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STATE OF WASHINGTON

NO. 81135-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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PERRY MILLS,

*Appellant,*

v.

WESTERN WASHINGTON UNIVERSITY,

*Respondent.*

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

Appellant Mills assigns error to:

1. The Superior Court's order affirming the decision of the Board of Trustees of Western Washington University ("WWU").

2. The Final Order of the Board of Trustees of WWU imposing a two quarter suspension without pay.

Mills also assigns error to the following mislabeled "Findings of Fact" entered by the Superior Court<sup>1</sup>:

3. "Finding of Fact" No. 1.

4. "Finding of Fact" No. 2.

5. "Finding of Fact" No. 3.

6. "Finding of Fact" No. 4.

7. "Finding of Fact" No. 6.

8. "Finding of Fact" No. 7.

Mills also assigns error to the following Conclusions of Law entered by the Superior Court:

9. Conclusion of Law No. 1.

10. Conclusion of Law No. 2.

11. Conclusion of Law No. 4.

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<sup>1</sup> Although the Superior Court's order contains seven rulings which are "Findings of Fact," appellant respectfully submits that none of these rulings are actually factual findings. All of them are mislabeled conclusions of law which are properly subject to *de novo* review. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1988).

12. Conclusion of Law No. 5.
13. Conclusion of Law No. 6.
14. Conclusion of Law No. 8.

Mills also assigns error to the following conclusions of law entered by the Board of Trustees of Western Washington University:

15. Conclusion of Law No. 5.
16. Conclusion of Law No. 21.
17. Conclusion of Law No. 28.
18. Conclusion of Law No. 30.
19. Conclusion of Law No. 33.
20. Conclusion of Law No. 34.
21. Conclusion of Law No. 38.
22. Conclusion of Law No. 46.
23. Conclusion of Law No. 47.
24. Conclusion of Law No. 53.
25. Conclusion of Law No. 63.
26. Conclusion of Law No. 67.
27. Conclusion of Law No. 68.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the closure of the hearing before the Faculty Hearing Panel violate the command of Wash. Const., art. 1, § 10 which states in pertinent part: "Justice in all cases shall be administered openly . . ."?

2. Did the closure of the hearing before the Faculty Hearing Panel violate the command of RCW 34.05.449 which states in pertinent part that an adjudicative hearing “is open to public observation except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules.”?
3. Did the University commit three separate breaches of its contractual obligations to Mills when its Provost suspended him (a) prior to the bringing of any disciplinary charges; (b) without consulting with the Executive Council of the Faculty Senate, and (c) without making any determination that he posed any threat of immediate harm; all in violation of Article XVII of the Faculty Handbook?
4. Did the University breach its contractual obligations to Mills under Articles XV and XVI of the Faculty Handbook, by suspending him for reasons that were *not* listed as one of the five contractually permissible grounds for a severe disciplinary sanction?
5. As construed by the University, do the provisions of the *Code of Faculty Ethics* violate the First and Fourteenth Amendments because they fail to provide faculty members with clear notice of the type of speech for which they may be punished?
6. Does the imposition of a disciplinary sanction upon a university professor violate the professor’s First Amendment right of free speech in an academic setting, or his art. 1, § 5 free speech rights, where the speech for which he was punished was classroom speech directly related to a classroom instructional exercise?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

Perry Mills is a tenured professor in the Drama Department at WWU. CP 81, ¶ 1. For more than 20 years he taught classes in the Department. CP 81, ¶ 1; RP III, 100, 114. On October 18, 2004 he was suspended *with* pay by the University Provost. CP 81, ¶ 2. Seven months later, disciplinary charges were filed against him. CP 42-48. A

disciplinary hearing was held before a faculty panel in October of 2005. CP 82, ¶ 5. Over Mills' objections the hearing was closed to the public. RP I, 10, 15.<sup>2</sup>

At the hearing Mills moved to dismiss the charges on breach of contract grounds, noting that none of the charges brought were included within the list of the five exclusive grounds for severe discipline enumerated by Article XV of the *Faculty Handbook*. RP I, 34-38, 44-50. The Hearing Panel denied this motion. RP I, 59. Mills also moved for an immediate end to his suspension with pay, arguing that it violated the provisions of the Faculty Handbook and thus constituted a breach of contract. RP I, 39-43. The Panel denied this motion as well. RP I, 59.

At the conclusion of the hearing, the faculty Hearing Panel recommended an additional two quarter suspension *without* pay. CP 78. Both sides appealed to the University President, who declined to change the recommended disciplinary sanction. CP 82, ¶¶ 7-8. On January 26, 2006 Mills appealed to the Board of Trustees. CP 83, ¶ 9.

The Trustees rejected all of Mills' breach of contract contentions and also his contention that his hearing was illegally closed in violation of provisions of the state constitution and the APA. CP 109-09, 125-26. On

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<sup>2</sup> The report of proceedings for the hearing before the Faculty Panel is referred to as follows: Vol. I: Oct. 5, 2005 (the transcript begins on CP 170); Vol. II: Oct. 12, 2005 (beginning on CP 232); Vol. III: Oct. 13, 2005 (beginning on CP 441); Vol. IV: Oct. 14, 2005 (beginning on CP 622); Vol. V: Oct. 19, 2005 (beginning on CP 712).

July 9, 2006 the Trustees remanded the case to the Faculty Hearing Panel and instructed the panel to reconsider whether Mills acted maliciously, and directed that if malice and a serious and persistent neglect of duty was found then “the Panel must conclude that Mills should be fired.” CP 1640, *Order on Remand*, ¶ 3; CP 83, ¶ 10.

On September 7, 2006, the Faculty Hearing Panel reconvened, and on September 25, 2006 it *again* recommended a two quarter suspension without pay and explicitly *refused* to find that Mills had acted maliciously. CP 83, ¶ 11. On October 27, 2006, the Trustees accepted the Faculty Hearing Panel’s refusal to find that Mills acted maliciously and reluctantly accepted the panel’s recommendation that Mills be suspended *without* pay for an additional two quarters. CP 80, 126. The University’s motion for reconsideration was denied on November 13, 2006. CP 1558-1559.

Mills' suspension *with* pay lasted from October 18, 2004 until January of 2007. The Trustees’ decision was then put into effect and he was suspended *without* pay for the Winter and Spring quarters of 2007. The University resumed paying Mills in the Fall quarter of 2007.

On November 28, 2006, Mills filed an APA Petition for Review in Whatcom County Superior Court. CP 1496-1559. On November 21, 2007 the Honorable Steven Mura heard argument and issued an oral decision affirming the Trustees’ decision. Written findings of fact and conclusions of law, and an order affirming the Trustees’ decision were

entered on December 27, 2007. CP 31-35.

The Superior Court rejected Mills' contentions that the closure of his disciplinary hearing violated art. 1, § 10 and RCW 34.05.449. Mills also raised the breach of contract contentions that he had raised throughout the administrative proceedings before the Hearing Panel, the President, and the Trustees. Judge Mura never specifically addressed Mills' breach of contract claims. In his oral ruling he simply stated that he did not have time to address all the arguments raised by Mills. CP 13. His written order does not address any of the breach of contract issues.

Mills filed a timely notice of appeal to this Court on January 18, 2008. CP 3-10.

## **2. FACTS PERTAINING TO HEARING CLOSURE**

### **a. Objections to Closed Hearing**

The disciplinary hearing before the Faculty Hearing Panel commenced at 3:30 p.m. on October 5, 2005. RP I, 1. The first issue to be addressed was whether the hearing should be open to the public or not. RP I, 7-8. Article XVII, ¶ 2(d) of the *Faculty Handbook* states: "The hearing will be private unless the Hearing Panel, in consultation with the Provost and only in agreement of the faculty member, decides that the hearing should be public." CP 59; RP I, 8-9. Mills argued that this conflicted with the command of art. 1, § 10 that justice in all cases shall be administered openly, and he questioned why the hearing should be held in

secret. RP I, 10. Counsel for the University argued that the hearing should be “private” and likened the proceeding to grand jury proceedings and adoption hearings which are closed to the public. RP I, 13. She said that there was a risk that slanderous statements might be made by both sides. RP I, 14. University counsel refrained from specifying who she believed might be defamed in the course of the disciplinary hearing. But it was obvious that the subject of embezzlement by Professor Kuntz was certain to come up during the hearing since one of the reasons why Kuntz recommended that disciplinary action be taken against Mills was that Mills was continuing to make statements accusing Kuntz of embezzling student course fees.<sup>3</sup> The University knew that Mills’ position was that his statements were true and that Professor Kuntz was guilty of embezzlement. This was not an allegation which the University wanted to see aired in a public hearing, especially since an independent audit had been conducted and tended to support Professor Mills’ allegation.<sup>4</sup> Mills responded that no reason had been given why the command of the Constitution for an open hearing should be ignored. RP I, 15.<sup>5</sup>

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<sup>3</sup> See Ex. 16, Letter of May 28, 2004 from Mark Kuntz to Dean Linda Smeins, CP 1280.

<sup>4</sup> See Ex. 24, “Theater Department Special Course Fee Review,” CP 1294-1312.

<sup>5</sup> “She did not offer you a reason why this hearing should be closed except that the Faculty Senate thought that they would like it that way a lot of the time.

“I have no doubt in this case the administration and some of the witnesses would like it closed because they would like to be able to testify, say their reasons why Professor Mills should be sanctioned in some way, dismissed, or suspended or something, and have it so that no one ever hears why.

After a brief recess, the Hearing Officer announced that hearing would be closed: "I'm reporting the decision of the panel, which is to keep the hearing private as per the Faculty Handbook." RP I, 16. Mr. Paul de Armond, a newspaper reporter present in the hearing room, was then ordered to leave the room. RP I, 16. Mr. de Armond returned on the next hearing day, October 12, 2005, and made his own motion that he be allowed to attend the hearing. He argued that under RCW 34.05.449 of the Administrative Procedures Act, it was illegal to close the hearing to the public. His arguments were made part of the record, RP II, 29-30 (Attachment A). Mills specifically joined in de Armond's arguments. RP II, at 26-27; RP III, 82. The Hearing Officer again overruled the objection and refused to permit de Armond to observe the hearing. RP II, at 28-29.

After the Faculty Hearing Panel rendered its decision, Mills appealed to the President of the University. Mills again argued that the closure of the hearing violated art. I, § 10 and RCW 34.05.449. The President rejected this contention and affirmed the Hearing Panel's two quarter suspension without pay. In his appeal to the Trustees Mills raised these same arguments, and the Trustees rejected them, stating that: "[w]e regard the Faculty Handbook's hearing procedures, as we must, as a

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" Miss Bohlke says that the fact of the hearing is public. That's true. I can see it in the paper now, you know, "Hearing held. Testimony was given. This result was reached. Why? We can't tell you.

provision of law expressly authorizing closure” of the proceedings for purposes of RCW 34.05.449(5). CP 126, ¶ 67.

**b. Superior Court Ruling on Closure Issue**

Mills raised these issues again in the Superior Court. Judge Mura ruled that art. 1, § 10 had not been violated because it applied only to cases arising within the courts and not to administrative hearings. CP 24.

With respect to the statute in the Administrative Procedures Act, Judge Mura *agreed* with Mills that RCW 34.05.449 had been violated:

[W]e have to get to the statutory provision of whether the hearing was open to the public and if there was a violation of the statute. And in that regard I think the statute was violated. I don't think the university has the right in all of these cases to simply close the hearing and conduct their business in private. They are a state agency. And the legislature has spoken that the hearing is open to public observation. . . . I don't believe that a university or any administrative agency can simply adopt a rule that all of our hearings will be closed.

CP 25. However, Judge Mura also concluded that Mills should have commenced an independent lawsuit seeking a writ to compel the faculty Hearing Panel to hold a hearing open to the public:

And under the circumstances in this case, and this is going to be a good appellate issue, Mr. Lobsenz, because I believe unlike the courtroom sense there is a right to go to court to seek a remedy immediately for any violation of a statutory or constitutional provision within the administrative context though, as I said, a writ of

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That's not open justice. That's not consistent with the State Constitution. And the Faculty Senate, with all due respect to them, which you – many of you, I guess, may be members of, cannot overrule the Constitution.”

mandamus or writ of prohibition or an injunction, temporary injunction immediately, we want this terminated. And if that hearing takes place at five o'clock at night and the court isn't open, if the judge can be reached at 8:30 the next morning and get an order enjoining any further action by the university in processing that case or sending it for review. . . .

CP 27. Because Mills did not seek a writ of mandamus or prohibition to force the Hearing Panel to hold an open hearing, Judge Mura ruled that the issue had been "waived":

I think that waiver, the doctrine of waiver ought to be applied in the statutory violation context in an administrative proceeding. That's something that the Court of Appeals may or may not agree with me on. . . .

CP 28.

**D. APPELLATE REVIEW STANDARDS**

Interpretation of the constitution provisions and of statutes are both questions of law which are reviewed de novo. *State v. Pulfrey*, 154 Wn.2d 517, 522, 111 P.3d 1162 (2005). In reviewing an administrative decision an appellate court stands in the same position as the Superior Court and reviews conclusions of law de novo. *Wenatchee Sportsmen's Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Interpretation of an unambiguous contract is a questions of law which is reviewed de novo. *Mayer v. Pierce County Medical Bureau*, 80 Wn. App. 416, 909 P.2d 1323 (1995); *Yaw v. Walla Walla Sch. District*, 106 Wn.2d 408, 414, 722 P.2d 803 (1986) (question whether school

breached janitor's employment contract was question of law properly reviewed de novo); *Mega v. Whitworth College*, 138 Wn. App. 661, 672, 158 P.3d 1211 (2007) (trial court erred by permitting jury to decide question of contract interpretation which was "a question of law for the court decision," citing *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

**E. ARGUMENT**

**1. ARTICLE 1, § 10 APPLIES TO ALL CASES, INCLUDING THOSE DECIDED BY ADMINISTRATIVE TRIBUNALS.**

**a. Open Access to Government Institutions Is Critical to A Free Democratic Society.**

Art. 1, § 10 provides: "Justice in all cases shall be administered openly . . ." The Superior Court decided that art. I, § 10 has no application to cases heard by administrative tribunals. But this conclusion ignores the fact that art. 1, § 10 does not contain any word which modifies the term "cases." Nevertheless, the Superior Court construed the provision as if the modifier "judicial" was present. This Court has rejected similar arguments in the past. For example, the text of art. 1, § 10 does not contain the word "criminal" and thus this Court has held that it guarantees the public access to judicial proceedings "in both civil and criminal cases." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2005). *Accord Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975).

Although art. I, § 10 does not limit the requirement of openness to

“court” cases, the Superior Court construed it as if it did. But there is no sound reason why secrecy should be viewed as unacceptable for hearings conducted before a court that is formally part of the judicial branch of government, but acceptable for hearings conducted before an administrative tribunal. “Open access to *government institutions* is fundamental to a free and democratic society.” *Dreiling*, 151 Wn.2d at 908 (italics added).<sup>6</sup> Since administrative tribunals are government institutions there is no logical reason why they should be exempt from the constitutional prohibition against secrecy.

**b. Barring the Public From Administrative Hearings Violates Article 1, §§ 1 and 32 By Preventing the People From Exercising Sovereignty Over Their Own Government.**

The Superior Court’s interpretation of art. 1, § 10 also conflicts with Wash. Const., art. 1, §§ 1 and 32. The latter provision states: “A frequent resort to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” In *State ex rel. Mullen v. Howell*, 107 Wn.2d 167, 181 P. 920 (1919) this Court held that art. I, § 32 was put in the Constitution by the people who have “directly charged us with a duty to be mindful of their sovereign rights.”

Article 1, § 1 states: “All political power is inherent in the people, and governments derive their just powers from the consent of the

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<sup>6</sup> “Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” J.J. Bentham, *Rationale of Judicial Evidence* 524

governed, and are established to protect and maintain individual rights.” Art. 1, § 1 is a “statement of a fundamental principle inhering in the formation of the state . . . government.” *State v. Clark*, 30 Wash. 439, 443, 71 P. 20 (1902). Accordingly, in deciding whether it violates art. I, § 10 to exclude the public from a disciplinary hearing conducted, this Court is charged with the duty of protecting the sovereign right to the people, from whom all political power derives, to maintain a free government and to protect individual rights. As this Court recently stated:

Our state constitution sets forth the blueprint for the structure of our state government. Central to that structure is the sovereignty of the people of the state of Washington because “[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”

*1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007), quoting art. 1, § 1.

The sovereignty of the people is the *first* principle articulated in our state constitution because it is the bedrock premise of our state government, “It therefore serves as the lens through which we view all other article I rights.” *In re Recall of West*, 155 Wn.2d 659, 121 P.3d 1190 (2005) (Johnson, J., concurring). Accordingly, the scope of art. 1, § 10 must be viewed through the lens of the political sovereignty of the people. If the people cannot find out what their government is doing, then

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(1827), quoted in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980).

the sovereignty of the people is threatened.<sup>7</sup> If they are not allowed to find out what disciplinary charges are being brought, what evidence supports them, and how the hearings are being conducted, then the people cannot very well give their consent to the manner in which such hearings are conducted or to the discipline imposed for alleged misbehavior. Nor can the people maintain their sovereignty over the government of a state university if they are kept in the dark about allegations of embezzlement of student funds by government employers.

**c. In This Case the University Wanted the Hearing Closed and the Newspaper Reporter Evicted So That The Issue of Embezzlement of Student Course Funds Would Not Be Publicly Aired.**

This Court has consistently held that openness in our state government is constitutionally required: "Secrecy fosters mistrust. This openness is a vital part of our constitution and our history." *Dreiling*, 151 Wn.2d at 903-04. Thus, the proponent of hearing closure must make some showing of a compelling interest" to justify it, and the closure "order must be no broader than necessary" to serve a compelling purpose. *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825; *State v. Bone-Club*, 128 Wn.2d , 258-59, 906 P.2d 325 (1995); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Allied Daily Newspapers*; 121 Wn.2d

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<sup>7</sup> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern

at 210-211. No such showing was made in this case.

The only reason for closure advanced by the University was that the University expected that during the hearing testimony would be given which reflected adversely upon some unnamed other person. RP I, 14. A similar reason for prohibiting access to the transcript of a license revocation hearing was rejected by this Court in the *Cohen* case.<sup>8</sup>

At the disciplinary hearing Professor Kuntz testified that Mills had accused him of embezzling student course fees paid by students in Mills' *Intro to Theater* course. RP II, 152. Kuntz admitted that as a result of Mills' accusation, the University conducted an internal audit to see if Kuntz improperly spent the course fees for equipment which was not specifically required by the students in that course. RP II, 154, 156. He admitted that there was a University policy that "course fees are only supposed to be spent for things which are for that course only," and that he knew about that policy. RP II, 183. He further admitted that he authorized using the student course fee money to buy equipment which was *not* specifically for the use of the students in that course. RP II, 185.

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ignorance: And a people who mean to be their own Governors, must arm themselves with the power that knowledge gives." 9 *Writings of James Madison* 103 (G. Hunt ed. 1910).

<sup>8</sup> "[T]he order of confidentiality stemmed from the trial court's concern that the transcript of the city council's proceedings contained a serious and grave allegation by the sauna parlor licensee against a named individual who was not present, not represented by anyone and not directly involved in the proceedings." *Cohen*, 85 Wn.2d at 388. "While the purpose of the trial court was laudable . . . we conclude that the court's reasons for secret adjudication in this matter are not of sufficient public importance to justify exception to the requirement of Const. art. I, § 10." *Id.* at 389.

He claimed that no one told him that this was improper. RP II, 186. But he later admitted in writing that he had “discovered this week that equipment purchases *are questionable with lab fee funds.*” RP II, 187-188 and Ex. 15; CP 1279. He admitted that although it would have been a good idea, he never made any attempt to refund the misspent course fees to the students in that course. RP II, 189. And he conceded that after Mills accused him of embezzling the course fees he made the decision to eliminate the course fee for Mills’ course and not to spend any money for instructional materials for that class. RP II, 190.

Finally, Kuntz admitted that in the spring of 2005 he wrote to the Dean of the College of Arts and Sciences, Linda Smeins and complained that Mills was still accusing him of embezzling funds. Kuntz stated that Mills had been overheard “telling a group of community members how I embezzled \$20,000 of state funds.” Ex. 16, (admitted RP II, 194). In his memo, Kuntz asked Dean Smeins: “I wonder how long we are going to allow this to happen.” Ex. 16. When asked what he meant by this statement, he answered: “I was wondering how long the university is going to allow him to say these things out loud in front of public forums.” RP II, 195. Roughly five months later, when a new Dean had taken over from interim Dean Smeins, Kuntz recommended to Dean Edwards that Professor Mills be fired. RP II, 196.

The internal audit report stated that “[a]ccording to the State

Auditor's Office, the university must spend special course fee revenues on the individual course that the revenue was collected for." Ex 22, CP 1311, admitted RP V, 25. The official University policy for the expenditure of student course fees said the same thing: "Student course fees are fees assessed to students enrolled in a specific course and used to fund supplies, materials, and services specifically for the course for which the fee is charged." Ex 4, RP II, 109-110. Professor Kuntz was never disciplined for his violation of this policy. Since the disciplinary hearing was closed to the public, the public never learned anything about Kuntz' improper expenditure of the fees paid by students taking Mills' class.

**d. The Public's Right To Observe Is In Addition to Mills' Right to a Public Hearing.**

This Court has always recognized that art. I, § 10 provides both the individual litigant *and the public at large*, with an enforceable constitutional right. See *Easterling*, 157 Wn.2d at 179 (closure order "constitutes a violation of the public's right under article I, section 10 to an open public trial, which exists separately from Easterling's right"); "We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice." *Allied Daily Newspapers*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); "the press is part of that public" *Cohen*, 85 Wn.2d at 388; *cf. Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7

(1986) (right to an open public trial is “a shared right of the accused and the public, the common concern being the assurance of fairness”).

e. **The West Virginia Supreme Court Has Construed a Nearly Identical State Constitutional “Open Courts” Guarantee As Requiring that Administrative Disciplinary Hearings Be Open to the Public.**

The Superior Court concluded that art. I, § 10 only applies to “judicial” cases, and does not apply to cases where the presiding hearing officer (in this case retired King County Superior Court Judge Robert Alsdorf) is employed by an administrative agency. Courts in other jurisdictions have rejected this same argument. For example, in *Daily Gazette v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705 (1985), the Court analyzed West Virginia Constitution art. III, § 17, which states that: “The courts of this state shall be open . . .” The West Virginia State Bar argued that this constitutional provision did not apply to attorney disciplinary hearings, and that consequently the public could be excluded from them. The West Virginia Supreme Court disagreed:

“The uniform interpretation of the mandate that the ‘courts shall be open’ by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding.” (Citations omitted).

*This fundamental constitutional right of access is not limited to formal trials, but extends to other types of judicial and quasi-judicial proceedings.*

*Daily Gazette*, 326 S.E.2d at 710 (bold italics added).

The Court rejected the contention that insulating lawyers from “adverse publicity” outweighed the public interest in learning about the administration of disciplinary justice to misbehaving attorneys. *Id.* at 711.

We therefore hold that under West Virginia Constitution art. III, § 17, which provides that “The courts of this state shall be open,” there is a right of public access to attorney disciplinary proceedings.”

*Daily Gazette*, 326 S.E.2d at 711. A year and a half later, the same Court held that its state constitutional guarantee of open access to the “courts” prohibited the exclusion of the public from *medical* disciplinary hearings:

The Board [of Medicine] argues that the *State Bar* decision does not extend the same right of public access to physician disciplinary proceedings on the theory that our decision was premised entirely upon the constitutional right of access to the courts. Because the Board is not a part of this State’s judicial system, it argues the *State Bar* decision is simply inapplicable to it. We disagree.

We believe the Board misperceived the rationale of our holding in *State Bar* where we indicated that the constitutional right of access is not limited to formal judicial proceedings.

*Daily Gazette v. Bd of Medicine*, 177 W. Va. 316, 352 S.E.2d 66, 69 (1986).<sup>9</sup>

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<sup>9</sup> Court in other states have reached similar conclusions in cases involving other types of administrative hearings. *See, e.g., Herald Company v. Weisenberg*, 89 A.D.2d 224, 455 N.Y.S.2d 413 (1982), *aff’d*, 59 N.Y.S.2d 378, 452 N.E.2d 1190 (1983), where the appellate court held that an administrative law judge erred when he excluded the public and a news reporter from an unemployment compensation hearing without compelling reason for closure: Principles requiring openness in criminal cases “should be applied with equal force to quasi-judicial proceedings where the process of government is

**f. The Due Process Clause Also Requires That Quasi-Judicial Administrative Hearings Be Open to the Public.**

Several courts, including the U.S. Supreme Court, have reached the same conclusion, but they have premised their holdings upon the determination that the Due Process Clause requires that administrative hearings of a quasi-judicial nature be open to the public:

[I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. *These demand 'a fair and open hearing' essential* alike to the legal validity of the administrative regulation and *to the maintenance of public confidence in the value and soundness of this important governmental process.*

*Morgan v. United States*, 304 U.S. 1, 14 (1938) (bold italics added).<sup>10</sup>

**g. A New Disciplinary Hearing is Required**

In this case, WWU never offered a compelling governmental reason why the hearing needed to be closed, and the Hearing Panel never considered any alternatives to closure. The Panel simply decided to defer to the request of counsel for the University when she expressed concern that disparaging allegations were likely to be made during the course of

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similarly at work and the integrity of the decision making process is equally essential to citizen confidence in government." 89 A.D.2d at 227.

<sup>10</sup> *Accord Railroad Comm'n v. PG & E*, 302 U.S. 388, 393 (1938) ("The right to a fair and open hearing is one of the rudiments of fair play"); *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972) (since "administrative proceedings are of a quasi-judicial character . . . due process requires that the Fitzgerald hearing be open to the press and public"); *Adams v. Marshall*, 212 Kan. 595, 512 P.2d 365 (1973) (civil service commission ruling that hearing would be closed to public violated due process); *Freitas v. Administrative Director*, 92 P.3d 993, 999 (Haw. 2004) ("inasmuch as [driver's license revocation] hearings are quasi-judicial in nature, due process requires that the hearings be public").

the hearing. Here, as in the *Cohen* case, the proffered “reasons for secret adjudication in this matter are not of sufficient public importance to justify exception to the requirement of Const. art. I, § 10.” 85 Wn.2d at 389.

The remedy for an art. I, § 10 violation is to vacate the entire proceeding and to start over. *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); *State v. Bone-Club*, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). Mills asks this Court to vacate the decision of the Board of Trustees, to order the University to pay him back the two quarters salary that it withheld, and to direct that no sanction may be imposed against him unless a new disciplinary hearing is held which complies with art. I, § 10.

**2. THE CLOSURE VIOLATED RCW 34.05.449 WHICH REQUIRES THAT ADMINISTRATIVE HEARINGS BE “OPEN TO PUBLIC OBSERVATION.”**

The closure of the disciplinary hearing also violated RCW 34.05.449(5). That statute provides in pertinent part as follows:

The hearing is *open to public observation* except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules. . . .

(Bold italics added).

In what it mislabeled as a “finding of fact”, the Superior Court correctly concluded that WWU had violated RCW 34.05.449(5) by closing the hearing:

The decision of the Faculty Hearing Panel to close the

hearing violated Mills' statutory right to having the hearing conducted in open session pursuant to RCW 34.05.449(5) which requires that adjudicative proceedings be open to public observation, "except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules." The Faculty Hearing Panel and Hearing Officer heard argument from the parties in open session regarding whether the hearing should be conducted in open or closed, private session; the decision was made by the Faculty Hearing Panel to "keep the hearing private as per the Faculty Handbook." The provisions of the Handbook do not constitute a provision of law providing justification for closing the hearing.

CP 32-33, Purported "Finding of Fact" No. 5.

However, the Superior Court *sua sponte* concluded that by failing to seek a writ of prohibition enjoining WWU from going ahead with a closed hearing, Mills had "waived" his right to an open hearing:

Mills' failure to seek court review of the decision to proceed with the hearing in closed session constituted a waiver of his statutory right to an open hearing. RCW 34.05.582 or a writ of mandamus was available to Mills to seek court intervention at the time of the denial of his request for having the hearing conducted in open session. Mills' failure to act promptly constitutes waiver. He cannot sit on his statutory right as one might with a constitutional right.

CP 33, Purported "Finding of Fact" No. 6.

The Superior Court cited no authority whatsoever for this proposition. That is not surprising since the remedy of a writ of mandamus was *not* available to him, and was in fact specifically forbidden by the Administrative Procedures Act. Moreover, even if this remedy had

been available, there is no case law to support the Superior Court's bizarre theory that in addition to making a timely objection before the tribunal in question, a litigant must also initiate a separate lawsuit seeking an extraordinary writ in order to preserve this objection.

- a. **RCW 34.05.510 States That the APA Provides the "Exclusive" Means of Obtaining Judicial Review. Thus, the Superior Court Erred By Assuming That Mills Could Have Obtained Judicial Review While the Faculty Disciplinary Hearing Was Still Going.**

First of all, the Superior Court incorrectly assumed that Mills had the option of seeking judicial review of the administrative tribunal's ruling closing the hearing by filing a petition for a writ of mandamus. But Mills could *not* have done this because RCW 34.05.510 expressly forbids such action. Subject to three enumerated exceptions none of which are applicable in this case, RCW 34.05.510 provides:

This chapter establishes the *exclusive* means of judicial review of agency action, . . . .

(Bold italics added). *See Judd v. American Tel. & Tel. Co.*, 152 Wn.2d 195, 204-05, 95 P.3d 337 (2004) (affirming dismissal of action challenging WUTC decision because RCW 34.05.510 provides the exclusive means of obtaining judicial review; since plaintiffs "suit was not brought pursuant to the terms of the APA" the suit was correctly dismissed). The Superior Court's decision that Mills could have immediately sought judicial review of the decision to keep the hearing

closed is in direct conflict with both RCW 34.05.510 and this Court's decision in *Judd*.

**b. RCW 34.05.582 Was Also Inapplicable.**

The Superior Court also stated that Mills could have obtained judicial review of the faculty Hearing Panel's refusal to hold an open hearing pursuant to RCW 34.05.582. CP 33. But that statute only authorizes a petition for judicial review of an agency's failure to enforce an order directed to another person. The statute provides in part:

Any person who would qualify under this chapter as having standing to obtain judicial review of an agency's failure to enforce an order directed to another person may file a petition for civil enforcement of that order, . . .

RCW 34.05.582(1). But there was no enforcement order in this case, and Mills was not seeking to overturn the Hearing Panel's failure to enforce any such order. Thus this statute was inapplicable.<sup>11</sup>

**c. Here, as in the *Kreager* Case, Any Immediate Independent Judicial Review Action Would Also Have Been Foreclosed by the Failure to Exhaust Administrative Remedies By Appealing to the University President and to the Trustees.**

Even if a mandamus action had not been foreclosed by RCW 34.05.510, Mills still could not have filed a mandamus action while the

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<sup>11</sup> Even if this statute were applicable it would have been of no use to Mills since the statute also expressly provides that a petition for judicial enforcement of such an administrative order "may not be commenced [u]ntil at least sixty days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek such civil enforcement to the head of the agency concerned, to the attorney general, and to each person against whom the petitioner seeks civil enforcement." RCW

hearing was going on because he was required to first exhaust all available administrative remedies. RCW 34.05.534 (“A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged . . .”); *South Hollywood Hills Citizens Ass’n v. King County*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984); *Harrington v. Spokane County*, 128 Wn. App. 202, 209-210, 114 P.2d 1233 (2005). The exhaustion of administrative remedies doctrine avoids premature interruption of the administrative process, provides for full development of the facts protects the autonomy of administrative agencies by giving them the opportunity to correct their own errors, and discourages litigants from ignoring administrative procedures by resort to the courts. *Hollywood Hills*, 101 Wn.2d at 73-74.

*Kreager v. Washington State University*, 76 Wn. App. 661, 886 P.2d 1136 (1995) is directly on point. Kreager, a state university employee, challenged his lay-off. A hearing examiner was appointed by the Higher Education Personnel Board. The hearing examiner recommended that his dismissal be affirmed. Under the applicable regulations Kreager had the right to file exceptions to the hearing examiner’s decision and to seek a hearing before the Personnel Board.

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34.05.582(1)(a). In this case, the sixty day waiting period would not have expired until roughly one and a half months *after* the disciplinary hearing had ended.

However, instead of pursuing this available administrative remedy, Kreager appealed directly to Superior Court. The University moved to dismiss the appeal on the grounds that Kreager had failed to exhaust his administrative remedies. The Superior Court agreed with the University and dismissed the appeal, and the Court of Appeals affirmed.

Like Kreager, Professor Mills had the right to appeal the decision of the faculty Hearing Panel to the University President and to the Board of Trustees. Mills took these administrative appeals. After the Trustees issued their final decision, Mills then brought his APA judicial review action. Had he attempted to go to Superior Court before exhausting these administrative remedies, his suit would have been dismissed just as Kreager's suit was dismissed. In *Kreager* the Court of Appeals affirmed the dismissal of Kreager's case because he attempted to bypass the step of an administrative appeal to the Higher Education Personnel Board:

The Board had cognizance of Mr. Kreager's claim and procedures established by statute and administrative rule provided for an appeal of the hearing examiner's decision by raising exceptions to that decision to the Board itself. [Citations]. The rule authorizes the Board to affirm, reverse, or modify any part of the hearing examiner's recommendation. The rule provides an administrative remedy for Mr. Kreager's complaint.

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[The regulation] provides exceptions to the hearing examiner's decision are to be made to the Board. A claimant cannot pass up this review by the Board and then bring an objection to that decision, final after 40 days, to the Superior Court. The Board has not had the opportunity

to pass on the objections of the claimant; *it is the administrative body charged with reviewing the hearing examiner's decision, before going to the Superior Court.* The Superior Court is entitled to have the benefit of the Board's ruling on the claimant's objections. Here, that was not available to the trial court or this court. *In light of Mr. Kreager's failure to exhaust available remedies, the trial court abused its discretion in granting judicial review.*

*Kreager*, 76 Wn. App. at 664-65 (bold italics added).

In the present case, if Mills had tried to go straight to Superior Court, as Judge Mura suggested, in addition to the per se bar of RCW 34.05.510, he also would have run into the rule requiring exhaustion of administrative remedies. Just as Kreager was required to take an administrative appeal up to the Higher Education Personnel Board, Mills was required to take an administrative appeal up to the University Board of Trustees.<sup>12</sup> Had he failed to do this and gone straight to Superior Court instead, his suit would have been dismissed just as Kreager's was.

**d. A Waiver is a Knowing and Intelligent Relinquishment of A Right. An Implied Waiver Cannot Be Shown By Equivocal Acts. Since Both Case Law and a Statute Forbade Mills from Going to Court to Seek Mandamus Relief, Mills Can Hardly Be Said to Have Unequivocally Waived His Right to an Open Hearing Under RCW 34.05.449 Simply By Failing to File A Writ Petition.**

Assuming, *arguendo*, that it was somehow possible for Mills to

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<sup>12</sup> *Donahue v. Central Washington University*, 140 Wn. App. 17, 163 P.3d 801 (2007) illustrates the proper procedural way for a state university professor to obtain judicial review of an adverse personnel action. In that case after losing before a hearing examiner, the professor appealed to the university's Board of Trustees. After losing there as well, he filed a judicial review petition. The Court of Appeals noted: "Our review of

bring a petition for a writ of mandamus while his faculty disciplinary hearing was going on, his failure to bring such an action cannot be deemed a “waiver” of his statutory right to an open hearing guaranteed by RCW 34.05.449(5). A waiver, even a waiver of a statutory or non-constitutional right, “requires intentional relinquishment or abandonment of a known right.” *State v. Edwards*, 93 Wn.2d 162, 168, 606 P.2d 1224 (1980) (defendant not shown to have waived statutory right under RCW 71.06.030 to immediate sentencing); *Spokane County v. Special Auto & Truck Painting*, 153 Wn.2d 238, 103 P.3d 792 (2004)(defendant held not to have waived right to dismissal under CR 41(a)(4)). Moreover, to establish a waiver the party’s action “must have been inconsistent with any intent other than to waive it.” *Id.* at 248. Mills never said he was waiving the right to an open hearing, and in fact argued on two successive days that the faculty Hearing Panel was required to hold an open hearing. The Superior Court judge appears to have believed that by failing to file a mandamus action to compel an open hearing, Mills was impliedly waiving his objection to the closure of the hearing. But an implied waiver requires “unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors.” *Doe v. Gonzaga University*, 143 Wn.2d 687, 711, 24 P.3d 390 (2001), *rev’d on other*

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the Board’s final order is under the Washington Administrative Procedure Act (WAPA).” *Id.* at 804. The same is true in this case.

*grounds*, 536 U.S. 273 (2002); *accord Carillo v. City of Ocean Shores*, 122 Wn. App. 592, 612, 94 P.3d 961 (2004). Furthermore, “the person against whom waiver is asserted must have understood that the consequences of his or her actions would be relinquishment of the right.” *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987); *In re Welfare of S.V.B.*, 75 Wn. App. 762, 85, 880 P.2d 80 (1994).

In this case, an independent writ action was prohibited by both the express terms of a statute, and by case law requiring the exhaustion of available administrative remedies. Thus, Mills failure to file such a suit is not an action inconsistent with his expressed desire to have an open hearing, nor does it show that Mills understood that the consequence of not filing such a suit would be forfeiture of the right to an open hearing.

The burden to show waiver of a right is on the party asserting waiver. In this case, there is no evidence in the record whatsoever to demonstrate that by failing to initiate a mandamus action against the Hearing Panel, Mills was manifesting an unequivocal intent to waive his right to an open hearing under RCW 34.05.449, with knowledge that this would be the consequence of his failure to commence such an action.<sup>13</sup>

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<sup>13</sup> No Washington Court has ever ruled that in order to preserve an objection for appellate review that a litigant must do anything more than make an objection on the record and state the grounds for his objection. No appellate court has ever ruled that a litigant must *also* go and file an independent lawsuit and seek to obtain an extraordinary writ commanding the other tribunal to do what the litigant has already argued is required. Such a ruling would mean that every time a litigant wanted to preserve an objection in an administrative proceeding, he would have to go and initiate a lawsuit. Thus in every

e. **The Superior Court's Decision is In Conflict With This Court's Decision in *Edwards*.**

Moreover, the Superior Court's holding in this case is in direct conflict with *State v. Edwards, supra*, where this Court explicitly *rejected* the argument that failure to apply for a writ of mandate constitutes an implied waiver of a statutory right:

The State's contention that Edwards waived his right to immediate sentence we find to be without merit. We do not believe failure to apply for a writ of mandate to compel the court to perform its duty to pronounce sentence timely operates as a waiver.

*Edwards*, 93 Wn.2d at 168.

f. **Even if Mills Had Attempted to Expressly Waive His Statutory right to an Open Hearing, Since RCW 34.05.449(5) Creates a Right for the Benefit of the Public, Mills was Powerless to Waive the Right Even if He Wanted to.**

Even if it had been possible for Mills to bring a mandamus action in the middle of the disciplinary hearing seeking to compel the Hearing Panel to open the hearing to the public, and even if Mills had expressly announced on the record that he was deliberately refraining from doing that because he was intentionally relinquishing his statutory right to an

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administrative proceeding where a litigant believed an error was being made, a twin judicial case would have to be started which would then be conducted simultaneously with the administrative hearing. Such a result is directly contrary to the express purposes of the doctrine requiring the exhaustion of administrative remedies before going to court, so as to "insure[] against premature interruption of the administrative process;" "provide a more efficient process;" "protect the autonomy of administrative agency's autonomy by allowing it to correct its own errors;" and to "insur[e] that individuals were not

open hearing, there *still* would not have been a waiver of the right guaranteed by RCW 34.05.449(5).

Some rights cannot be waived, and this is one of them. It is “well settled . . . than an individual may not waive a right where such right violates public policy.” *Shoreline Community College v. Employment Security Department*, 120 Wn.2d 394, 409, 842 P.2d 938 (1993).

Where a statutorily created private right serves a public policy purpose, the persons protected by the statute cannot waive the right either individually or through the collective bargaining process.

*Id.* at 410; *Kelso Educ. Ass’n v. Kelso Sch. District*, 48 Wn. App. 743, 749, 740 P.2d 889, *rev. denied*, 109 Wn.2d 1011 (1987).

Obviously the right to have an administrative hearing “open to public observation” serves an important “public policy purpose.” Therefore, even if Mills had wanted to waive this right – and here he did not want to waive it and instead consistently objected and protested that it was being violated – he could not have done so.

In sum, the statutory right to have a disciplinary hearing that was “open to public observation” was violated. The only appropriate remedy for such a violation is to order a new disciplinary hearing. *Cf. Orange*, 152 Wn.2d at 814; *Bone-Club*, 128 Wn.2d at 261-62.

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encouraged to ignore its procedures by resorting to the courts.” *Hollywood Hills*, 101 Wn.2d at 73-74.

**3. BY SUSPENDING MILLS WITH PAY IN OCTOBER OF 2004 IN VIOLATION OF THE PROCEDURES SET FORTH IN ARTICLE XVII OF THE *FACULTY HANDBOOK*, THE UNIVERSITY COMMITTED A BREACH OF CONTRACT.**

**a. Suspension In October of 2004 Followed By A Statement of Charges in June 2005.**

On October 18, 2004, by letter Provost Andrew Bodman advised Mills that he was immediately suspending him and banning him from campus unless accompanied by a police escort. Bodman told Mills that he was suspending him with pay "pending review of complaints" that the college Dean had received from faculty and students, and that he might bring charges if the complaints proved well-founded. *Ex.2*, CP 39.

Prior to suspending him, Bodman did not inform Mills of the complaints against him that he had received, nor did he give Mills any opportunity to respond to these complaints. Bodman did not file any *Statement of Charges* prior to suspending Mills on October 18, 2004. The length of the suspension imposed was not specified. CP 39; *Ex.2*.

Roughly seven and a half months later, on June 6, 2005, a *Statement of Charges* was delivered to Mills at his home. CP 42-48.

**b. The Initial Suspension Violated Article XVII For Three Separate Reasons: (1) It Started Before Any Charges Were Brought; and (2) There Was Never Any Finding of Threatened Immediate Harm; and (3) the Provost Did Not Consult the Executive Council Before Suspending Mills.**

Mills' initial suspension with pay was illegal because the Provost

had no power to suspend him prior to the filing of a Statement of Charges. *Article XVII* sets forth the procedures the Provost must follow when he suspends a faculty member. It prohibits suspensions from being imposed prior to the bringing of charges; it permits suspensions to be imposed before the holding of a disciplinary hearing only in situations involving a threat of “immediate harm”; and it requires prior consultation with the Executive Council of the Faculty Senate before any such suspension:

*From the time at which charges are specified, the faculty member may be suspended, or assigned to other duties in lieu of suspension, only if immediate harm to the faculty member or others is threatened by continuance. Before suspending a faculty member, pending an ultimate determination of the faculty member’s status through the institution’s hearing procedures, the Provost will consult with the Executive Council of the Faculty Senate concerning the propriety, the length, and the other conditions of any suspension.* This consultation will occur within 10 working days of the filing of the statement of charges . . .

CP 58; *Article XVII*, § 2a. (bold italics added).

“When an employer promises in writing specific treatment in specific situations, those promises may become an enforceable component of the employment relationship, even in an at-will situation.” Trimble v. Washington State University, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). Accord Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081 (1984). In the present case, Mills is not an at-will employee; he is a tenured professor. *Article XVII* § 2a of the *Handbook* specifically makes

three contractual promises to tenured faculty members:

- (1) they *cannot* be suspended *prior* to the filing of a statement of charges;
- (3) *after* a statement of charges is filed, they may be suspended *only* if the failure to suspend will cause *immediate harm* to the faculty member or others, *and*
- (2) *before* suspending the faculty member, and within ten days of the filing of the statement of charges, *the Provost must consult with the Executive Council of the Faculty Senate* concerning the length and propriety of the suspension.

All three of these contractual promises were broken in this case.

First, the Provost breached the contract by suspending Mills on October 18, 2004, *more than seven months before* the filing of the *Statement of Charges*. The words used in *Article XVII* are clear and unambiguous:

*From the time at which charges are specified, the faculty member may be suspended, or assigned to other duties in lieu of suspension . . .*

(Bold italics added). The word “from” signifies a starting point. The dictionary confirms this obvious fact. *Webster’s Ninth New Collegiate Dictionary*, at 494 (1983) defines the word as follows:

**From** **1.** -- used as a function word *to indicate a starting point*: as (1) a place where a physical movement begins (came here ≈ the city) (2) *a starting point* in measuring or reckoning or *in a statement of limits* (a week ≈ today). . .

(Bold italics added). Thus, the words “From the time at which charges are specified” mean that “the starting point” “at which the faculty member may be suspended” is “the time at which charges are specified.”

The dictionary also confirms that the word “from” is used to make “a statement of limits.” In this case, it “limits” the time at which a suspension may be started. It may not be started before “the time at which charges are specified.” The word “may” serves to reinforce this concept of the imposition of a limit. “May” is a verbal auxiliary which means to

**a** have the ability to **b** have permission to (you ≈ go now):  
be free to (a rug on which children ≈ sprawl . . .

*Webster's Ninth New Collegiate Dictionary*, at 734 (1983).

Thus it is painfully evident that only after “the starting point” does the Provost have “permission” to suspend the faculty member. Since the Provost suspended Mills before the starting point of his power to suspend – *before charges were specified* – Mills’ initial suspension with pay violated *Article XVII* and constituted a breach of the contract.

Second, the Provost’s suspension violated the consultation provision of *Article XVII*. *Article XVII* states: “***Before suspending a faculty member . . . the Provost will consult with the Executive Council of the Faculty Senate concerning the propriety, the length, and the other conditions of any suspension.*** This consultation will occur within 10 working days of the filing of the statement of charges . . .” *Article XVII*, ¶ 2a (bold italics added).

At Mills’ disciplinary hearing conducted the Provost testified that he did *not* comply with this condition. Inexplicably, he contended that the

provisions of this Article did not require him to consult with the Executive Council of the Faculty Senate:

Q. Before you suspended him [Professor Mills] on October 18<sup>th</sup>, did you consult with the Executive Council of the Faculty Senate regarding the suspension?

A. No, I did not. It's not required in the faculty handbook.

RP II, 70.

Provost Bodman testified that he believed that consultation with the Executive Council was not required "at that stage," RP II, 70, and that such consultation was only required at the time at which charges are specified. RP II, 71.<sup>14</sup> But the plain words of *Article XVII*, ¶2a state such a consultation is required "before suspending a faculty member." The Provost's contention that consultation is only required before charges are specified simply ignores the express wording of *Article XVII*. The word "before" modifies the phrase "suspending a faculty member," *not* the phrase "the time at which charges are specified":

***Before suspending*** a faculty member pending an ultimate determination of the faculty member's status through the institution's hearing procedures, ***the Provost will consult***

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<sup>14</sup> The Provost purported to rely on the first sentence of *Article XVII*, ¶2a. RP II, 71. But the first sentence only demonstrates that he did everything out of order. The first sentence directs that the first thing the Provost must do is to specify charges. That act is a prerequisite that must be done before any suspension is ordered. The second sentence sets forth the second prerequisite for a suspension – a prior consultation with the Executive Council of the Faculty Senate. Bodman admitted that he did neither of these things before he suspended Mills. He argues that he consulted with the Executive Council before he specified the charges against Professor Mills on June 6<sup>th</sup>. But that is completely irrelevant. The required consultation is not a prerequisite to specifying charges; it is a prerequisite to ordering any suspension.

*with the Executive Council* of the Faculty Senate concerning the propriety, the length, and the other conditions of any suspension.

*Article XVII*, ¶ 2a. (bold italics added).

Finally, there is a third reason why Mills' suspension violated *Article XVII*. That articles explicitly provides that *after* charges are specified, a faculty member may be suspended "only if immediate harm to the faculty member or others is threatened by the continuance." Bodman never found that after June 6, 2001 Mills continued presence on campus posed a threat of immediate harm to anyone.

In sum, in three separate ways the suspension of Professor Mills, which began on October 18, 2004, violated the contractual promises set forth in *Article XVII* of the Faculty Handbook.

**4. BY SUSPENDING MILLS WITHOUT PAY FOR TWO MORE QUARTERS IN 2007 BASED ON VIOLATIONS OF THE *CODE OF FACULTY ETHICS*, THE UNIVERSITY VIOLATED ARTICLE XV OF THE *FACULTY HANDBOOK*, THEREBY COMMITTING A BREACH OF CONTRACT.**

**a. Together With Article XVI, Article XV Limits the Grounds for Suspensions to One of Five Enumerated Reasons.**

In the *Statement of Charges* against Mills, the Provost set forth the following excerpt from *Article XV* of the Faculty Handbook:

A faculty member covered under the Faculty Handbook may be dismissed for cause from his or her position *only for one or more of the following reasons*:

1) A serious and persistent neglect of faculty duties.

- 2) Unlawful discrimination or sexual harassment.
- 3) Serious scientific or scholarly misconduct, consisting of, but not limited to, significant misrepresentation of credentials, falsification of data, plagiarism, abuse of confidentiality, violation of regulations applicable to research, or failure to meet minimum standards of professional competence.
- 4) Conviction of a felony.
- 5) Intentional and malicious interference with the scientific, scholarly, and academic activities of others.

*Article XV*, ¶F(B), “Termination for Cause,” (bold italics added); CP 57.<sup>15</sup>

In his *Statement of Charges* the Provost alleged that Mills’ conduct fell within the first and fifth categories listed above. With respect to category #1, he alleged that “faculty duties include behaving in conformance with the Code of Faculty Ethics.” CP 44. He further specified that Mills had violated § 1 of the Code of Faculty Ethics by breaching the duty “to exercise self-discipline and judgment in using, extending, and transmitting knowledge.” CP 45. The Provost alleged that by making crude comments to students Shareen Julieta Faleafine<sup>16</sup> and Caitlin Doyle, Mills violated this section of the Code of Faculty Ethics.

The Provost also alleged that Mills violated § 2 of the Code of

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<sup>15</sup> *Article XVI* of the Faculty Handbook, entitled “*Severe Sanctions Other Than Dismissal*,” applies to temporary suspensions: “Severe sanctions are those that involve reduction in salary or *temporary suspension with or without pay*.” (Bold italics added). *Article XVI* provides that like dismissals, suspensions can only be premised upon conduct falling within the same five categories enumerated in *Article XV*.

Faculty Ethics. The Provost emphasized and quoted this section of the ethics code in his *Statement of Charges* as follows:

**As teachers, the Western faculty encourage the free pursuit of learning by students and demonstrate by example the best scholarly standards of their respective disciplines.** The faculty respect students as individuals and adhere to their designated role as intellectual guides and counselors, make every effort to foster honest academic conduct and to assure that evaluations of students reflect their actual performance. **The faculty avoid and condemn sexual harassment, intimidation, and the exploitation of students.** The confidential nature of the relationship between professor and student is respected, and any exploitation of students for private advantage is avoided by the faculty member who acknowledges significant assistance from them. Faculty strive to help students develop high standards of academic competency and respect for academic freedom.

CP 46 (emphasis in original). The charges alleged that by making statements to students Faleafine and Doyle, Mills violated this section of the Code of Faculty Ethics by intimidating them.

The *Statement of Charges* stated that Mills used foul and offensive language when speaking to one female faculty member (identified elsewhere as Professor Deborah Currier Greer) and to one male faculty member (identified elsewhere as professor Gregory Pulver). CP 46. The Provost alleged that this conduct was “in direct conflict with Section 4 of the Code of Faculty Ethics,” and he quoted that section as follows:

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<sup>16</sup> Mills made fun of Faleafine’s auto bumper sticker which urged the reelection of President Bush. Faleafine felt Mills’ comments were belittling and disrespectful. RP III, 78; CP 92-93.

**As a colleague, the Western faculty member has special obligations that derive from membership in the community of scholars. These include respect for, and defense of, the free inquiry of associates and, in the exchange of criticism and ideas, the respect for the opinions of others.** Faculty members acknowledge the contributions of their colleagues and strive to be fair in their professional judgment of colleagues. Each accepts his/her share of faculty responsibilities for the governance of this institution.

CP 46 (emphasis in original).

Finally, the *Statement of Charges* alleged that the library staff and members of the Theatre Arts department had “express[ed]” and “discussed their fear of Professor Mills.” The *Charges* alleged that “Professor Mills’ anger toward others, including administrators, is disruptive to the work of the college and the university,” and linked these allegedly bellicose behaviors to § 8 of the ethics code by stating that “the following item in [Section 8 of] the Code of Faculty Ethics speaks in part to this concern:”

The expression of dissent and the attempt to produce change on campus and in the larger society are legitimate, but they must be carried out in ways which do not violate academic freedom, injure individuals, disrupt the classes of colleagues, intrude on the individual rights of others, or damage institutional facilities or private or public property. All members of the academic community and visitors to the University must be assured of the right to be heard in an atmosphere of free inquiry and in a situation devoid of violence.

CP 47-48, quoting from § 8 of the Code of Faculty Ethics.

**b. Illegal Charges.**

*Articles XV* and *XVI* limit the grounds for which a severe

disciplinary sanction can be imposed. *Article XV.F(B)* states that a dismissal can only be for one of five identified grounds. CP 57. *Article XVI* incorporates *Article XV* by reference and states that "To warrant a severe sanction other than dismissal," (such as the suspension without pay that the Hearing Panel has found to be appropriate), there must be proof of conduct falling within the five categories listed under Termination for Cause" under *Article XV*. CP 57.

The University maintains that the phrase "a serious and persistent neglect of faculty duties" -- the first ground listed in *Article XV.F(B)* -- incorporates the provisions of *Article III, ¶D*. Because *Article III, ¶D* has a reference to the Faculty Code of Ethics, which is set forth in Appendix F of the *Faculty Handbook*, the University argues that any violation of the Faculty Code of Ethics constitutes a permissible ground for the imposition of a severe disciplinary sanction under *Article XV.F(B)(1)*. Professor Mills submits that such a construction of *Article XV* is objectively unreasonable since *Article XV* makes no reference whatsoever to **either** *Article III, ¶D*, **or** to the Faculty Code of Ethics. Mills maintains that it was a breach of contract to bring charges alleging violations of the Faculty Code of Ethics because the bringing of these charges violated the express provisions of *Article XV* of the Faculty Handbook.

*Article XV, ¶F*, entitled "Termination for Cause," sets forth the five permissible grounds for dismissal or suspension. The Code of Ethics is

not mentioned anywhere in *Article XV*. It is mentioned, however, some 28 pages earlier in the *Handbook* in *Article III, ¶D*. *Article III, ¶D* is entitled, "*Scholarly and Professional Qualifications of Faculty Members*." CP 51. *Article III, ¶D* sets forth four areas in which faculty members will be assessed when the University considers their appointment:

1. *It is the policy of Western Washington to appoint faculty members who provide evidence of achievement (or the promise of achievement) in teaching, in scholarly or creative endeavors, and in service to the University or community.* Unless otherwise specified in the letter of appointment, retention shall be on the basis of continuing effectiveness in these areas. Assessment at all levels is to be carried out in accord with the unit evaluation plan.
2. Faculty members have an obligation to adhere to and behave in keeping with the principles of faculty conduct *contained in the Code of Faculty Ethics (found in Appendix F of the handbook).*
3. Faculty have an obligation to pursue excellence in teaching.
4. Faculty have an obligation to engage in scholarly and/or creative activity of recognized quality.
5. Faculty have an obligation to serve their departments, colleges, university, and profession. In addition, the University values contributions to the wider scholarly and civic communities.

*Article III, ¶D, Faculty Handbook* (bold italics added); CP 51.

*Article III, ¶D*. contains no cross-reference to *Article XV, ¶F(B)* and *Article XV, ¶F(B)* contains no cross-reference to *Article III, ¶D*. Nevertheless, the University takes the position that *Article III, ¶D* is

relevant to the interpretation of *Article XV*, ¶F(B), which sets forth the five permissible grounds for dismissal or suspension of a tenured faculty member. The first of these grounds is “a serious and persistent neglect of faculty duties.” Because the words “duties” and the word “obligations” are synonyms to some degree, the University argues that a failure to meet the “obligation to adhere to and behave in keeping with the principles of faculty conduct contained in the Code of Faculty Ethics” also constitutes “a serious and persistent neglect of faculty duties.” The similarity of meaning between duty and obligation makes this argument superficially appealing at first blush. But the express definition of the term “faculty duties” contained in *Article III*, ¶C demonstrates that the this attempt to read the Faculty Code of Ethics into *Article XV*, ¶F(B)(1) is fatally flawed.

The Faculty Handbook has a section which specifically defines “Faculty Duties” in *Article III*, ¶C. This article, which is *immediately prior* to *Article III*, ¶D, reads as follows:

***Faculty Duties.*** *The duties of probationary and tenured faculty include* such activities as classroom and laboratory instruction; preparation for teaching, research, scholarly and creative activities; scheduled office hours; student advisement; committee responsibilities; public service that uses faculty professional expertise; and occasional special assignments. The duties of full time, limited-term and part-time, limited term faculty are defined in the letter of offer.

(Bold italics added); CP 51.

Thus, *Article III*, ¶D sets out what areas of achievement will be

assessed when considering whether “to appoint” a faculty member, and *Article III*, ¶C sets forth the duties which faculty members must fulfill after they are appointed. If the Board of Trustees had intended to include the “obligations” mentioned in *Article III*, ¶D within the category of “duties” mentioned in *Article III*, ¶C, it would have included them within *Article III*, ¶C itself, since that is the article which expressly defines the scope of “Faculty Duties.” There would be no need to separate *Article III*, ¶C from *Article III*, ¶D if ¶D were merely intended to set forth more “faculty duties” in addition to those mentioned in ¶C. When ¶¶ C and D of *Article III* are read seriatim, it is clear that ¶D defines those areas which are considered by the University when the University is deciding whether someone should become a Faculty Member, or should become a higher ranking Faculty Member by means of a promotion. But once a person has been appointed as a Faculty Member, that person’s “duties” are defined by ¶C.

Professor Mills became a fully tenured Associate Professor in 1994. *Article III*, ¶D refers to “evidence of achievement” in four specific areas, including adherence to the Faculty Code of Ethics. When the Faculty Tenure Committee and the President considered whether to appoint him to the faculty it was appropriate to assess Professor Mills “evidence of achievement” in the areas set forth in *Article III*, ¶D. But the decision whether to dismiss or suspend a tenured Professor like Mills is governed by *Article XV*. When making this type of decision, it is not proper to consider

achievement in these areas of assessment for appointment purposes which are listed in *Article III, ¶D*.

When determining the scope of the phrase “faculty duties” set forth in *Article XV, ¶F(B)(1)*, it is appropriate to refer to *Article III, ¶C*, since ¶ C is entitled “Faculty Duties.” Moreover, it makes eminent good sense to conclude that if a professor failed –

- to conduct “classroom and laboratory instruction,”
- to engage in “preparation for teaching, research, scholarly and creative activities,”
- to keep “scheduled office hours”
- to engage in “student advisement”
- to participate in “committee responsibilities,” or in “public service”

-- and if such failures were serious and persistent, then a severe disciplinary sanction would be both authorized and warranted by *Articles III, ¶C* and *XV, ¶F(B)(1)*. However, Mills cannot be suspended for any “serious and persistent neglect of his faculty duties” because there was neither evidence nor any accusation that he failed to do any of these things.

The illogic of attempting to read *Article III, ¶D*, entitled “*Scholarly and Professional Qualifications of Faculty Members*,” into *Article XV, ¶F(B)(1)* is further illustrated by the absurd results that such a construction necessarily leads to. To begin with, the Faculty Code of Ethics, set forth at the back of the *Faculty Handbook* as Appendix F, has a preamble and *nine sections*. In his *Statement of Charges*, Provost Bodman specifically

referred to sections 1, 2, 4, and 8 of the Code of Ethics,<sup>17</sup> claiming that Mills committed ethics violations by failing to —

- “exercise self discipline and judgment in using, extending and transmitting knowledge”;
- “avoid and condemn sexual harassment, intimidation, and the exploitation of students,” to show “respect for the opinions of others.”
- “show respect for the opinions of others,” when engaged “in the exchange of criticism and ideas.”
- “express dissent” in a manner which “do[es] not violate academic freedom, injure individuals, disrupt the classes of colleagues, intrude on the individual rights of others, or damage institutional facilities or private or public property.”

Although there is no mention or cross-reference to *Article III* in *Article XV*, ¶ F(B) where the grounds for severe sanctions are listed, nevertheless the University argues that a person reading *Article XV*, ¶ F(B)(1) should realize that the ground listed there actually incorporates “the obligation to adhere to and behave in keeping with . . . the Code of Faculty Ethics” which is set forth in the “Scholarly and Professional Qualifications” section of *Article III*, ¶ D(2). Further, the University maintains that because *Article III*, ¶ D(2) does refer to the Code of Faculty Ethics, and states that it can be “found in Appendix F of the *Handbook*,” every faculty member should also realize that any violation of *any* provision of the Code of Faculty Ethics is necessarily legitimate cause for dismissal under

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<sup>17</sup> “*Here is a list of references to particular elements of the Code of Faculty Ethics that the Dean, Chair and I assert have been breached through your pattern of behavior towards your faculty colleagues, and your interactions with the particular students who lodged complaints in Fall 2004: . . .*” *Statement of Charges*, at p. 3 (bold italics added).

*Article XV*, ¶F(B)(1). Thus the University argues that all faculty members are informed that in order to learn about all the possible grounds for dismissal or suspension, in addition to *Article XV*, ¶F(B) they must also read two other sections of the *Handbook*.

However, the University's analysis conflicts with well settled provisions of contract law. First, the language of *Article XV*, ¶F is completely inconsistent with the University's hop-skip-and-jump reading of the *Handbook*, because *Article XV* expressly states:

A faculty member covered under the Faculty handbook may be dismissed from his or her position ***only for one or more of the following reasons. . .***

(Bold italics added).

The word "only" is an unambiguous term. It *restricts* the class of things which can trigger a dismissal to the five enumerated categories which follow the word.<sup>18</sup> And yet the University would read the phrase limiting dismissal to one of five grounds as also incorporating any of the eight sections of the Code of Faculty Ethics. So instead of being limited to the five "following reasons,"<sup>19</sup> dismissal or suspension would actually be

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<sup>18</sup> Once again, the Dictionary confirms this interpretation. When used as a conjunction "only" is defined as meaning "with the restriction that." *Webster's Ninth New Collegiate Dictionary*, 825 (1983).

<sup>19</sup> A reason first referred to in *Article III*, ¶D(1)(a) logically could not be said to be a reason set forth "following" *Article XV*, ¶F(B). "Following" when used as an adjective in this sense means: "1: being next in order or time (the ≈ day) 2: listed or shown next (trains will leave at the ≈ times)." *Webster's Ninth New Collegiate Dictionary*, 479 (1983).

authorized for a multitude of additional reasons that are all found in a completely different part of the *Handbook*, which are not mentioned at all in the Articles which expressly deal with the subjects of "Termination for Cause" and Severe Disciplinary Sanctions. (*Articles XV, XVI, and XVII.*)

In order to be apprised of all the reasons that could justify a dismissal or sanction, one would either have to make it a point to read the entire 135 page Faculty Handbook, *just in case it listed additional reasons for dismissal or sanction in some part of the handbook other than the part on disciplinary sanctions.* Alternatively, one would have to be prescient enough to realize that reading the *Article III* subsection labeled "Scholarly and Professional Qualifications of Faculty Ranks," *and* the Appendix which is referred to within that section, would be necessary for the reader to have a full understanding of the sections on "Termination" and "Severe Sanctions," even though those sections are found more than 25 and 70 pages away from the sections on Dismissal and Severe Sanctions.

Washington follows the objective manifestation theory of contracts. *Hearst Communications v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990); *Hollis v. Garwall*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999). Thus courts look to the objectively reasonable meaning of the actual words used in the contract, rather than to the subjective intentions of the contracting parties. *Hearst*, at 503; *Lynott v. National Fire Ins.*, 123

Wn.2d 678, 684, 871 P.2d 146 (1994). Words in a contract are given their “ordinary, usual and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst*, at 5; *Universal Land Constr. v. Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1997). Courts are prohibited from interpreting a contract in such a manner as to “vary, contradict or modify the written word.” *Hollis*, at 695; *U.S. Life Credit v. Williams*, 129 Wn.2d 565, 569-570, 919 P.2d 594 (1996).

The University’s suggested reading of the *Handbook* would violate these well established principles of Washington contract law. The University would have the courts read the word “only” so that it no longer means “only,” and the word “following” so that it no longer means “following.” It seeks to contradict or modify the plain language of *Article XV* so that it would mean the *opposite* of what it actually says.

Thus, the University’s construction of *Article XV* as encompassing every provision of the Code of Faculty Ethics is objectively unreasonable. Violations of the Code of Faculty Ethics do *not* provide grounds for either dismissal or for a suspension, because they are not one of the five restricted grounds set forth in *Article XV*. Therefore, the bringing of these charges against Mills violated *Article XV* and constituted a breach of contract. Since *none* of the Code of Faculty Ethics charges were proper, this Court should vacate *all* disciplinary sanctions and remand with directions that *all* the charges must be dismissed.

**5. BOTH FACIALLY AND AS APPLIED TO MILLS' STATEMENTS, THE PROVISIONS OF THE CODE OF FACULTY ETHICS VIOLATE THE 1<sup>ST</sup> AND 14th AMENDMENTS ON VAGUENESS GROUNDS.**

As the following cases illustrate, to suspend Professor Mills for alleged violations of the *Code of Faculty Ethics*, also violates the First Amendment and the Due Process clause of the 14th Amendment because both facially and as applied, these vaguely worded statements of ethical principle do not inform professors of what they may not say.

In *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9<sup>th</sup> Cir. 1996), the Ninth Circuit held that a tenured professor is constitutionally entitled to clear notice as to what types of statements can trigger disciplinary action, and that as applied to the facts of that case, the college's disciplinary policy was unconstitutionally vague. The same is true in this case. Cohen, a tenured professor, made statements about pornography and used profanity in his classroom. His statements offended a female student. She filed a complaint and the college proceeded to discipline him for violating that portion of a college policy prohibiting conduct which "has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment." *Id.* at 970-71.

Cohen argued that the policy violated the First Amendment. The Ninth Circuit agreed with him and found that the policy was

unconstitutionally vague as applied to Cohen's conduct for three reasons: (1) It failed to provide fair warning of what was prohibited; (2) it delegated too much basic policy making to low level officials thereby creating too great a risk of arbitrary and discriminatory enforcement; and (3) it discouraged the exercise of First Amendment freedoms. *Cohen*, 92 F.3d at 972. The policy "was simply too vague as applied to Cohen" and thus it violated the First Amendment. Describing the college's actions "as a legalistic ambush," the Court held that Cohen "was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style . . ." *Id.*

A similar result was reached in *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 627 (D. Puerto Rico 1974). There the Court struck down a college regulation prohibiting "Improper or disrespectful conduct in the classroom or campus," holding that it was void for vagueness. The Court noted that "[t]he inadequacy [of the rule] is obvious – the purpose of a prohibitory rule is to inform those affected what is improper, not merely that the 'improper' is prohibited." *Id.* The *Marin* Court also held unconstitutional a regulation prohibiting all activities that "affect the normal functioning" of university activities. *Id.* at 628.<sup>20</sup>

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<sup>20</sup> Other cases involving the suspension of college *students* have reached similar results, vacating student suspensions on the grounds that the student disciplinary policies were unconstitutionally vague. See, e.g., *Doe v. University of Michigan*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) and *Soglin v. Kauffman*, 418 F.2d 163, 167 (7<sup>th</sup> Cir. 1969).

In the present case, the reasons given by the University for disciplining Mills are similarly vague and unconstitutional. Mills was not on notice that his statements could constitute grounds for discipline because they manifested (1) a failure “to exercise self discipline and judgment in using, extending and transmitting knowledge”; (2) a failure to show “respect for the opinion of others”; or (3) because he “expressed dissent” in a manner which somehow violated “academic freedom, injure[d] individuals, disrupt[ed] the classes of colleagues, intrude[d] on the individual rights of others, or damage[d] institutional facilities or private or public property.” Even assuming that Mills could have figured out that violations of the Code of Faculty Ethics constituted grounds for dismissal, he was not on notice that these vague phrases within the Code of Faculty Ethics *applied* to the statements and conduct attributed to him.

In *Cohen* the Court noted that the Professor’s longstanding “confrontational teaching style designed to shock his students” had “apparently been considered pedagogically sound” for several years, and thus it was a due process violation to suddenly discipline him for employing such methods. The same is true here. When Professor Kuntz evaluated Professor Mills for a possible merit pay raise in the spring of 2000 he specifically stated that Mills’ “style of teaching” was based on confrontation.” Ex. 10, CP 107-09. Kuntz noted that Mills’ approach to

teaching was "either hated or adored by his students" and that his "aggressive approach does serve to stimulate thought." *Id.*; RP II, 172. Kuntz concluded that Mills "does serve a vital function by generating lively discussion in the department and on campus." Ex. 10; CP 1079.

The University recognized that Mills' teaching methods worked well:

Perry's playwriting students continue to excel in regional and national playwriting contests. His support of the NPT [New Playwrights Theatre] program has resulted in students freely examining issues and dramatic structures embraced by an environment that encourages exploration. It is one of the most successful programs in our department.

CP 1079; *See* RP II, 173. And yet five years later Mills' same "aggressive approach" and "confrontational" teaching style was found to constitute grounds for a two quarter suspension because Mills was failing to show "respect for the opinion of others," and did not "exercise self-discipline and judgment in . . . transmitting knowledge" as required by Sections 1 and 4 of the Code of Faculty Ethics.

When Mills persisted in accusing Professor Kuntz of embezzlement, he found himself facing disciplinary charges because Kuntz told the Dean that allowing Mills to "speak freely under the protection of the tenure" left him free to "continue to be an embarrassment" and "a considerable liability to the University." CP 1086; Ex. 16; *See* RP II, 194. Suddenly Mills' teaching style had become so unacceptable that the Provost, at the urging of Professor Kuntz,

commenced a disciplinary proceeding in which he sought to have him fired. CP 42. The vague terms of the ethical code were used in an attempt to silence a person who continued to “embarrass” the University.

Here, as in *Cohen*, the Court should hold that the imposition of a disciplinary suspension for supposed violations of vague ethics provisions based on the pretext that the professor had a confrontational teaching style (which the college had known about for several years) constituted a violation of the First and Fourteenth Amendments.

**6. PUNISHING MILLS FOR A GERMANE CLASSROOM STATEMENT MADE FOR A PEDAGOGICAL PURPOSE VIOLATES THE RIGHT TO ACADEMIC FREEDOM GUARANTEED BY THE FIRST AMENDMENT AND ARTICLE 1, § 5.**

As noted in FF No. 37 of the *Trustees' Final Decision*, a female student at the University was diagnosed in the fall of 2003 with cancer and had to leave the college for surgery and chemotherapy. CP 91; RP II, 207. She came back to school in the spring of 2004 and enrolled in Mills' play writing class. CP 91; *Id.* at 135-136. She was not fully recovered and was still anxious about her health. CP 91. At first she volunteered to have the play she had written critiqued by other class members, but then she balked and said she was not sure if she wanted to put her play up for discussion. CP 91; RP III, 136. At this point Mills said to her “If you don't put up your work, it's just as if you died of cancer and aren't here at all.” FF No. 38, CP 91; RP III, 137. This caused her to tear up; however, it also got her to agree

to put her play up for classroom critique. CP 91; FF No. 37; RP III, 138..

The Trustees concluded that Mills' probably could have persuaded her to put her work up without being so cruel:

He acknowledged that his words were hard and that [redacted] appeared upset by what he said, but he did not think his words were rude or cruel. RP III, 137. He justified his words as "an attempt to motivate her to consider that art is worth putting yourself out for, and if we don't produce art, it's just as if we never had existed." RP III, 137. He said he apologized to [redacted] afterward for having to "bend her arm, but it worked." RP III, 137-138. Mills' testimony on this point proves only that he remains oblivious to the fact that he, more probably than not, could have motivated [redacted] without being cruel to her. As [redacted] indicated, while Mills succeeded in getting her to put up her work, *his approach was "entirely inappropriate."*

CP 91, FF No. 38 (bold italics added).

Professor Mills testified that he made this statement deliberately, because in his judgment as a professor it was an effective way of getting student CD to see that her responsibility as a living artist was to create works of art, and because it was a means of prodding her to overcome her fear of criticism and getting her to put up her play for class discussion:

[S]he was in the class and had written a play, and she wanted to put that play up. So I said okay.

And what we mean by – "putting the play up" means that you ask people to act in the play, and you have a stage reading. So when you stage the reading, then people can look at it and say, "Okay. It's a play. I can understand it. This person does that." And then we have a critique of it and figure out whether it made sense or not and whether it's going to be, you know, a workable piece. And that's

the way the workshop technique in the playwriting business works.

So she says, "Okay. Well, I'll do my play.

"Oh good, good, good."

She said, "well, I don't know. Maybe I won't."

I said, "Well, what's it going to be?"

She said, "Well, you know, I'm conflicted."

And I said, "Aren't we all?"

"Yes. You know, I should have stayed home today." *And then she said, "Well, I don't know. Why should I do it,"* or something like that.

*And I said, "Well, because if you don't do it, it's just as if you died of cancer and aren't here at all,"* or something like that.

So it wasn't an attempt at putting her down. It wasn't making ridicule of her, and people who say so just don't get it. *And what it was is an attempt to motivate her to consider that art is worth putting yourself out for, and if we don't produce art, it's just as if we never had existed.*

RP III, 137 (bold italics added).<sup>21</sup>

Mills respectfully submits that the Trustees erred, and violated his constitutionally protected right to academic freedom, when it arrogated to itself the right to determine that his pedagogical teaching methods were

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<sup>21</sup> "But I was motivating her to stay alive. You know, *the concept of allowing your art to live past you means that you focus on it and sacrifice for it.* So if I'm going to be thought about in 200 years, I have to write the book, I have to paint the painting, and I have to have the strength to be able to say to the student, '*You must produce the art.*'" RP III, 153 (bold italics added).

“inappropriate.”<sup>22</sup> The First Amendment prohibits attempts to control what college professors may say in their classrooms. The Supreme Court has recognized that “[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . .

*Keyishan v. Board of Regents*, 385 U.S. 589, 603 (1967).

Courts acknowledge that classroom instructional speech is entitled to special constitutional. See *Cohen*, 92 F.3d at 971; *Calif. Teachers Ass’n v. State Bd. of Education*, 271 F.3d 1141, 1148 (9<sup>th</sup> Cir. 2001). In *Cohen* the disciplined professor taught English and film studies. *Cohen*, at 970. He had his students write a paper defining pornography and he began class discussions on pornography by “playing the ‘devil’s advocate’ by asserting controversial viewpoints.” *Id.* A student in his class was offended by his repeated focus on topics of a sexual nature. *Id.* The college found that the professor’s conduct towards this student violated its sexual harassment policy. That policy prohibited harassment “which had

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<sup>22</sup> This incident was alleged and found to be a violation of § 1 of the *Faculty Code of Ethics* because it demonstrated that Mills “failed to exercise self-discipline and judgment in using, extending, and transmitting knowledge.” This conclusion aptly demonstrates the vagueness problem with the Code. The imperative command that all faculty members “must exercise judgment” is about as vague a standard as one can imagine. Whenever a

the effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive work environment." *Id.* at 971. "[S]tudents came forward to testify about the sexual nature of Cohen's teaching material and his frequent use of derogatory language, sexual innuendo, and profanity." *Id.* at 971.

The District Court held that the disciplinary sanctions violated the First Amendment and enjoined the college from imposing the sanctions. The Ninth Circuit affirmed and directed that all references to the discipline be deleted from Cohen's personnel file because his classroom speech was protected; as applied to Professor Cohen's conduct, the college's sexual harassment policy was unconstitutional. *Id.* at 972-73.

Cohen's classroom conduct, while offensive to one student, was clearly motivated by a pedagogical purpose. The same is true in this case. It was apparent to everyone that Professor Mills made his harsh comment to student Doyle in an effort to prod her into agreeing to put her play up for classroom discussion.<sup>23</sup> He was making the point that while an artist is alive it is her duty to create art. His remark was not made out of a malevolent desire to make her feel scared by the reference to her mortality and possible death. It was designed to promote her education. She was in

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person speaks, he or she "exercises judgment" by deciding that the words spoken should be spoken.

<sup>23</sup> See, e.g., RP III, 151: "I get you, you felt that to speak to her the way you did was a teaching strategy; was to get her to put her work forward when she was hesitating."

his class to learn how to write plays. She could not learn that skill if she was not willing to put her play up for comment. His remark “succeeded in getting her to put up her work.” CP 91.

Not every professor would have made the remark that Mills made.<sup>24</sup> But the First Amendment protection for academic freedom does not depend upon what most other professors would have done; nor does it depend upon whether there was a better way to accomplish the pedagogical purpose. Since Mills’ comment was motivated by a proper teaching purpose; it was constitutionally protected, and thus it cannot be the basis for the imposition of any disciplinary sanction.

In *Hardy v. Jefferson Comm. College*, 260 F.3d 671 (6<sup>th</sup> Cir. 2001)

a professor lectured on how language is used to marginalize minorities:

The lecture included a discussion and analysis of words that have historically served the interests of the dominant culture in which they arise. Hardy solicited comments from his students of examples of such terms. Among their suggestions were the words “girl,” “lady,” “faggot,” “nigger,” and “bitch.” According to Hardy and other members of the class, the discussion was academically and philosophically challenging. Almost every student participated in the exercise. One African-American student, however, objected to the in-class use of the words “nigger” and “bitch.”

*Hardy*, 260 F.3d at 674-75. One of Hardy’s students complained. When

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<sup>24</sup> Many professors would consider the remark too harsh. Mills himself acknowledged that it was a “brutal” tactic; that he made the remark on the spur of the moment; that quite possibly it was not “the right answer” to the problem of how to persuade her to put her piece up for class discussion; and that if he had it to over again, he might choose to use some other means of persuading her. RP III, 153-15.

the college declined to renew Hardy's teaching contract, he sued alleging that the college had violated his First Amendment rights.

The Sixth Circuit noted that Hardy's speech was germane to the subject matter he was teaching: "The course was on interpersonal communications and Hardy's speech was limited to an academic discussion of the words in question." *Hardy*, at 679. Accordingly, the Court concluded that Hardy's First Amendment right of freedom of speech in the academic classroom setting has been violated because "the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom.." *Hardy*, 260 F.3d at 682.

Here, as in *Hardy*, the remark Mills made to student Doyle was germane to the class he was teaching. He was teaching playwriting. In order to learn this skill she had to put her work up for criticism. Mills made a remark which succeeded in getting her to put up her work, and thus led directly to her learning how to improve the play she had written.

The issue is simply whether it is constitutional to use this remark as a basis for disciplining Professor Mills. *Cohen* and *Hardy* both demonstrate that it is not. Since Mills' protected statement to Doyle was a substantial or a motivating factor for the disciplinary sanction ultimately imposed upon him, that sanction must be set aside. *Mt. Healthy Sch. District v. Doyle*, 429 U.S. 274, 287 (1977).

## 7. ATTORNEYS FEES REQUESTED

Mills' petition for judicial review included a request for an award of attorneys' fees. CP 1504, ¶ H. Pursuant to RAP 18.1(a) he requests an award of fees pursuant to RCW 4.84.350 for defending himself in the disciplinary proceeding, and in the prosecution of this administrative procedures act judicial review proceeding. The positions taken by WWU have not been substantially justified because no reasonable person would be satisfied by them. In the event that Mills prevails in this case, he is entitled to an award of reasonable fees. A party is considered to have prevailed for purposes of an attorney fee statute if that party obtains relief on a significant issue. *Citizens for Fair Share v. Dept. of Corrections*, 117 Wn. App. 411, 72 P.3d 206, *rev. denied*, 150 Wn.2d 1037, 84 P.3d 1229 (2003); *Herbert v. PDC*, 136 Wn. App. 249, 148 P.3d 1102 (2006).

## F. CONCLUSION

Appellant Mills asks this Court to vacate the Trustees' decision and to remand with directions that all disciplinary charges be dismissed because under *Article XV* none of them are legitimate grounds for the imposition of a suspension. Mills also asks this Court to hold that WWU must pay him back the salary it withheld during his two quarter suspension without pay, and must expunge all record of the earlier suspension with pay which lasted for more than two years because it violated *Article XVII*.

In the alternative, if this Court concludes it was not a breach of

contract to bring disciplinary charges based on the Faculty Code of Ethics, then Mills asks this Court to hold that the Code is either unconstitutionally vague on its face, or as applied to Professor Mills' conduct, and that they chill the exercise of the rights of free speech and academic freedom guaranteed by the First Amendment and art. 1, § 5. Accordingly, Mills asks this Court to direct that all the charges must be dismissed.

If this Court concludes that there is neither a breach of contract nor a vagueness problem with charges based on the faculty ethics code, then Mills asks this Court to hold that the closure of his hearing violated both art. 1, § 10 and RCW 34.05.455; to vacate all previously imposed disciplinary sanctions; and to direct that if WWU still wishes to pursue sanctions it must hold a new hearing open to the public.

Finally, in the event that this Court decides that some charges may be pursued at a new disciplinary hearing open to the public, Mills asks this Court to rule that no disciplinary sanction may be based on the classroom comments he made to student Doyle because they were protected by both the state and federal constitutional free speech guarantees.

DATED this 28<sup>th</sup> day of March, 2008.

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