VOLUNTARY ARBITRATION TRIBUNAL
Before Michael C. Ryan, Esq., Arbitrator

In the matter of the arbitration between:	
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, UNIVERSITY OF NEW HAMPSHIRE CHAPTER	Grievance: Professor Edward Larkin Termination
- and -	
UNIVERSITY OF NEW HAMPSHIRE	

DECISION AND AWARD

For the University

Debra Weiss Ford, Esq.

For the Association

Glenn Milner, Esq.

I. Background.

The hearing in this matter took place on January 13 and 25, 2011. The parties stipulated to the following statement of the issue:

> Did the University violate Article 14.2 when it terminated Professor Larkin's employment? If so, what shall be the remedy?

The evidentiary record is primarily documentary. The parties submitted well over 100 exhibits, which provide a detailed, comprehensive picture of the case. Two witnesses testified for the University: University President Mark

Huddleston and the Associate Dean of the College of Liberal Arts, Ted Kirkpatrick. The Association did not put on any witnesses, although the grievant was present for the entire hearing. Both parties filed post-hearing briefs and responsive briefs.

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Article 14.2 of the parties' collective bargaining agreement provides:

> 14.2 Dismissal and Suspension Without Pay
>
> 14.2.1 A bargaining unit member shall not be subject to dismissal or suspension without pay except for just cause. … Just cause shall encompass professional incompetence, deliberate neglect of duty or moral delinquency of a grave order.
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> 14.2.2 In a dismissal or suspension without pay … the following order of procedure will be followed:
>
> 14.2.2.1 … Case may be resolved by mutual agreement, dismissed, or referred to Professional Standards Committee.
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> 14.2.2.2 Professional Standards Committee of the Faculty Senate informally inquires into the situation, attempts to mediate a mutually agreeable resolution, and, if no resolution is reached, makes a recommendation to the President regarding whether the President should pursue the case. The Committee shall present its recommendation to the President within twenty (20) days of the date on which the matter was referred to the Committee.
>
> 14.2.5 If the President of the University decides that dismissal … is warranted after either the above procedure has been followed, or

> the time limit specified in Article 14.2.4.2 has passed without a recommendation from the Professional Standards Committee, s/he shall notify the faculty member in question and the Association in writing of the intent to dismiss or suspend without pay. … The burden of proof in a grievance involving a dismissal or suspension without pay shall be on the University, which proof shall be by clear and convincing evidence.

The grievant, Edward Larkin, is a tenured professor of German at the University. He was a well-regarded member of the University faculty for over 25 years and has no previous disciplinary history. Dean Kirkpatrick described the grievant as a "productive colleague, a good scholar and a good teacher." Over 50 of the grievant's colleagues submitted letters or emails of support, describing him as "a successful and devoted professor," "a man of great integrity and compassion for others," and "an asset to UNH."

On September 1, 2010, University President Mark Huddleston sent the grievant the following letter of intent to terminate:

> As you know, we have carefully considered how your conviction on charges of indecent exposure and lewdness will affect your employment at the University of New Hampshire. This situation is a matter of grave concern to UNH. Our inquiry into this matter revealed that your conduct represents a significant deviation from the moral standards and behavioral expectations to which we hold our faculty. It has undermined your standing in the broader community and your capacity to continue to perform your responsibilities as a University

> of New Hampshire faculty member. Consequently, we will initiate the steps necessary to terminate your employment with the University.
>
> We recognize your long tenure at this institution and your dedicated service to our community, and it is with great sorrow that we take this necessary action to protect the best interests of the University and our students. …

A. THE INCIDENT OF JULY 19, 2009

On July 19, 2009, the grievant was riding his motorcycle on Route 101 in Milford, New Hampshire. He pulled into the parking lot of the Market Basket supermarket. There is no dispute that the grievant parked the motorcycle, dismounted, and then intentionally exposed his genitals to a woman and her seventeen-year-old daughter who had just parked their car nearby. The mother and daughter subsequently wrote descriptions of the incident for the Milford Police. The mother, Debra Kelly, wrote:

> …Upon pulling in [to the Market Basket parking lot] I noticed a motorcycle behind us. My daughter [the driver of the car, who was learning to drive] was nervous parking so we didn't park right away. The motorcycle followed us. After she did the loop she parked far end away from store where there were hardly any cars. I noticed the bike stopped, waiting to see what we were going to do. … My daughter put car in park and didn't move car. I exited passenger side and proceeded around rear. As I got out I looked over and saw a man on the same bike with yellow & black jacket on standing there facing my daughter with his fly down and penis out. … I said to [R, the daughter] to come this way with me, she looked at me confused and I quietly said that man has his penis out don't go that way. She then

> looked and said something like "Oh my God" and followed me. I told her not to react to him, that is what he wants. We walked away and I snuck between two cars to look back. I was hoping it was just an older man who forgot to put "it" away. I watched him fidget, pretend or prepare to leave then as someone else came by he get off bike and act like he was just getting there and you could tell he was intentionally trying to expose himself. I then called Milford P.D. and attempted to read his plate to them.

The daughter, R., wrote:

> When I was getting out of the car at Market Basket I noticed a man pull in next to us on a motorcycle. I heard my mom call me over so I walked to the other side of the car and she told me to walk the other way. I looked back a the man standing there looking at us with his penis pulled out of his pants. We walked the other way and my mom called the cops. We then kept watching him to try to get his license plate number and notice[d] he kept getting back on his bike to leave, but every time somebody would walk by he would get off again and try to nonchalantly expose himself. Finally he decided to leave and drove right past us in the parking lot…We reported it and then went grocery shopping.

Patrolman Michael Donahue of the Amherst Police Department and Officer John Noel of the Milford Police Department responded to the call and stopped the grievant on Route 101. According to the police reports, when the officers confronted the grievant with Kelly's and R.'s allegations, the grievant told them he "hadn't done anything like that," "had not done that intentionally" and then that it "could have happened accidentally." Officer Noel told that grievant that his story "didn't add up" and

that he was most likely going to seek a warrant for his arrest. The officers then released the grievant.

Shortly thereafter Officer Noel interviewed Kelly and R. at the Milford Police Station. The women's descriptions of the incident, as Officer Noel recorded them in his report, were more expansive than their written statements. Kelly told Noel that after exposing himself to them, the grievant

> …got on his motorcycle as if he was going to leave, and then when a couple (man and woman) walked by, he got off of his motorcycle again and stood in a manner that he was trying to show his penis to the couple. … [T]here was a group of kids that obviously worked at Market Basket … taking a break in the corner of the parking lot…he was trying to get their attention as well, by standing there with his penis out facing them. … [H]e got on his motorcycle once again, and then off once again with his penis already out, when a woman walked by…. Kelly…was unsure if the woman, the couple, and the kids taking their break noticed [the grievant].

According to Noel's report, R. stated that "the guy was getting on and off his motorcycle and when people were around he was trying to show his penis." R. did not mention the Market Basket workers.

Both women told Noel that there was "no way" the exposure could have been accidental because the grievant

> was standing in a way that he was obvious showing it (penis) on purpose. Kelly showed me hands on her hips, and jutting out her pelvis to demonstrate. They also said he got on and off

his motorcycle two additional times, and when he did his penis was hanging out.

Noel returned to Market Basket to canvass the area and found no other witnesses to the grievant's conduct. The market does not have a surveillance camera for its parking lot.

A warrant was issued for the grievant's arrest on charges of indecent exposure and lewdness in violation of RSA 645:1, a class A misdemeanor.[1] Officer Noel's affidavit in support of the warrant application averred that Kelly and R. "observed the suspect standing, facing towards them, with his hands on his hips, pelvis jutting out and penis exposed, causing them to be scared"; and also that the grievant "turned toward an approaching couple, exposing himself in the same manner" and "attempted to expose himself to a group of kids." On July 23, 2009 a criminal complaint issued against the grievant, alleging that he "did knowingly expose his genitals (penis) under

[1] RSA 645:1 provides: "A person is guilty of a misdemeanor if such person…exposes his or her genitals…under circumstances which he or she should know will likely cause affront or alarm." A class A misdemeanor is a crime for which the maximum penalty is imprisonment for less than a year. The prosecution may reduce an offense originally charged as a class A misdemeanor to a class B misdemeanor, which is a crime with a maximum penalty that does not include imprisonment or a fine in excess of $1,200. RSA 625:9.

circumstances which he knew would likely cause affront or alarm, in that the defendant did expose his genitals (penis) while outside in the Market Basket parking lot."

The grievant's arrest and the charges against him became public knowledge after the Milford Police Department issued a press release identifying the grievant by name and linking him to the University. During the ensuing criminal proceedings, which lasted for some ten months, the matter received media attention, including a front-page article in the Manchester *Union Leader* and coverage on Boston.com, the on-line outlet of the *Boston Globe.* In all of these articles the grievant was identified as a professor at University of New Hampshire.

B. THE UNIVERSITY PLACES THE GRIEVANT ON ADMINISTRATIVE LEAVE

On July 23, 2009, President Huddleston notified the grievant by letter that he was being placed on paid administrative leave through August 15, 2009. The letter continued, "While I expect to be able to inform you of my decision [regarding the grievant's continued employment] in that communication, it is possible that circumstances beyond my control may require that I extend this administrative leave."

As it turned out, the criminal matter extended well beyond August 15, 2009. After several continuances, the grievant decided to seek a jury trial in Superior Court, using a procedure that required the District Court to enter a verdict of guilty. The District Court imposed a fine of $1,000 (with $500 suspended) and ordered the grievant to engage in evaluation counseling. Because the penalty was a fine of less than $1,200, the grievant's offense was converted from a class A to a class B misdemeanor. He was not required to register as a sex offender.

In the meantime, President Huddleston extended the paid leave to August 31, 2009; to December 31, 2009; to February 28, 2010; and finally until the outcome of this arbitration. In his letters extending the leave, President Huddleston stated that the University intended to conduct its own investigation of the grievant's conduct. He directed the grievant "to engage in assessment and counseling related to the circumstances that led to your arrest," and to provide documentation of his counseling to Donna Marie Sorrentino, the Director of the University's Office of Affirmative Action and Equity.

Well before receiving the latter instruction from Huddleston, the grievant began treatment with Dr. Carol Ball, a clinical psychologist who specializes in treating

and assessing the risk of persons convicted of sexual offenses. Dr. Ball is a recognized expert on the subject of compulsive sexual disorders, including exhibitionism. The grievant met with Dr. Ball approximately twice a month through the date of arbitration. Concurrently, he saw Dr. Martin Kafka, a psychiatrist and colleague of Dr. Ball, who specializes in treating compulsive sexual behavior.

C. THE UNIVERSITY'S FIRST INVESTIGATION

In December 2009, Provost John Aber directed Sorrentino to conduct an investigation of the incident of July 19. Sorrentino sent the grievant a letter notifying him of the investigation and further stating, "While we will obviously remain cognizant of criminal proceedings relating to this charge, the University may take action without awaiting the outcome of those proceedings. … [T]he University will, at a minimum, require your participation in counseling and evaluation if you are to remain affiliated with UNH. I will be your primary contact at the University to discuss such counseling … and would like to discuss these matters at your earliest convenience…."

Thereafter, Sorrentino's office repeatedly asked the grievant for an interview, a written statement, a list of suggested witnesses, and documents from the criminal case. But having been instructed by counsel not to discuss the

matter with the University to avoid any possibility of self-incrimination, the grievant was reluctant to respond to these requests and did not do so until the criminal proceedings were over. Neither he nor his counsel apprised Sorrentino of the status of his criminal case, nor of his participation in counseling. Sorrentino found this non-responsiveness extremely exasperating.[2]

On March 23, 2010, Sorrentino issued her report to the Provost. Because the grievant had not been forthcoming with information, the report was largely based on public records and second-hand sources, such as Associate Dean Kirkpatrick.[3] In sum, Sorrentino found it credible that the grievant purposefully exposed himself to Kelly and her daughter and to the unidentified couple, and also

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[2] In its brief, the University repeatedly criticizes the grievant's lack of cooperation with the University's investigation. While the grievant or his criminal counsel could have been more communicative with Sorrentino, the grievant did make some effort in that direction, and given the circumstances his lapses were perhaps understandable. Furthermore, between the two lawyers representing the grievant, Sorrentino, and the University's in-house counsel, the lines of communication became rather tangled.

[3] Dean Kirkpatrick told Sorrentino that the grievant was unlikely to ever repeat the offense, would "be contrite and take responsibility for his actions" and would "assimilate well if allowed to return." But he also recognized that the situation presented a major "public relations" problem for the University. At the arbitration hearing, Kirkpatrick testified that over time his thinking had changed, with the balance now tipping in favor of the grievant's termination.

"attempted to expose himself to a group of kids." She laid out three options for the University: (1) immediate termination, (2) an unpaid leave pending the criminal trial, (3) reinstatement on a probationary basis.

D. THE UNIVERSITY'S SECOND INVESTIGATION

Only a few days later, the grievant decided against going to trial and pleaded guilty to the class B misdemeanor in Superior Court. This concluded the criminal proceedings against him.

Since the grievant was now free to discuss the matter, Provost Aber had Sorrentino re-open her investigation. On March 30, 2010, Sorrentino directed the grievant to provide the pertinent documents from the criminal proceeding, submit to an interview, and arrange for psychological evaluation and counseling (since she was not aware that the grievant had been undergoing the same for six months). The grievant provided the requested court documents and also submitted letters from Drs. Ball and Kafka.

In her letter to Sorrentino, Dr. Ball diagnosed the grievant as having Sexually Compulsive Disorder. She further stated:

> In most cases the person [with this diagnosis] has a history of a mood disorder, and the [compulsive sexual] act seems to be a response to

> the dysphoria as the behavior acts as a temporary release or self-soothing mechanism for the underlying psychiatric condition. If motivated, the person can gain control of the compulsive action through the use of appropriate medications and specialized behavior therapy.
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> …[The grievant] is actively seeking to understand the etiology of his behavior and to gain control of his compulsive nature. [He] has shown himself to be a conscientious client. He was prepared for our sessions having read appropriate material and having reflected on the sources and consequences of his action. My sessions with him were primarily aimed at developing interventions that are intended to prevent a reoccurrence of such an event. Given his commitment, the specialized therapy he has received at NEFA, and the medication he is taking under Dr. Martin Kafka's supervision, my professional opinion is that he is not a danger to anyone and that he is a low risk to show a recurrence of this behavior. His prognosis is excellent.

Dr. Kafka diagnosed dysthemic disorder, which he defined as "a chronic low-grade depressive disorder." Dr. Kafka's opinion was that the underlying mood disorder had predisposed Dr. Larkin to engage in inappropriate sexual behavior:

> While it used to be counterintuitive that depressive disorders would be associated with increased sexual behavior, such an association has been consistently reported in men with sexual impulsivity disorders or "risk-taking" in association with sexual behavior. I have seen a pattern of a single "outburst" of such behavior in a few other men when a particularly stressful set of circumstances affects them.

Kafka reported that he had placed the grievant on appropriate medication, and that the grievant had had "no

sexual urges associated with exposing himself" since the July 19 incident. With ongoing therapy and medication, the grievant posed "a very low risk for another episode of inappropriate sexual behavior."

On April 7, 2010, Sorrentino interviewed the grievant in person. Following are excerpts from Sorrentino's notes of that interview:[4]

> DMS [Sorrentino]: …The allegation was that you had "purposely exposed" yourself to "two different female victims while in the parking lot" of the Market Basket grocery store in Milford.
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> EL [the grievant]: That was the allegation.
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> DMS: Is there anything you would like to expand on that?
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> EL: No. But there were some inaccuracies and incorrect inferences that were drawn. … EL didn't want to get into where there were inaccuracies. The Court has made its judgment and I am going to leave it with that.
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> * * *
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> DMS: Officer Noel…indicated that you had "knowingly exposed his genitals (penis) under circumstances which he knew would likely cause affront to alarm…." Do you agree with that? Is it accurate?
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> EL: I don't know that I can really say what was in my mind at the time of the action. I think that is the best I can do at this point.
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> * * *
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> DMS: [Kelly stated that] she and her daughter observed you "standing, facing towards them, with his hands on his hips, pelvis jutting out and penis exposed, causing them to be scared." EL:

[4] All material pertaining to the grievant's psychological treatment was redacted from the interview notes.

This was one of the points we were questioning. That would be a point where I might disagree." …

DMS: They further stated…that they "observed the suspect begin to get on his motorcycle, however, he immediately got off the motorcycle and turned toward an approaching couple, exposing himself in the same manner."

EL: No, I don't think that is correct. I did walk to the motorcycle to get back on. This is their account and interpretation of what they saw.

DMS: Mother and daughter further alleged, "after seeing the suspect attempt to expose himself to a group of kids, they called the police."

EL: No, I would say that is just nonsense. I was 150 feet away from them, driving my motorcycle. I was departing the parking lot at that time and there was a considerable distance between us. There was a group of baggers outside…they had on orange vests. That did not happen and I don't know how the woman making the allegation would have been able to see that far and make that determination. … This was a supposition on their part. …

I do want to deny there was any indecent exposure directed toward [the Market Basket employees]. That was not the case.

DMS: Anything else within the context of the incident itself that you would like to further elaborate on?

EL: No, I am happy not to revisit it. I don't have any further comment on the specifics of the incident. …

DMS: I want to make sure I am giving you the opportunity to state any factual errors.

EL: I don't think I need to go into detail at this time. …
The Court has looked into [the affidavit supporting the arrest warrant] and reached a

decision. I wish it could have been a different decision but that is where we are. … I am not going to take it to a different Court level and will accept what was decided. I am moving forward to close that chapter a little bit. The Court looked at the documents and made a decision and that is what I have to live with. …

That said…[i]t is important to me to have it on record [that there was only] [o]ne count [in the complaint], no second or third counts. I think it is important for whoever is going to make a judgment to understand that (only one count, not [the] kids [who worked for Market Basket].)

* * *

EL: Just is general I would like to go on record as saying that [Dean Kirkpatrick] was the first person I went to. … I knew I was not in a good position and was worried about who would teach my courses in the Fall. …

* * *

I suppose if I were really thinking only about myself, I wouldn't have done that.

* * *

DMS: …We were looking for [letters from his treating psychotherapists] all along.

EL: It is not lack of cooperation. Individual protections and those protected should be pursued without disadvantage. I don't want the allegation of [non-]cooperation to be a fact. I know you were looking for them all along, and I would love to share them with you. I don't know what the University wants to do. Are they going to terminate me? These reports are very personal. Confidentiality is key. I don't want to read about this is [a local on-line news outlet]. I don't know what my future is. I don't know where this is going.

* * *

Finally, the grievant submitted a written statement, which included the following remarks:

…I would like first to deny my lack of cooperation in the preparation of [Sorrentino's]

report. … I would not want this observation to become a truth.

I also want to emphasize that the event took place off campus…. No student or University community member was harmed by my action. I certainly don't condone the action, but I think that the remote setting is also significant. …

Further, I want to emphasize that I deeply regret any distress my action may have caused.

I think additionally that we need to be clear…that my offense is a misdemeanor class B and this it is not a so-called "registerable" offense. … If this were a felony charge…one would indeed be correct to describe it as serious and grave. I certainly do not mean to make light of the action, but whether it may be characterized as moral delinquency of a grave order is debatable.

While I would prefer not to revisit the details of the complaint…I do want to point out that it has taken…UNH and me…this long to meet in part because of the numerous inaccuracies in the police report and the incorrect inferences that were then regarded as factual statements. …

The University is certainly correct to want to look after the safety of its students…. The question is whether my return to UNH as a full-time member of the faculty, which is my desire, would endanger the students or the University community. I do not believe that it does. … [Both psychotherapists] conclude that I represent a very low level of danger to students. …

I don't believe that my competence, either as instructor or as scholar, has been diminished by the incident in question. …

[M]y ongoing work with mental health professionals coupled with the extraordinary support of my family and of my many colleagues at UNH give me the confidence to know that my behavior will not be repeated. …

Sorrentino submitted her second report, which was essentially a summary of the documents and interview, on May 17, 2009. On May 21, President Huddleston notified the grievant that the University intended to initiate termination proceedings.

On June 22, 2010, Provost Aber referred the question of whether to terminate the grievant to the Professional Standards Committee (PSC) of the Faculty Senate. The PSC interviewed the grievant, Provost Aber, and the University's counsel; read the letters from Drs. Ball and Kafka; and reviewed the documents in the criminal case. On July 19, the PSC wrote a lengthy recommendation against termination to President Huddleston. Among its observations were:

> …[W]e are concerned that the University's inquiry has been guided by faulty presumptions that have subtly prejudiced the investigation against Professor Larkin. Specifically, we note the tendency in the University's official documents and evidential findings to portray as though they were fact characterizations of the incident that remain disputable or otherwise ambiguous. …
>
> We also perceived a tendency to take Professor Larkin's disagreements with specific characterizations and inferences as signs of insufficient remorse. …
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> Professor Larkin is not an exhibitionist, though the initial University inquiry seemed to presume the association…. [That term does] not fit Professor Larkin's psychological evaluation

according to the expert medical reports we have reviewed.

The medical reports from two credible experts weighed heavily in our rejection of termination. … Prior to review of that evidence, we were concerned about the likelihood for recurrence … We found the psychological reports reassuring. … The University did not submit any expert evidence to challenge these medical reports …. In the absence of contrary expert evidence…we concluded that Professor Larkin's prognosis is good and the likelihood of recurrence very low. …

The Collective Bargaining Agreement states that a faculty member can be dismissed for "professional incompetence, deliberate neglect of duty, or moral delinquency of a grave order. … The University has not met any of these conditions sufficiently. …

Public exposure is a morally delinquent action, but whether that action is so "grave" as to warrant termination is the issue here. … The legal verdict classified that action as a Class B Misdemeanor, which does not require registration as a sex offender. Experts mitigate the moral gravity of the action by disclosing its psychological basis…. Professor Larkin's delinquent act seems as much a psychological act as a moral problem. Considering all these factors together, we cannot see how Professor Larkin's admittedly delinquent action meets any reasonable standard for "grave" moral delinquency. …

The Committee recommends an alternative proposal…: *Formal suspension without pay for the fall 2010 semester with the guarantee that Professor Larkin can return to his faculty position in the spring 2011 semester under probationary conditions.* Professor Larkin should be issued a disciplinary letter and be suspended without pay for the fall 2010 semester. His return for the spring 2011 term should be accompanied by formal probationary conditions including zero tolerance for a repeat of the

> behavior, or such similar behavior of a sexual nature. A repeat will result in an immediate response for dismissal. As a further condition, Professor Larkin must remain in counseling until such time as a medical professional ascertains that additional counseling is no longer warranted. We propose a three year formal probationary period that will end when Professor Larkin is eligible to apply for annulment of his criminal record, an application which, if successful, enables Professor Larkin to be treated as though he "never has been arrested, convicted, or sentenced…."[5]

President Huddleston wholly disagreed with the PFC's recommendation. He testified that he considered the grievant's conduct moral delinquency of a grave order. Because of the extensive media coverage, parents and potential donors in New Hampshire and beyond were well aware of the grievant's crime (or would easily discover it as soon as they googled the University), and Huddleston believed most of them would find it "reprehensible." The grievant's reinstatement would be detrimental to the University's reputation, a handicap in its competition for the best students, and a continuing threat to its funding. The University's two largest funding sources are tuition and philanthropy, both of which are entirely dependent on

[5] The quote is from RSA 651:5, under which persons may petition to annul the criminal record for a class B misdemeanor after three years with no other conviction.

the reputation of the institution. "Reputation is all we have," he testified.

Additionally, Huddleston believed that there was an undue risk that the grievant would repeat the conduct, either on campus or off. The letters from the grievant's doctors did not alleviate this concern because the doctors did not state that the risk was zero. Huddleston testified that in his view, "Any risk is too much risk."

II. Contentions of the Parties.

The University. The University proved by clear and convincing evidence that the grievant engaged in "moral delinquency of a grave order." Although the Agreement does not define those words, simple dictionary definitions, as well as common understanding, leave no doubt that the grievant's conduct met that description. A University employee who engages in a sex-related crime, even a misdemeanor, must know that he cannot retain his job if he is arrested and convicted. Clearly, exposing one's penis in a supermarket parking lot to a mother, her teen-age daughter, another couple and a group of teen-age supermarket employees is morally delinquent, illegal and wrong. The University therefore had just cause to terminate the grievant.

There were no flaws in the University's investigation. The University carefully considered all options and gave the grievant many opportunities to explain his conduct. The University was under no obligation to accept the PSC's recommendation. The University President has the ultimate authority to make disciplinary decisions. His decisions are entitled to deference. Furthermore, by recommending a suspension, the PSC must have determined that the grievant engaged in moral delinquency of a grave order, because the contractual standards for suspension and termination are identical.

The grievant himself was markedly unwilling to participate in the University's internal investigation or explain his conduct. He declined to do so while his criminal case was pending and delayed providing police and witness statements. While the Association claims that the University acted on inaccurate police reports, the grievant has never detailed the purported inaccuracies and chose not to testify at the arbitration.

The Association misleadingly argues that the University moved to terminate the grievant because of his criminal conviction. It is true that University took that step only after the grievant pleaded guilty, but this was because it wanted confirmation that he indeed engaged in

the conduct alleged. The conduct motivated the discharge, not the conviction. Nowhere does President Huddleston's letter state otherwise.

It is of no significance that the grievant's conduct occurred off-duty. The contract language is clear and contains no such exception. Even if the arbitrator should consider extra-contractual principles concerning off-duty misconduct, it is well-established that an employer may impose discipline for off-duty conduct if it harms the employer's reputation or product, renders the employee unable to perform his duties or appear at work, or leads to refusal, reluctance or inability of other employees to work with the miscreant.

The grievant's actions substantially damaged the University's reputation. From the moment of his arrest, the grievant's conduct and subsequent guilty plea have received considerable print and on-line media coverage, all of which identified the grievant and the University by name. Such negative publicity adversely affects the University's recruitment efforts and fundraising potential.

It was not unreasonable for the University to conclude that the grievant's continued employment would cause students, parents, alumni and the public at large to have misgivings about the wisdom and judgment of the University

administration. The University's students are about the same age as R. The University cannot run the risk of a recurrence by retaining the grievant in its employment. As a public institution, the University has the right to hold its employees to a higher standard, especially when the off-duty criminal conduct relates directly to the grievant's constant interaction with students who are the same age as one of his victims.

Many of the grievant's colleagues, primarily women, have expressed reluctance to work with him. It is predictable that at least some students will not want to take classes with him, yet they will be unable to avoid him because he is one of only two tenured professors teaching German. The letters of support that the Association submitted were solicited, not spontaneously offered.

The Association's contention that the grievant is unlikely to repeat the conduct is irrelevant to the contract language. The single incident provides just cause under the Agreement. None of the Association's experts stated that the risk of recidivism is zero. Dr. Ball identified stress as one factor leading to this kind of sexual behavior, and the Language Department is a particularly fractious, stressful environment.

The grievant never apologized for his behavior but equivocated and made excuses instead. This refusal to take responsibility for his conduct makes alternatives to termination inappropriate.

The Association. The grievant has had a long and impeccable career at the University. He has no prior criminal history. The conduct at issue occurred off-campus and involved a single incident lasting a few moments. The grievant resolved the criminal matter by paying a fine and remains in therapy for what the undisputed expert evidence establishes is a mental-health issue. While the grievant disputes certain statements in the police reports, he acknowledged, through counsel at the arbitration, that he committed an act that would support a finding of guilty based on the allegations in the criminal complaint.

Despite the foregoing, the University insists on terminating the grievant, in disregard of: the PSC's recommendations; the options offered by Sorrentino; the opinion of Associate Dean Kirkpatrick; the recommendations of the grievant's treating therapists; and the overwhelming support of the grievant's colleagues. The specific reason for the grievant's termination, as stated in Huddleston's letter, was his conviction of a Class B misdemeanor. Contrary to the belated assertions in its brief, the

University did not charge the grievant with failure to cooperate in the investigation. The grievant was acting on legal advice to avoid self-incrimination. When he was able to do so, the grievant not only gave a written statement to the University but also appeared before the Faculty Senate.

The University did not carry its heavy burden to demonstrate that the grievant engaged in "moral delinquency of a grave order." The University presented no proof beyond the hearsay police records. It relied on exaggerations and unproven, inaccurate assertions. The grievant pleaded guilty to a single count of a Class B misdemeanor, the lowest classification of a crime in New Hampshire, in the same category as operating under the influence, trespass, domestic violence and reckless driving. By its very nature, a Class B offense does not constitute "moral delinquency of a grave order." "Grave" means not just serious but egregiously serious.

Under well-established standards concerning off-duty misconduct, the University was obliged to establish a sufficient "nexus" between the misconduct and the employer's legitimate business interests. The University relied solely on media accounts of the grievant's arrest and conviction. There was no evidence of any actual detrimental effect on the University's reputation, student

enrollment or fundraising. The University submitted no expert evidence that there is any appreciable risk of reoffending.

If the arbitrator chooses not to reverse the termination and order a full, unconditional return to work, he should adopt the findings and recommendations of the PSC: an unpaid suspension for one semester followed by a return to work under certain prescribed conditions, including a "last chance" proviso and continuing counseling. This in itself is a severe sanction that amply protects the University's interests.

III. Opinion.

A. THE MEANING OF "MORAL DELINQUENCY OF A GRAVE ORDER"

Article 14.2.1 of the collective bargaining agreement provides: "A bargaining unit member shall not be subject to dismissal or suspension without pay except for just cause." This is a fairly standard just-cause provision. However, the parties also specified three kinds of conduct that, if proven, would constitute just cause for dismissal or suspension: "professional incompetence, deliberate neglect of duty or moral delinquency of a grave order."

This case centers on the question of whether the grievant was guilty of "moral delinquency of a grave order" when he intentionally exposed himself in the parking lot of a supermarket on July 19, 2009. The grievant does not deny that he did so, although, as is discussed later in this decision, he does deny certain other allegations made against him.

Both parties note that the Agreement does not define the three key words in the phrase at issue: "moral," "delinquency," and "grave." Nor, apparently, has any arbitrator construed them in the past. With respect to the words "moral" and "delinquency," this absence of precedent or contractual guidance is ultimately not material because the parties essentially agree that the grievant's conduct met the definition of "moral delinquency."

Therefore, the fundamental inquiry narrows down to the meaning and application of the adjective "grave." A well-established principle of contract interpretation is that the parties intended every word of their collective bargaining agreement to have meaning. One cannot presume that they included empty words. This rule is particularly apt in the case of the word "grave," which in my experience is unusual in a collective bargaining agreement. Obviously the parties consciously chose this special word. As used

in Article 14.2.1., the word "grave" is necessarily a term of limitation. It clearly signals that the parties did not intend every act of moral delinquency to be just cause for discharge. Only *grave* moral delinquency meets that standard.

The dictionary definitions of "grave" include "Requiring serious thought; momentous" and "Fraught with danger or harm." American Heritage Dictionary of the English Language (4th ed. 2000). "Grave" connotes "the…somberness associated with weighty matters." Id. In fact, the Latin root of the word is *gravis*, "heavy." When one speaks of a "grave illness," it signifies that on the spectrum from minor to mortal, the illness is close to the mortal end. Likewise, on the spectrum of moral delinquency from trivial to extreme, grave moral delinquency is close to the extreme end.

B. THE GRIEVANT'S CONDUCT ON JULY 19, 2009

Before deciding whether the grievant engaged in "moral delinquency of a grave order," it is necessary to pinpoint exactly what he did. The grievant has admitted that he is guilty of the allegations in the criminal complaint, which are that he "did knowingly expose his genitals (penis) under circumstances which he knew would likely cause affront or alarm, in that the defendant did expose his

genitals (penis) while outside in the Market Basket parking lot." However, the police reports, witness statements, and affidavit in support of the warrant application contain a number of allegations that the grievant did not admit, and in some instances forcefully denied.

The task of defining the alleged conduct at issue is more straightforward when the employer either makes specific allegations or identifies the allegations it credits. President Huddleston's letter of intent to terminate, however, as well as his testimony, were general and not specific on this point. The letter identifies the grounds for the discharge as the grievant's "conviction on charges of indecent exposure and lewdness," without elaboration.[6] At the arbitration hearing, President Huddleston testified that he terminated the grievant because he "exposed himself in a parking lot." In the University's brief, it states as a fact that the grievant exposed himself to "two separate couples" and "tried to expose himself to a group of kids."

[6] Based on the letter, the Association argues vigorously that President Huddleston discharged the grievant because of the conviction, not the underlying conduct, but that is an overly literal interpretation. Huddleston testified firmly and repeatedly that he moved to discharge the grievant because he exposed himself. I have no doubt that the grievant understood the letter in that sense.

Although there is no question that the grievant engaged in unsavory, unacceptable, and criminal conduct, there is a material difference between briefly exposing oneself to an adult woman and her teen-age daughter, which the grievant admits, and intentionally waiting for other potential victims to pass by, or purposely targeting a group of teen-age baggers on break, both of which the grievant denies. To measure the conduct against the contractual standard, it is necessary to clarify what it was.

At the arbitration, there was no testimony from persons who were actually present in the Market Basket parking lot on July 19, 2009. The complaining victims were not witnesses, nor was Officer Noel, who interviewed them. Therefore, all of the charging evidence concerning the grievant's conduct was literally hearsay evidence – that is, statements made outside of the arbitration hearing that were offered in evidence to prove the truth of the matter asserted therein. See Fed.R.Ev. 801(c). Some of it was straightforward hearsay, such as Kelly's and R.'s written statements, and some of it was double hearsay, such as the oral statements as recounted by Officer Noel in his police report.

The technical rules of evidence generally exclude most types of hearsay evidence because it is unreliable. Since the rules of evidence do not apply in arbitration, the hearsay evidence both for and against the grievant came into evidence. However, the problem of reliability remains. One of the arbitrator's tasks as a factfinder is to decide whether the hearsay evidence is sufficiently reliable to establish that the facts asserted therein are *true*.[7]

The Agreement provides some direction regarding this task. Article 14.2.5 requires the University to prove the grievant's guilt by "clear and convincing evidence." This is a fairly demanding standard of proof, more difficult than the easier standard of preponderance, i.e., "more likely than not." Where an employer uses hearsay evidence to establish guilt, there must be some independent assurance of its reliability.

In this case, there is no such assurance. Aside from the admitted fact that the grievant intentionally exposed himself to Kelly and her daughter, I am not convinced of

[7] The PSC recognized this problem without reference to legalisms. In its report, the PSC analyzed in detail some of the allegations against the grievant and found that they lacked factual foundation. Hence its criticism of the University's investigation for its "faulty presumptions."

the truth of the other allegations against him. For example, Officer Noel wrote in his police report that Kelly told him that the grievant intentionally exposed himself to the teen-age Market Basket employees. That assertion is not questionable not only because it is double hearsay but also because it does not appear anywhere in Kelly's own written statement. Given these circumstances, the Agreement's requirement for "clear and convincing evidence" precludes me from finding the grievant guilty of the extremely serious allegation based on an uncorroborated second-hand statement in a police report.

For the same reason, I cannot credit Kelly's and R.'s allegations that the grievant "tried" to expose himself to a couple and a woman who happened to walk by him. The grievant denied this, and there was no first-hand evidence from a percipient witness that it actually occurred.

C. THE GRIEVANT'S MORAL DELINQUENCY WAS NOT "OF A GRAVE ORDER"

As noted earlier, there is no question that the grievant engaged in moral delinquency when he intentionally exposed himself to Kelly and R. on July 19, 2009. But was it moral delinquency "of a grave order?"

When the parties negotiate such language, they do not seek the purely personal opinion of the arbitrator.

Rather, they expect an expert, objective interpretation within the context of the bargaining history, practices of the parties, nature and context of the employment relationship, and common meanings of language in that setting. Objective sources of assistance in interpretation are often necessary and useful in that process. Here, both sides, in the absence of other precedent and sources of guidance, have appropriately cited dictionaries. In this case, an objective reference point is also available in the applicable criminal law, which has its own ranking order of severity that is specifically relevant here.

RSA 645:1 represents the consensus of the elected representatives of the people of New Hampshire regarding the seriousness of the offense of intentionally exposing one's genitals in public. In my view of the applicable law, this offense is clearly not considered "of a grave order." The crime is a misdemeanor, not a felony. The grievant's crime in particular was treated as a class B misdemeanor, the lowest type, for which the maximum penalty is a fine of $1,200. Moreover, the court did not impose the maximum fine, but a fine of $1,000, with $500 suspended. The grievant's conduct does not require that he be publicly identified as a sexual offender.

There was quite a bit of testimony concerning the possible adverse reaction of parents, students, and donors should the grievant be reinstated. All of it is hypothetical. There is evidence of actual negative effects, or even correspondence expressing negative sentiments. It is safe to assume that some proportion of the University's constituencies will classify the grievant's conduct as a grave moral delinquency, but the contractual standard cannot depend on the possible future opinion of an unknown proportion of the public.

There was also evidence concerning the media uproar over the grievant's arrest. I do not mean to minimize the anguish that these "public burnings" can cause to institutions of higher education. While great harm was done to the reputation of the grievant, there was certainly blowback to the University. The parties, however, could not have intended that the news media's sensationalistic choices, or the self-aggrandizing attentions of bloggers, serve as the measuring stick for what constitutes grave moral delinquency. The criminal law and criminal-justice system reflects the more deliberate, considered judgments of New Hampshire society regarding the moral gravity of the grievant's crime.

The opinions of Drs. Ball and Kafka are also significant. They do not absolve the grievant from responsibility for his actions or shift his conduct from the moral to the medical sphere, but they do elucidate his motives. According to these experts, the grievant did not act out of malice but out of a compulsion that he himself did not understand, which was at least partly owing to an underlying depression. That does not excuse the grievant's actions, but it is a mitigating factor in assessing the moral dimension of his conduct.

In sum, I find that while the grievant's conduct on July 19, 2009, constituted moral delinquency, it was not moral delinquency of a grave order. The University did not have just cause to terminate him. The remaining question is what the remedy should be.

D. THE GRIEVANT'S SERIOUS OFF-DUTY MISCONDUCT JUSTIFIES A SUBSTANTIAL UNPAID SUSPENSION

I conclude that, although the grievant's termination was unwarranted under just cause, a substantial suspension is in order.

As both parties point out, the accepted standard for whether off-duty misconduct constitutes just cause for discipline is the so-called "nexus" test: whether there is a significant intersection between the misconduct and the

employer's legitimate business interests. I do not agree with the Association that the relationship between a professor's arrest and conviction for "flashing" two women in a supermarket parking lot and the University's mission of educating students is merely hypothetical. As a practical matter, the relationship is quite clear. The grievant is one of only two tenured professors of German at UNH. Some students might well shy away from taking his classes, at least for a while, which will impede their opportunity to learn it and the University's effort to teach it. As noted, the mere possibility that this might happen does not suffice to make the grievant's conduct moral delinquency of a grave order," but in my view it does establish a definite nexus between the misconduct and the University's business. The University is therefore entitled to discipline the grievant for his off-duty offense. Under the unique circumstances of this case, including the Union's proposed alternative, fallback remedy, I will order the following.

The grievant will be suspended without pay for the Fall semester of the 2011-12 academic year. Upon his return to work, the University shall effectuate the probationary conditions set forth in the PSC's report under the heading, "An Alternative Course of Action." These

probationary conditions represent an intelligent, balanced reconciliation of the grievant's continued employment reinstatement, the University's legitimate concerns, and the interests of the University's various constituencies regarding the risk of recurrence. I will retain jurisdiction for 60 days from the date of this Award for the sole purpose of resolving any dispute over the implementation of this remedy.

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AWARD

The University violated Article 4.2 when it terminated Professor Larkin's employment.

As a remedy, the University shall rescind its letter of intent to terminate and expunge all reference to the proposed termination from the grievant's personnel file.

The University may issue a letter of suspension and suspend the grievant without pay for the Fall semester of the 2011-12 academic year.

Upon the grievant's return to work, the University shall effectuate the probationary conditions set forth in the July 19, 2010, report of the Faculty Senate Professional Standards Committee under the heading, "An Alternative Course of Action."

The arbitrator shall retain jurisdiction for 60 days following the date of this Award for the sole purpose of resolving any dispute over the implementation of this remedy.

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Michael C. Ryan
Arbitrator
April 12, 2011