LEO
Lecturers' Employee Organization
AFT Michigan Local 6244, AFL-CIO
339 East Liberty, Suite 340
Ann Arbor, Michigan 48104

September 9, 2018

Dominick Fanelli LSA HR
Alexandra Matish, Academic HR

Dear Mr. Fanelli and Ms. Matish:

Please be advised that we are writing to grieve the termination of Dr. John Rubadeau, a Lecturer IV in the Department of English Language and Literature (the Department). More specifically, in terminating JR without prior warning, the Employer violated the just cause protections of the UM-LEO Collective Bargaining Agreement (CBA), specifically Article XX, Discipline and Dismissal, including subsections A.3. and B.

This grievance is being filed at Step III, in accordance with Article X, Section B.4.b. (Expedited Process 2) of the CBA. As per agreement between the Union and the Employer, the time of reasonable knowledge for this grievance began on July 20, 2018, the date of the notice of termination sent by Prof. David Porter, Chairman of the English Department; however, timelines were extended to September 10, 2018, due to the time it took to receive Dr. Rubadeau's personnel file.

Background

JR has taught in the Department since 1987 as a nontenure-track faculty member. Prior to the first UM-LEO CBA in 2004, he held the title of Senior Lecturer, a designation which is the highest recognition bestowed by the College of LSA for a nontenure-track faculty member -- a reflection of his long and excellent service. In 2005, he "mapped" to the Lecturer IV title with the Senior Lecturer title as his working title. He is one of the Department's highest paid lecturers and well known across the University as a gifted, beloved, and charismatic teacher, who has received uniformly high student evaluations and multiple teaching awards, as shown by his CV.

Since 1987, Dr. Rubadeau has passed numerous performance reviews and been awarded multiyear appointments, most recently in 2017 (Attachment 1, Departmental Review Letter). He also won a Golden Apple Award in 2005. The award "Honors those teachers who consistently teach each lecture as if it were their last and strive not only to disseminate knowledge but also to inspire and engage students in its pursuit." His classes are consistently waitlisted, many students refer to his class as the best and most important class of their time at the University, and his personnel file contains scores of letters of appreciation from current and former students. The outpouring of student support since the news of his termination has been considerable, and several of his students have offered to pay the cost of his legal defense.

Timeline of relevant dates

Winter 2017: JR passed his continuing renewal review. Although the review was successful, the review committee noted that a "small number" of students had raised concerns regarding comments that could be perceived as "racist or sexist." In the cover letter from the Chair, the concerns were highlighted with a threat of potential "disciplinary sanctions." In response, JR expressed immediate concern and dismay to his chair that any student would feel upset by anything he said. He also reviewed all 600 CRLT forms from the previous five years and discovered that only five of the 600 responses made a negative comment (0.83%). JR explained to the Chair that he (JR) has never made any racist or sexual comments to any student in his entire teaching career. In fact, no student of color complained about insensitive comments; instead the complainants were Caucasian students who chose to take offense at the imaginary slights of other students. The employer conducted no investigation regarding what the comments might have been nor, indeed, whether they were in fact offensive or discriminatory.

On March 8, 2018, JR was asked to a meeting with the Chair (summarized in the Chair's email of March 15, 2018, Attachment 2), where a range of "concerning" behaviors, primarily with staff, were discussed. JR did not have union representation at that meeting and was told he could not record the meeting.

On April 23, JR was asked again to meet with the Chair, this time accompanied by LEO reps, Kirsten Herold (LEO VP) and Moe Fitzsimons (LEO staff). Three additional concerns were raised at the meeting regarding interactions with staff members. He was advised not to retaliate against any staff member. And he did not.

On April 26, JR received an email from the Chair alleging he was reported to have retaliated against a staff member. He was instructed not to speak to anyone in the Department, except on matters directly related to his employment, or he would face "disciplinary proceedings." JR and the Union denied that JR retaliated against anyone; however, he did have a spirited conversation with one staff member, a close friend of his, which was not forbidden.

Concurrently, an investigation by the Office of Institutional Equity (OIE) into allegations of harassment of colleagues was underway. JR met with an OIE representative on January 8, 2018. Again, he did not have union representation at this meeting. The OIE report was finalized on April 30, after the semester was over. It was sent to JR but not to the Union.

In mid-June of 2018, the Department attempted to schedule a meeting with JR, a meeting which never happened due to JR being out of town for a week and the Chair being gone subsequently.

On June 28, 2018, JR received a letter from the Chair informing him of the intent to terminate his appointment effective July 6, with a review conference on July 3. (Letter was dated June 27, but sent via email on June 28.) The review conference proceeded with two LSA Associate Deans (Cole and Shaw), the Chair, and LSA HR in attendance. JR

was accompanied by two union reps, Kirsten Herold, and AFT Staff Rep, Jon Curtiss. The Union protested the short notice of termination, especially during the 4th of July week, a short period of time which did not afford JR time to arrange for retirement payments or health insurance.

On July 20, 2018, JR received notice from his Chair that his appointment would be terminated effective August 3rd with his benefits ending at the end of August. On the same date, LSA HR offered via email that JR might elect to retire (immediately) and receive one semester's worth of pay. JR rejected this offer posthaste, and he was terminated.

Violation

In terminating JR, the Employer failed to adhere to the just cause standard outlined in Article XX, including Section A. 3, which states, "Any discipline or dismissal of an Employee pursuant to this Article shall be for just cause." "Just cause" consists of seven principles:

1. Was the employee adequately warned of the consequences of his conduct?
2. Was the employer's rule or order reasonably related to efficient and safe operations?
3. Did management investigate before administering the discipline?
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence or proof?
6. Were the rules, orders, and penalties applied evenhandedly and without discrimination?
7. Was the penalty reasonably related to the seriousness of the offense and the past record? [1]

In this case, management violated all seven principles to various degrees, especially Principles 1, 4, 5, and 7. We will discuss each in turn.

1. Was the employee adequately warned of the consequences of his conduct?

The principle of **adequate warning** is at the heart of just cause. While JR was told on more than one occasion that he needed to change certain aspects of his behavior (which he did), he was not warned that the consequences of not making the changes would be termination.

In order to implement the most drastic of penalties, termination, it is not enough for an employer to say, "You need to stop swearing in the workplace"; instead, the employer must be explicit that failure to stop swearing will lead to termination. The reason for this

[1] See, https://www.hawaii.edu/uhwo/clear/home/EnterpriseWire.html for the precedent.
See also, https://www.ueunion.org/stwd_jstcause.html and
https://hr.berkeley.edu/hr-network/central-guide-managing-hr/managing-hr/er-labor/disciplinary/just-cause

rule is twofold: It places the employee on notice that the continued objectionable behavior will result in termination. It also communicates the degree of seriousness with which the Employer views the behavior. Because the University failed to comply with this principle and warn JR of the consequences, it is procedurally barred from terminating JR's employment.

In this case, the Department had ample opportunities to issue termination warnings and failed to do so. For example, in winter 2017, JR had a successful continuing renewal review and received a five-year appointment. In the review report, the committee wrote:

> *It was the judgment of the committee that conducted the review in 2011 that "in his decades in the classroom, Dr. Rubadeau has developed and honed a teaching method that is as* ***popular and effective as it is idiosyncratic****" [bolded by LEO]. They also found that he "continues on a daily basis fully to justify the enviable reputation he has earned over the years as a masterful teacher and inspirational classroom presence." Our Committee [in 2017] concurs with the judgment of that earlier review.*

The committee in particular noted JR's use of humor and his ability to create "a sense of community in his classroom where students share sometimes personal and intimate details of their lives **without fear of negative judgment** [bolded by LEO]. The student evaluations in Dr. Rubadeau's classes consistently comment on the passion and energy he brings into the classroom often stating that the experience has been a life transforming one."

Without offering any specifics, the review committee did note some concerning comments from a few students about problematic statements around women's bodies and race and urged him to be mindful of how his comments come across to all students. Nevertheless, the overall assessment was "overwhelmingly positive."

In spite of this positive response, the cover letter from the department chair was considerably more negative. "A few students" was now "students," the concerns have been turned over the OIE for investigation, and they expected JR to address them or else potentially face disciplinary sanctions. It is as if it were two different reviews![2] However, the unit did not issue a remediation plan (which typically includes a threat of termination if the problem is not remediated, although this would have been an obvious occasion to do so). However, Dr. Rubadeau took the concerns to heart and addressed them the following year; we note that he is not being terminated due to any issues with his teaching.

In addition, the OIE report regarding interactions with colleagues was issued on April 30, 2018, after the end of the winter semester. Because the semester was already over, **JR had no opportunity to address the concerns that were raised in the report**. Moreover,

[2] We expect the Employer will respond here that if the Union had concerns about this review, those concerns should have been brought up at the time, not more than a year later. However, we cannot ask questions about problems we do not know about. Had JR shared his letter with the Union at the time, we would at a minimum have raised questions about the cover letter and how "a small number of students" (as evidenced by his evaluations numbers also) suddenly became "students."

the OIE report did not recommend termination; in fact, it specifically noted that going forward, JR should be advised to behave in a more professional manner, **thus clearly envisioning future employment**. So even at this late date in the process, JR was not adequately warned of the potential consequences of his conduct.

The Employer will no doubt note that the cover letter to the major review report of 2017 and the April 26, 2018 email from the Chair contain threats of disciplinary action if the behaviors are not addressed. In a university setting, discipline may include the loss of a class, research funds, or travel moneys, or being told to take a class (aka sensitivity training). Similar forms of discipline have been imposed on Employees by the Employer on previous occasions. In some case, these employees were guilty of far more egregious offenses than the allegations in this case. However, a threat of discipline is not a threat of termination.

Tellingly, Article XX is titled, "Discipline and Dismissal," not "Discipline including Dismissal." In other words, discipline is distinct from, and short of, dismissal. One is not assumed in the other. Warning an Employee of discipline is not a silent warning of dismissal. **Thus, in the contract, a threat of disciplinary action clearly does not equal a threat of termination.** By moving directly to termination, without prior warning that the consequences of the objectionable behavior could be termination, the Employer violated the first principle of just cause.

2. Was the employer's rule or order reasonably related to efficient and safe operations?

Reasonable people may disagree on the answer to this question. The fact that some people were upset by the JR's behavior is obviously concerning. That said, the use of nicknames and the telling of risqué jokes to people with whom JR has had a close working relationship, and in some cases has known for many years, are not unusual behaviors in a workplace; it is part and parcel of a culture of ritualized banter, banter which may be interpreted as antagonistic behavior, but which is, in fact, intended to be friendly.

Certainly, speaking loudly in the office is not unusual behavior nor should it prevent anyone from working safely and efficiently. Indeed, to the extent JR was friendly and reached out to new members of the department, he could be said to aid "efficient and safe operations."

Nor has any evidence been presented that JR interfered with an individual's work performance for more than a few seconds to say hello or tell a quick joke. For a workplace to become "hostile," the behavior has to be pervasive. The allegations against JR do not reflect pervasive behaviors. Asking a coworker twice over a few months if he or she is interested in meeting someone from their own country is not "pervasive," nor does it create a hostile workplace—even if the person may take offense at what was meant as a friendly gesture. Certainly, no reasonable person would be so upset by it that his or her work performance would suffer.

Similarly, overhearing a dirty joke about sheep may disgust a few employees, but, again, it is not sufficiently pervasive to create a hostile environment. In fact, one witness (1) had originally "decided that she did not wish to participate in OIE's process. However, Witness 1 decided subsequently that she was willing to participate as part of this investigation" (quoting from OIE report). This reluctance to come forward suggests that the witness did not think the incidents were sufficiently serious to interfere with her work. To claim so constitutes a slippery slope where any speech we don't like (say, in the political realm) becomes hostile speech.

3. Did management investigate before administering the discipline?

The answer to this question is mixed. Apparently the Department interviewed all staff members (according to an oral communication between HR and the Union). The OIE talked to seven witnesses: three tenure-track faculty members, three graduate student instructors, and one lecturer. But compared to the thousands of students, faculty, and staff with whom JR has been in contact during his time at the U, that is a very small and highly selective group -- those who were unhappy. Moreover, the seven witnesses who came forward with concerns, did so at the **instigation** of the department leadership; in fact, at least one witness acknowledged that in her mind the concerns had been resolved (Witness 6).[3]

4. Was the investigation fair and objective?

The answer to this question is no. While we are pleased that JR was cleared of the serious sexual harassment charge in five of the cases (Witness 2-6), there is nothing fair and objective about an investigation that looks for malicious intent in the most innocuous interactions and only interviews witnesses who have expressed concerns while ignoring the hundreds of individuals who did not.

5. Did the investigation produce substantial evidence or proof?

Emphatically no. To fire an employee after 31years, one would expect the evidence to be "substantial." However, while it is true that some members of the Department do not like JR, there is absolutely no evidence that JR sexually harassed anyone. No evidence has been presented that JR ever propositioned any of his colleagues or staff or requested sexual favors. He did not make salacious personal remarks (a joke is not a personal remark), he did not touch anyone in a sexual way, he did not invite anyone out for coffee or a movie or seek intimacy. And he did not hug any colleagues against their will; he

[3] Regarding Witness 6, the charge is essentially that JR had trouble remembering her name, and that this was somehow because she was a faculty member of color. Two points: First, as the Department is aware, JR has problems with his vision. Thus, it is perfectly possible that he did in fact have trouble recognizing her and confused her with someone else. Second, English is a large department with many new hires every year -- tenure-track faculty, lecturers, and graduate student instructors. The fact that JR sought out new members of the Department and got to know them should be to his credit. We are reasonably confident that most long-time members of the department know far fewer of their colleagues by name than Dr. Rubadeau.

asked permission first. When told "no," he did not disregard the directive and hug them anyway. These are not the signs of sexual harassment.

The Employer may cite the indisputable requests for hugs as evidence of sexual harassment. We disagree. First of all, hugs are not inherently sexual; most of us hug our children, our pets, and our friends. Our culture is becoming increasingly huggy; even President Obama hugged Joe Biden all the time! Moreover, JR only requested hugs from people he knew well; he was of the not-unreasonable belief that people in the Department whom he had known for years were his friends. Thus, he did not ask witnesses 2, 3, 4, 5, or 6 for hugs or they would surely have mentioned it. In some cases, the request and refusal of hugs had turned into a running joke, like with Lewander Davis. He also asked men for hugs, including the Dean of LSA and his Union reps. And he hugged his students, and they hugged him, as anyone who has ever walked across the Diag with him or attended graduation can attest. None of these hugs were in the least bit sexualized. Moreover, JR is hardly the only faculty member at the University to engage in occasional hugging of colleagues and students.

One witness (4) claims that JR stood in her office where he could look down her shirt. He denies that vehemently[4], and there is no evidence he did, in fact, look down her shirt. First, no other witness has made this allegation. If he were, in fact, the habitual sexual harasser of the Department's narrative, surely more than one "victim" would have made this claim during his 31 years at the University. Secondly, JR is very tall, at least 6'-4", and he was standing and the witness was sitting in a small office space with the door open. The disparity in heights may have contributed to the witness's perception that he was looking down her shirt. It would have been more noteworthy if he had NOT looked at her while talking with her. By no reasonable consideration can this incident be considered "substantial evidence" of sexual harassment.

Similarly, when he invited colleagues into his office to see his collection of photos, he did not close the door; colleagues could easily stand in the doorway and see the photos of his students. He did, however, on numerous occasions invite colleagues, their partners, and his students to his home for dinner with himself and his wife, but one hopes that is still acceptable behavior.

Moreover, there was no quid pro quo in any of these interactions, and nobody's employment was affected. As a lecturer, JR has very little power; if anything, the power differential went in the other direction. Witness 1 from the OIE report is a tenured associate professor and director of the undergraduate program, and thus one of JR's immediate supervisors. Witness 6 is also a tenured faculty member. Moreover, JR did not have supervisory authority over **any** of the graduate students, lecturers, or staff in the Department who allegedly complained about his behaviors. Certainly in this sense, his behavior did not constitute sexual harassment.

4 It is also worth noting that this is one of the few instances where there is a discrepancy between the witness' statement and JR's; often JR agrees that the thing described in the OIE report occurred, more or less as the witnesses stated it, even if he does not believe he did anything wrong. But in this case, he outright denies the assertion which, again, is entirely unsupported by any other facts.

Finally, as the OIE report acknowledges, JR did not intend to sexually harass anyone; he thought he was being friendly. Of course, as the report also notes, sexual harassment **could** have occurred, even if the person did not view his conduct in this way. Still, it is difficult to conclude that there is substantial proof of sexual harassment if the alleged harasser had no intention to harass. By the same token, a person may believe him- or herself to have been harassed, but **that does not necessarily mean sexual harassment occurred**. In other words, the Union does not believe that the behavior described by the witnesses constitutes harassing behavior, certainly not "substantial evidence" of sexual harassment, as required by principle 5.

6. Were the rules, orders, and penalties applied evenhandledly and without discrimination?

The answer to this question, again, is no. As the review letter notes, JR's teaching style and personality are "idiosyncratic." He truly is one of a kind. However, it is difficult for the union to believe that JR is the only employee of the Department / College who tells jokes in the workplace (including risqué jokes), uses nicknames and occasional four-letter words, or hugs coworkers, speaks loudly in the halls, or walks into a colleague's office to say, "Hello." The department has no policies against these behaviors. Nor does the department have any rules about office decorations, although apparently at least one person found JR's collection of photos unusual or even "creepy." In other words, once JR was singled out for investigation, the department conducted a postmortem of his interactions with colleagues to identify incidents that may have made someone "uncomfortable," which is a far cry from harassed. That is not evenhanded.

7. Was the penalty reasonably related to the seriousness of the offense and the past record?

It is not the union's position that because of JR's past (and present) record as a highly successful teacher, he should be held to different standards than others. That said, his record as a highly successful teacher, over 31 years, should be considered, especially when weighed against what can only be characterized as trivial charges against him. Once again, we note how students and classroom observers noted how safe students felt to express themselves in his classroom (see also letter from Dr. Lillian Back). It simply does not add up to have an instructor capable of creating such trust in the classroom, yet allegedly generating such discomfort in the larger workplace. In this case, termination is an extreme overreaction; thus, the penalty exceeded the offense.

Reasonable people can disagree as to whether the behaviors cited in the decision to terminate were professional, borderline unprofessional, or unprofessional. A university is a less formal workplace than, say, a bank, and, like many of his colleagues, JR engaged in behaviors that could be deemed less than professional: in terms of attire, mode of address, teasing, joke telling, et cetera. Even within the culture of the English Department, there are different norms of professionalism for faculty and for staff. In short, the meaning of terms like "professional" or "unprofessional" is relative.

In contrast, sexual harassment of which JR is accused, has a clear definition, as stated by the EEOC: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct **of a sexual nature** constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work place." As we have shown, the evidence is clear that JR is not guilty of sexual harassment. Yet JR was fired, the most serious penalty that can be levied against a UM employee who has been proven guilty of sexual harassment, as outlined in the Standard Practice Guide (SPG) (201.89):

> *Corrective action could include a requirement not to repeat or continue the harassing or retaliatory conduct, a reprimand, denial of a merit pay increase, reassignment, suspension and termination. The severity of the punishment will depend on the frequency and severity of the offense and any history of past discriminatory or retaliatory conduct. A finding of sexual harassment may be cause for the separation of the offending party from the University, in accordance with University procedures, including, for qualified faculty, the procedures set forth in Regents' Bylaw 5.09. Every effort will be made to assure University-wide uniformity of sanctions for similar offenses.*

Thus, even if sexual harassment had occurred, the Employer had other options available. Firing someone for telling a risqué joke -- or asking for a hug (and walking away when the request is turned down), or talking loudly, or using nicknames with colleagues, or forgetting a colleague's name, or any of the other allegations that are unquestionably not sexual harassment -- is wrong.

Nor do we believe there was "uniformity of sanctions"; certainly, the Union cannot recall another lecturer who was terminated on such slender grounds. Similar behavior has been exhibited by other faculty and staff members who have not been fired. In short, termination is an overreaction given the nature of the offense.

Conclusion

By going directly to termination, with no prior warning, the Employer violated the just cause protections of the Collective Bargaining Agreement as well as the SPG. The Employer did so despite the fact that JR has changed his conduct when circumstances warranted; he implemented every change suggested by the Chair – as evidenced in his response to student complaints about his language, or about pronoun use, and even in the incidents reported to the OIE. The Employer has also failed to prove that JR sexually harassed anyone, instead relying on a murky area of "creepy," "uncomfortable," and "unprofessional."

The Union understands the pressure on the University to take allegations of misconduct seriously. We also understand that in some cases the misconduct of employees can be very severe. However, there must also be a measure of compassion and of common sense that temper decisions like this one. Firing a man who has dedicated 31 years of his life to this University, based on these kinds of allegations, is not only a contract violation; it is morally wrong.

The remedy we seek is that Dr. Rubadeau be made whole. That means restoring him to his teaching appointment with backpay for time missed, including reimbursement for insurance and medical expenses, and his email access and other privileges restored.

Finally, please note that the CBA states, "The designee(s) of the Provost and Dean will hold a Step Three meeting within fourteen (14) days of submission. The meeting may include relevant witnesses as determined by each party. The Step Three written answer shall be sent by the Provost's and Dean's designee(s) within fourteen (14) days following this meeting."

Sincerely,

Kirsten Herold
Vice President