal letter, it would not change the fact that his dismissal was based upon the proper application of progressive discipline in which the 2007 dismissal appropriately followed and referenced the 2006 suspension.¹¹⁹ Removal of the 2000 warning letter, after his dismissal, would not change the fact that the 2006 suspension followed by the 2007 dismissal composed the proper steps in progressive discipline.

5. The Record Does Not Support Lee's Assertion That He Was Overcharged And Was Provided With Only a Portion Of The Certified Record.

The only citation provided by Lee in support of his contention that he was overcharged and did not receive all of the certified record of administrative proceedings is a reference to his Notice of Payment of Hearing Administrative Record for Appeal of Dismissal.¹²⁰ RCW 34.05.566(3) provides that an agency may charge a nonindigent petitioner with the reasonable costs of preparing any necessary copies and transcripts for transmittal to the court. Lee did not present any argument or briefing that the College's calculation of costs was incorrect while this matter was at superior court. Similarly, Lee failed to present any argument at superior court that he was indigent. Since this case is being reviewed pursuant to

¹¹⁹ Ex. 44 which incorporates and references Ybarra letter of 1/10/07; Ex. 46.

¹²⁰ Br. Appellant at 6.

the APA, the cost of the transcript was properly borne by the appellant. *McKinlay v. Dep't of Social and Health Services*, 51 Wn. App. 491, 495, 754 P.2d 143 (1988).

Lee was provided with the entire certified record. Lee has presented no citation to the record for his newly-developed misrepresentation that he did not receive 520 pages of the certified record. There is no factual support for Lee's contention that he did not receive the entire certified record. Lee's only support for this misrepresentation is his self-serving Notice of Payment of Administrative Record,¹²¹ Certificate of Service,¹²² and Receipt of Payment from the College.¹²³ Neither of these documents supports Lee's argument. Lee was certainly well aware of the entire contents of the certified record due to the fact that he was present for all of the proceedings. Furthermore, there is no dispute that the College filed the certified record along with an itemized description of the contents of the certified record and a declaration by the College records custodian who forwarded the records to the court.¹²⁴ Lee did not raise the issue of not having the entire record during the administrative hearing

¹²¹ CP 1303.

¹²² CP 1304.

¹²³ CP 1305.

¹²⁴ AP Index of Certified Record of Administrative Proceeding filed with Superior court on September 22, 2008.

process or at superior court and is precluded from raising the issue at this time.

C. Lee’s Brief of Appellant Fails to Comply With Procedural Rules.

A litigant appearing *pro se* is bound by the same rules of procedure and substantive law as his or her attorney would have been had the litigant chosen to be represented by counsel. *Patterson v. Superintendent of Public Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994). RAP 10.3 requires the appellant to provide “[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6). In addition, a *pro se* litigant must comply with all procedural rules and failure to do so may preclude review of the asserted claims. *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999).

Lee presented very little substantive evidence during the administrative hearing. Most of Lee’s testimony consisted of argument, as evidenced by the numerous sustained objections raised by the College and the hearing officer’s repeated admonishment to Lee regarding his need to present testimony rather than argument.¹²⁵ In his Brief of Appellant, Lee references citations to the testimony contained in the administrative record

¹²⁵ Tr., 8/30/07 at 127; 186; 199; 205-09; 218. Tr., 8/31/07 at 66; 73; 79; 80; 89; 90; 91; 111; 114-20; 124.

on just two pages of his brief.¹²⁶ These citations refer to an unchallenged finding of fact and a secondary issue regarding attempts to mediate a complaint which had little relevance regarding Lee's dismissal from the College. Lee's brief is largely conclusory and the court should not consider those arguments which are not properly raised.

D. The Record Does Not Support Lee's Representation Of The Facts Concerning The "Lockett" Complaint.

Lee's assignment of errors concerning the "Lockett" complaint¹²⁷ is predicated upon a mischaracterization of the established and unchallenged facts of this appeal. Lee has attempted to distort and misrepresent the "Lockett" Complaint to the extent that his representation of this alleged incident has no basis in fact and has simply become a fabricated device for Lee to apply his unique legal theories and arguments. These unique theories and arguments rely completely on Lee's unsupportable rendition of this alleged incident.

As discussed *supra*, Lee has not challenged any of the hearing officer's explicit findings of fact. The hearing officer made the following findings Specific to the "Lockett" Complaint:¹²⁸

1. Substantial evidence exists that Mr. Lee encouraged Mr. Lockett to file his complaint against Mr. McCormick with the State Board and that he used this alleged incident between Mr. Lockett and Mr. McCormick for his own personal gain.

¹²⁶ Br. Appellant at 8; 38.

¹²⁷ Br. Appellant Assignment of Errors Nos. 4, 5.

¹²⁸ AP at 160.

2. It was obvious to this Hearing officer that Mr. Lee, either directly or indirectly, engaged former student Nick Esparza to support the assault claim against Mr. McCormick. Mr. Esparza's testimony was not credible, it was evasive at best, and it bordered on pure fabrication. For example, contrary to his testimony that he was a student at the College at the time the alleged incident between Mr. Luckett and Mr. McCormick took place, the College clearly established that he was not. Furthermore, Mr. Esparza testified that the reason he placed a call from his home in Arkansas to Mark Rogstad in September of 2006 about the Luckett incident was that the incident was being talked about on the Yakima campus and that he had heard about it from several people. When instructed by this Hearing Officer to identify who these "people" were, Mr. Esparza finally stated that he had heard about it from Gwen Guinn, another employee at the College. Ms. Guinn testified that she had never spoken to Mr. Esparza about the Luckett incident.

There is no factual support in the record or even a citation in Lee's Brief of Appellant to support his contention that Mr. Luckett was a vulnerable adult or child and was Lee's patient.¹²⁹ Similarly, there is no factual support in the record that the "Luckett" complaint was a crime victim report.¹³⁰ Therefore, there is no factual basis to support Lee's assertions that Chapters 74.34; 70.02; 5.60; 42.56 or 26.44 RCW have any relevance to this appeal. A rational, factually supported conclusion with

¹²⁹ Br. Appellant at 6.

¹³⁰ Id.

regards to the “Lockett” complaint is set forth on page 13 of the Rogstad and Kjellman investigation.¹³¹

Lee’s assertion that the August 2, 2006 “Lockett” e-mail was not a valid complaint is generally irrelevant.¹³² On February 27, 2006, Lee was suspended for three days by the College.¹³³ Lee was found to have violated Board Policy 1.05¹³⁴ and was warned to cease and desist his continued pattern of harassing and asserting false allegations against his colleagues in violation of Board Policy 1.05. In his August 2, 2006, e-mail and during meetings with administrators following his e-mail, Lee continued with the behavior that he was specifically and repeatedly warned against engaging in, regardless of whether or not the August 2, 2006, e-mail was a complaint (although it clearly was a valid complaint as admitted by Lee himself¹³⁵), it still consisted of the exact same type of behavior that Lee was repeatedly warned against engaging in. Therefore, it served as a valid basis for the subsequent complaint by Mr. Rogstad and the resulting disciplinary action against Lee.

¹³¹ Ex. 19.

¹³² Br. Appellant at 7. Compare this with Br. Appellant at 8 where Mr. Lee asserts that the “Lockett complaint” is a valid complaint.

¹³³ Ex. 17.

¹³⁴ Ex. 15.

¹³⁵ Tr., 8/21/07 at 21-22.

E. The Record Does Not Support Lee’s Allegation That His Dismissal Was In Response To His Exercise Of Rights And Constituted Unlawful Retaliation.

The record does not support Lee’s allegation that he was discharged in violation of public policy regarding the mandatory reporting law,¹³⁶ violation of Title VII of the Civil Rights Act of 1964,¹³⁷ nor did Lee experience disparate treatment.¹³⁸

1. Lee Was Not Dismissed In Violation Of Public Policy.

Lee relies on *Gardner v. Loomis Armored Inc.*, in an effort to force the facts and circumstances of this case into a claim of wrongful discharge on public policy grounds. In *Gardner*, the Supreme Court held that a former employer violated public policy in discharging a former employee for violating company rules in order to save a woman from a life-threatening hostage situation. 128 Wn. 2d 931, 913 P.2d 377 (1996).

Gardner set forth a four-part test for analyzing wrongful discharge claims involving alleged violations of public policy. The four prongs are: (1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element); (2) The plaintiff’s must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element); (3) The plaintiffs must prove that the public-policy-

¹³⁶ Br. Appellant Assignment of Error 4.

¹³⁷ Br. Appellant Assignment of Error 5.

¹³⁸ Br. Appellant Assignment of Error 7.

linked conduct caused the dismissal (the *causation* element); and, (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element). *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2001). *Gardner* is not applicable for several reasons.

Lee has failed to prove the existence of a clear public policy issue which constitutes the first prong of the *Gardner* test. Lee cites his filing of EEOC and HRC complaints,¹³⁹ and further “(a)lleges that he was discharged in violation of public policy for being a mandatory reporter of suspected abuse or permissive abuse.”¹⁴⁰ The record does not support that Lee was dismissed for filing EEOC or HRC complaints. The record clearly supports that Lee and all the College employees were encouraged to file legitimate EEOC and HRC complaints.¹⁴¹ However, the only evidence in the record is that Lee’s EEOC and HRC complaints had no merit and were filed to harass other individuals.¹⁴²

Similarly, Lee offers no authority for his contention that his numerous HRC and EEOC complaints were “private” to which the College can respond.¹⁴³ There is no legal support for Lee’s contention that

¹³⁹ Br. Appellant at 15.

¹⁴⁰ Br. Appellant at 18.

¹⁴¹ Tr., 8/29/07 at 215-16.

¹⁴² Tr., 8/21/07 at 56-57; Tr., 8/29/07 at 215-16.

¹⁴³ Br. Appellant at 14.

he can file numerous redundant HRC and EEOC complaints which are utilized to intimidate, harass and retaliate against other faculty members and not expect this information and behavior to be utilized in an internal disciplinary process.

The record also does not support the second or third prongs of *Gardner*. Lee has not proven that the College discouraged his ability to file EEOC or HRC complaints or file crime victim or abuse reports. Nor does the record support that Lee's public-policy-linked conduct caused his dismissal.

Finally, as documented in the record and discussed *supra*, the College has provided an overriding justification for Lee's dismissal. The Findings of Fact are soundly based on a compelling record of Lee's repeated violations of the College's ethical standards ultimately resulting in his dismissal. The Conclusions of Law correctly reflect that the CBA expressly authorized Lee's dismissal. Because the College had an overriding justification for its actions, Lee cannot satisfy the *Gardner* test. *Donahue v. Central Washington University*, 140 Wn. App. 17, 26, 163 P.3d 801 (2007).

2. The Record Does Not Support That Lee Experienced Race and Gender Discrimination At The College.

Lee's assertion that the College unlawfully retaliated against him under Title VII for filing race and gender discrimination claims is without merit and not supported by the record. In order to establish an actionable Title VII or RCW 49.60.210 retaliation claim, Lee must objectively show that his complaints to the College were reasonably based on a belief that the College violated the law against discrimination and that those complaints were a substantial motivating factor in the College's decision to terminate his employment. *Estevez v. The Faculty Club of the University of Washington*, 129 Wn. App. 774, 798-99, 120 P.3d 579 (2005). There is nothing in the record to support that anyone at the College made any racially derogatory remark or took any action against Lee based on his race or gender. To the contrary the record clearly shows that the College has a demonstrated history of ensuring and valuing diversity.¹⁴⁴

3. The Record Does Not Support Lee's Assertion That He Experienced Disparate Treatment At The College.

Without any citation to legal authority or reference to any part of the record, Lee asserts that he experienced disparate treatment at the College.¹⁴⁵ To establish a *prima facie* case of racial discrimination based on disparate treatment, a plaintiff must show that his or her employer

¹⁴⁴ Tr., 8/24/07 at 47.

¹⁴⁵ Br. Appellant Assignment of Error 7 at 42-47.

treats some people less favorably than others because of his/her race. The plaintiff must show: (1) she belongs to a protected class; (2) she was treated less favorably in the terms or conditions of her employment than a similarly situated, nonprotected employee; and (3) she and the nonprotected “comparator” were doing substantially the same work. *Johnson v. Dep’t of Social & Health Servs.*, 80 Wn. App. 212, 226-27, 907 P.2d 1223 (1996).

Lee’s disparate treatment argument must fail because he can not establish a *prima facie* case. The record does not support Lee’s contention that he was treated less favorably than others because of his race. The mere fact that Lee’s coworkers and supervisors are of a different race is insufficient to show discrimination. *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 84, 98 P.3d 1222 (2004).

F. Lee Is Not Entitled To His Requested Relief By The Court.

Inasmuch as the hearing officer’s Decision, as affirmed by the College Board of Trustees, was correct, Lee is not entitled to relief by this court. Pursuant to RCW 34.05.574(1), which is the applicable statute regarding the issue of types of relief available, the court may (a) affirm the agency action or (b) order an agency to take action required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

This action is a judicial review of an agency order, not a civil rights action brought pursuant to 42 USC Sec. 1983, or claims for lost wages. It is axiomatic that state agencies can act only pursuant to express or implied authority from the legislature. There is no such authority in state law for agencies to pay damages to their employees through internal processes. Indeed, payment of most damages under these circumstances is expressly precluded by state law. Under RCW 4.92.100, “[a]ll claims against the state for damages arising out of tortious conduct shall be presented to and filed with the risk management office.” This is a prerequisite to any “action ... for damages arising out of tortuous conduct ...” under RCW 4.92.110. There is no evidence of such a claim having been filed here.¹⁴⁶

Even *if* state law authorized (instead of precluded) such damages, the College clearly has not exercised any such authority. There is *no* provision in the CBA, for any award of monetary damages.

Besides there not being any authority to award damages, such an award would make no sense. RCW 34.05.574(3) states: The court may award damages, compensation or ancillary relief only to the extent expressly authorized by another provision of law. There is no such authority in state law for agencies to pay damages to their employees

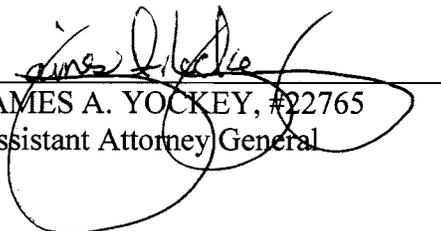
¹⁴⁶ RCW 34.05.574(3) (in reviewing administrative actions, even a court may award damages “only to the extent expressly authorized by another provision of law.”)

through internal processes. Specifically, there is no provision in the CBA for any award of monetary damages.

VII. CONCLUSION

Because the College Board of Trustees' decision was based on substantial evidence and in accordance with both the CBA and applicable law, the College respectfully requests that this court deny Lee's appeal, and affirm the Board of Trustees' Findings of Facts and Conclusions of Law and Decision.

RESPECTFULLY SUBMITTED this 21st day of October, 2010.



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Assistant Attorney General

NO. 28701-7-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

ALPHONSO LEE,

Petitioner/Appellant,

vs.

YAKIMA VALLEY COMMUNITY
COLLEGE,

Respondent

CERTIFICATE OF
MAILING

I, Collien Sanchez, certify and declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am a citizen of the United States of America and of the State of Washington, living and residing in Yakima County in said State, over the age of eighteen years, not a party to the above-entitled action, and am competent to be a witness herein.

That on the 21st day of October, 2010, I deposited in the United States mail a properly stamped and addressed envelope, to:

Renee S. Townsley
Clerk, Court of Appeals III
500 N. Cedar Street
Spokane, WA 99201

Alphonso Lee
1114 South 38th Ave
Yakima, WA 98902

said envelope containing a copy of this Certificate of Mailing and a copy of Respondent's Brief.

SIGNED at Yakima, Washington this 21 day of October, 2010.

A handwritten signature in black ink that reads "Collien Sanchez". The signature is written in a cursive style with a horizontal line underneath the name.

COLLIEN SANCHEZ
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Yakima, WA 98902