GARRETT OLMSTED,

Grievant,

v. **Docket No. 97-BOD-545**

BOARD OF DIRECTORS/
BLUEFIELD STATE COLLEGE,

Respondent.

D E C I S I O N

Dr. Garrett Olmsted (Grievant), was employed during the period of time pertinent to this grievance by Respondent Bluefield State College (BSC), as an Associate Professor of Sociology. On or about November 17, 1997, he filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that BSC did not provide a safe workplace and condoned his harassment. (See footnote 1) As relief, Grievant asks that harassment by students, staff and faculty at BSC cease, and that a student, Tom Perkins (Perkins), be disciplined. A second grievance, Docket No. 98-BOD-108, contests his dismissal. (See footnote 2) Because both grievances arose from the same set of facts, they were consolidated for hearing by an Order dated June 18, 1998.

This grievance was denied at Level I by Grievant's immediate supervisor, Dr. JamesVoelker, on November 17, 1997. The grievance was denied at Level II by Dr. Robert Moore, President of BSC (President Moore)(Moore), on December 5, 1997. No Level III proceeding took place.

Level IV hearings were held on June 23, and August 6, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by John Feuchtenberger, Esq., and BSC was represented by Senior Assistant Attorney General Mary Roberta Brandt, Esq. The parties were given until September 3, 1998 to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision at that time.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level

II hearing, the sworn testimony of the witnesses at the Level IV hearing, and documentary evidence admitted at Levels I, II, and IV. (See footnote 3)

FINDINGS OF FACT

1. Grievant had been employed by BSC, during the period of time pertinent to this grievance, for nine years as an Associate Professor of Sociology. He holds a Ph.D. in Anthropology.

2. Founded in 1895 as Bluefield Colored Institute, BSC once served an all-black student population with a predominantly black staff. Changes in the racial composition ofthe student body resulted from growth of the student body and demographic shifts, as mechanization of southern West Virginia's coal industry led to a substantial decrease in the black population of southern West Virginia.

3. BSC is designated by the U.S. Department of Education as an Historically Black College and University (HBCU). An HBCU is defined as a college or university, founded before 1964, with a principal mission of educating black Americans. There are 114 HBCU's in the United States. Two are located in West Virginia.

4. In the 1960's, BSC experienced shootings, bombings, and arson resulting from racial issues. These events fostered a climate of racial polarization.

5. BSC receives more than $1,000,000.00 annually in federal funding because of its HBCU status. Its annual budget is approximately $16,000,000.00.

6. BSC has the lowest percentage of black students of any HBCU.

7. Today BSC, for the first time in its history, has no black faculty. Black enrollment has fallen to approximately seven percent.

8. Grievant's concern over the lack of black faculty led him to file a complaint with the U. S. Department of Education's Office of Civil Rights (OCR).

9. As a result of OCR's investigation, BSC entered into a compliance agreement with OCR on April 20, 1998. BSC agreed to develop a comprehensive plan to recruit, hire and train black faculty, ensure black participation in every phase of the hiring process, provide equity training for all individuals involved in hiring, and to report to OCR for five years on its progress in hiring black faculty.

10. The position of BSC's last black faculty member, Linville Hawthorne(Hawthorne), was not

renewed in 1996. (See footnote 4)

11. The concerns of Grievant and students over the lack of black faculty generated substantial publicity, including articles in the Washington Post, the national magazine Black Issues In Higher Education, and, on November 6, 1997, in the Charleston Daily Mail. Some students, faculty, and administration members reacted negatively to the attention focused upon racial issues at BSC.

12. Grievant addressed the change in the racial composition of BSC in a speech at a local church. To avoid confrontation, he spoke allegorically of green and purple people instead of black and white people.

13. Grievant wrote a paper entitled, “Why there are no Black Professors and only 7% African-American Enrollment at Historically-Black Bluefield State College,” which analyzed the lack of black faculty, and criticized the administration of President Moore in the strongest terms. Grievant's paper accused President Moore of deliberately and clandestinely transforming BSC into a predominantly white middle-class career technical institution, a practice Grievant termed cultural genocide.

14. Grievant's advocacy regarding the issue of the lack of black faculty at BSC created substantial controversy on BSC's campus, polarizing students and faculty according to their opinions on the proper racial composition at BSC.

15. Three inch paper cutouts of a human figure, with one half colored green and the other half colored purple, appeared on campus. These “green and purple people” were distributed by members of the Student Government Association, and were worn by thoseopposed to Grievant's position.

16. On October 18, 1997, the Vice-President of the Student Government Association, Perkins, confronted Grievant at a BSC homecoming dance, stating that Grievant's statements regarding black representation at BSC would lead to riots and bloodshed.

17. During the period of time pertinent to this grievance, Perkins became President of the Student Government Association, and BSC began paying him for his services.

18. On or about November 14, 1997, a racially charged poster, based upon a photograph of Grievant and Hawthorne that appeared in the Charleston Daily Mail, and bearing the “approved” stamp typically affixed by the administration, was distributed about the BSC campus and placed in student mailboxes. This poster invoked negative racial stereotypes and questioned Grievant's sanity. The poster remained present on the campus for several weeks.

19. BSC policy requires that all banners, posters, and stickers receive administration

authorization before being placed on college property. Unauthorized banners, posters, and stickers are removed.

20. On October 28, 1997, a member of the Student Government Association, Christina Kegley, told Grievant that his problem was that he didn't know what color he was, and that he could be eliminated. Grievant perceived this as a threat and reported it to the Bluefield Police.

21. Sheila Walls, a student leader of Concerned Students for the Future of Bluefield State College, a group that generally supported Grievant's position, had her carvandalized, and reported this incident to Bluefield Police and BSC's Office of Campus Security (Campus Security), naming Perkins as the vandal.

22. A faculty meeting was held on November 10, 1997, in Dickason Hall, to discuss Grievant's concerns about the lack of black faculty, as well as faculty concerns that publicity regarding Grievant's advocacy was casting BSC in an unfavorable light. Before the meeting began, Grievant, his family, and several members of the surrounding black community were present in the hallway, outside of the room where the meeting was to be held.

23. Campus Security Supervisor Rick Akers (Akers) had been alerted by the Bluefield Police, who had previously been alerted by the Governor's Office, that the faculty meeting would be controversial.

24. Perkins entered Dickason Hall and confronted Grievant. Perkins stood within inches of Grievant, in a tense and aggressive posture, while challenging Grievant to leave with him and settle their differences in a physical altercation.

25. Grievant reported this incident to the Bluefield Police, Akers, and the FBI. (See footnote 5)

26. The Bluefield Police advised Grievant not to go onto the BSC campus unescorted. For a time, Grievant hired a man to accompany him on campus. On other occasions, Grievant was accompanied on campus by his wife or son.

27. Grievant was 52 years of age, six feet one inch tall, and of thin build. Perkins was in his early twenties, five feet ten inches tall, and of wiry, athletic build. 28. A surveillance camera made a video tape of the hallway where the confrontation discussed in Finding of Fact No. 24 occurred. However, the camera was aimed at the glass entrance doors of Dickason Hall, and the daylight entering the glass doors backlit the figures in the hallway, so that the video tape showed them only as very dark silhouettes. The tape's evidentiary value was further diminished by the fact

that it also recorded images from five other cameras, switching between them at three second intervals, and by the fact that it was badly damaged by the video tape player in Perkins' student conduct hearing.

29. The video tape shows only that Grievant and Perkins were, at one point, standing very close together. It does not show their facial expressions, gestures, or body postures.

30. On November 19, 1997, Perkins drove his car towards Grievant on the campus of BSC in a manner that caused Grievant to fear for his life. Grievant reported this incident to Bluefield Police and Campus Security.

31. Akers investigated both incidents.

32. Akers' investigations were ineffective.

33. Akers' investigations concluded there was no probable cause to believe that either incident constituted an assault by Perkins on Grievant.

34. On November 17, 1997, Grievant filed a charge against Perkins with BSC's Student Conduct Committee (Committee). The Committee was composed of two students, two faculty members, and a member of the classified staff.

35. On November 18, 1997, Perkins was requested by Akers to have no contact with Grievant, and Akers assigned a student intern to be present for the one hour classPerkins had in the building containing Grievant's office.

36. A hearing was held before the Committee on December 12, 1997, to consider Grievant's charge against Perkins. Akers' investigation of Grievant's charge led him to conclude, before the Committee hearing began, that Grievant's charge against Perkins was unfounded. Akers then described the incident at Dickason Hall, and interpreted the video tape, to the Committee. The Committee found that Perkins did not threaten Grievant.

37. President Moore had his presidential evaluation in October of 1997. This evaluation was performed by a committee composed of five college presidents. Moore received a positive presidential evaluation.

38. Grievant and his supporters chose a public hearing, scheduled on October 28, 1997, as part of Moore's evaluation, to air their concerns about the racial composition of BSC. Grievant spoke forcefully at this hearing.

39. In response to the concerns raised by Grievant, students, and members of the black

community, Moore issued a “Position Paper. . . To Address Recently-Raised Issues Concerning the College,” on November 20, 1997. This Paper stated that recent events at BSC were very troubling to President Moore, and that untrue statements had been made, causing distress to BSC.

40. Also in November of 1997, Moore convened a fourteen member “Presidential Task Force on Recruitment of Minorities,” comprised of respected and knowledgeable black leaders from BSC's service area.

41. Perkins' father is Dr. David Perkins, Director of BSC's Greenbrier Community College Center in Lewisburg, who reports directly to President Moore. 42. On March 4, 1998, Perkins was involved in a physical altercation with former Student Government Association President Steve Tibbs (Tibbs) on BSC's campus. This incident was investigated by Akers, who concluded that both assault and battery and disorderly conduct had occurred. Akers concluded that this altercation would have no effect on the Student Government Association or BSC, and closed the investigation with no charges having been filed.

43. Perkins graduated from BSC in the spring of 1998 and now lives in Virginia.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W.Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

SAFE WORKPLACE

Employers in West Virginia have a general duty to provide a safe workplace. “Every employer shall furnish employment which shall be reasonably safe for the employeestherein engaged. . .” W. Va. Code § 21-3-1. The purpose of this statute is to assure workers a reasonably safe workplace.

Burdette v. Columbia Gas Transmission Corp., 198 W. Va. 356, 480 S.E.2d 565 (1996); Henderson v. Meredith Lumber Co., 190 W. Va. 292, 438 S.E.2d 324 (1993). An employer, owner of a place of employment, place of public assembly, or public building has a responsibility under this statute to maintain such a place in a reasonably safe condition. Taylor v. Sears, Roebuck & Co., 190 W. Va. 160, 437 S.E.2d 733 (1993); Pack v. Van Meter, 177 W. Va. 485, 354 S.E.2d 581 (1986).

Grievant's contention that BSC failed to provide a safe place to work is properly before this Grievance Board in that he complains of “any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.” W. Va. Code § 18-29- 2(a); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996). Grievant alleges that BSC failed to provide him a safe workplace. He asserts that his criticism of President Moore's racial policies created a backlash among students, particularly members of the Student Government Association, and members of BSC's administration. The incidents which caused Grievant to feel that BSC was not providing a safe working environment included 1) Perkins confronting Grievant at a BSC homecoming dance, stating that Grievant's statements regarding black representation at BSC would lead to riots and bloodshed; 2) a racially charged poster, described in Finding of Fact No. 18; 3) a member of the Student Government Association telling Grievant that his problem was that he didn't know what color he was, and that he could be eliminated; 4) Perkins confronting him, in a tense and aggressive posture, while challenging Grievant to leave with him and settle their differences in a physical altercation (fight challengeincident); and 5) Perkins driving his car towards Grievant, on BSC's campus, in a manner that caused Grievant to fear for his life (car swerve incident).

BSC maintains that an investigation of Grievant's safety concerns was conducted, revealing no probable cause to believe that unsafe working conditions existed at BSC.

The events surrounding the fight challenge incident are crucial in determining the outcome of this grievance. Grievant and several members of the community were present at Dickason Hall to attend a faculty meeting, which had been called to discuss Grievant's concerns about the lack of black faculty, as well as faculty concerns that publicity regarding Grievant's statements was casting BSC in an unfavorable light. Grievant's wife, Hope Olmsted, was present and confirmed the offer of a fight by Perkins in her testimony at Levels II and IV. Mrs. Olmsted testified that Perkins was very agitated and intense, and that he stood very close to Grievant. Norieka Froe testified at Level II that she was

present and saw Perkins standing with his fists clenched and with an aggressive demeanor, like he wanted to fight, although she did not hear his words. Jon DeBerry testified at Level II that he was outside the glass doors of Dickason Hall, that he saw, through the glass doors, Perkins speak to Grievant from a distance of less than one foot, that Perkins' demeanor was very aggressive, very confrontational, upset, and agitated. Calvin Gilmore testified at Level II that he was present at Dickason Hall, that Perkins' gesturing wasn't too friendly, and that it looked like something was about to get started, although he did not hear his words. Grievant's adult son John Olmsted was present at Dickason Hall and testified at Level II that he was standing two feet from Grievant and Perkins, that Perkins was very belligerent and aggressive, that he got within six inches of Grievant and said “let's you and me go around the corner and settle this man to man right now,” that it was a scarysituation, and that he was concerned for Grievant's safety.

Ms. Irma Cabiness testified at Levels II and IV. Ms. Cabiness has a Ph. D., has degrees in social studies and education, is a Methodist minister, and taught in the junior high schools and high schools of the New York City school system for 20 years. She was present for the faculty meeting, and had never met Grievant before. She saw a young man standing very close to Grievant, within four or five inches, whose body language said he wanted to fight. His muscles and body posture were stiff, with his fists clenched, with both arms free and ready to swing from either side. He said “let's go outside and finish it.” The young man acted like angry children she had taught, and defended herself against, in the New York City schools. Ms. Cabiness further testified that the whole incident took perhaps 30 seconds, that she observed the entire incident, that Grievant told the young man he should respect his elders, and that after Grievant entered the faculty meeting, from which she and other members of the community were excluded, the young man returned two or three times before being escorted away by a guard.

The consistent testimony of these six witnesses is deemed credible. They were present at the scene and in position to observe the events in question. They answered the questions of counsel directly and without evasion. They substantially confirm Grievant's testimony, leading the undersigned to conclude that Perkins entered Dickason Hall and threatened and intimidated Grievant, by standing within inches of him, a faculty member some 30 years his senior, in a tense and aggressive posture, while challenging Grievant to leave with him and settle their differences in a physical altercation. The undersigned finds it reasonable to conclude that this incident constituted a

substantial detriment to or interference with Grievant's health and safety. It is noteworthy that the only evidence that this incident did not occur as Grievant said it did consisted of a letter from Perkins, his testimony at Level II, (See footnote 6) an equivocal letter from a student security intern who did not testify at any level, and the testimony of Akers, who was present at Dickason Hall, but did not see the incident.

Although he testified at the Level II hearing held for Grievant's dismissal grievance, Perkins was not presented as a witness at Level IV. His testimony would have been extremely valuable, and BSC offered no reason for its failure to present Perkins as a witness at Level IV. However, because the preponderance of testimony at Levels II and IV supported Grievant's position, the undersigned finds it unnecessary to conclude that Perkins' testimony would not have supported Respondent's position. See Sharp v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-497 (June 15, 1998).

The undersigned also concludes that, by a preponderance of the evidence, the car swerve incident took place substantially as Grievant said it did. Grievant was the only witness to this incident to testify at Level IV. Here again, Perkins' testimony would have been extremely valuable. However, in his testimony at Level II, Perkins placed himself at the scene, and said that he swerved his car to avoid hitting Grievant, missing him by about one yard on a street that was approximately thirty feet wide. This is generally consistent with Grievant's credible testimony that Perkins swerved his car at him and narrowly missed running him down, particularly in light of the threatening and intimidating behavior by Perkins at Dickason Hall eight days earlier. Hope Olmsted also testified that when she sawGrievant 15 minutes after this incident, he was pale and shaking. This incident too constituted a substantial detriment to or interference with Grievant's health and safety.

Grievant's situation was similar to that described in York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996). In that grievance, an employee of the Mingo County Board of Education complained that the school where she worked was not enforcing the Board's policies forbidding vandalism and tobacco use, which made her work circumstances intolerable. Ms. York sought additional security personnel and enforcement of the Board's existing policies. This Grievance Board found that her ability to complete her assigned duties had been chronically impeded by student misconduct including deliberate discarding of trash and tobacco products in sinks and commodes, as well as on floors, spitting tobacco juice, placing graffiti on various surfaces, vandalism including breaking lavatory fixtures, and false fire alarms, and that disciplinary measures taken against

students who engaged in such conduct had not been particularly effective.

This Board held that these conditions constituted the sort of “substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees” that is made actionable by W. Va. Code § 18-29-2(a).

Grievant has demonstrated that a similar, and worse, situation existed at BSC. His ability to complete his assigned duties was impeded by student misconduct including threats and intimidation. This misconduct made Grievant's job more difficult than it needed to be and created a safety concern for Grievant. Grievant has established that BSC's failure to take effective action regarding this misconduct constituted "a substantial detriment to or interference with . . . job performance or the health and safety of students or employees." These conditions also directly impacted his "conditions of employment." See W. Va. Code § 18-29-2(a); Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

As in York, supra, BSC had policies in place prohibiting the types of conduct that made Grievant's working conditions unsafe. The Student Conduct Code of BSC provides generally:

> Bluefield State College's Conduct Code seeks to promote the peaceful pursuit of intellectual and subsidiary activities under the auspices of the college and to ensure the safety of persons engaging in those pursuits. It further seeks to protect the free and peaceful expression of ideas and to assure the integrity of various academic processes.

Specifically, the Student Conduct Code lists as violations physical assault; harassment, intimidation or verbal abuse; and placing a person or persons in reasonable fear of imminent physical harm. Perkins' actions in the fight challenge and car swerve incidents constituted intimidation and placing a person in reasonable fear of imminent physical harm. As in York, Grievant's employer attempted to, yet failed to, enforce its own policies. BSC failed to provide a safe workplace for Grievant.

HARASSMENT

W. Va. Code §18-29-2(n) defines harassment as the “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

Grievant alleges that BSC condoned his harassment by a student employee of BSC, Perkins, and

by other students. The incidents constituting the alleged harassment are the same ones listed above, in the discussion of Grievant's safe workplace contentions. This Grievance Board may award relief against an employer based upon conduct of which the employer is aware and which it, in effect, condones. White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994).

The “green and purple people” described in Finding of Fact No. 15 were distributed by members of the Student Government Association and worn by students opposed to Grievant's position. These figures serve to demonstrate that a climate of racial polarization existed at BSC, but their presence on campus could not reasonably be said to rise to the level of the “disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession” inherent in a charge of harassment.

It is uncontradicted, and supported by the testimony of Grievant and his wife, that Perkins confronted Grievant at a BSC homecoming dance, stating that Grievant's statements regarding black representation at BSC would lead to riots and bloodshed. This could reasonably be viewed as political discussion and not as the disturbance, irritation or annoyance of Grievant. (See footnote 7) As with the “green and purple people,” this incident does not rise to the level of harassment.

The racially charged poster described in Finding of Fact No. 15 was distributed about the BSC campus and placed in student mailboxes. It remained present on the campus for several weeks, although President Moore testified that he ordered Akers to remove it from campus. It was apparently still present as of Grievant's Level II hearing onNovember 21, 1997. Because BSC policy requires that such a poster receive administration authorization, and because it bore the “approved” stamp typically affixed by the administration, the undersigned concludes that BSC condoned its presence on campus, particularly in light of the fact that it was not effectively investigated or removed from campus by Akers. However, this poster can not be said to rise to the level of the “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession” inherent in a charge of harassment. What constitutes harassment varies based upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket No. 97-52-183 (Sept. 30, 1997). The poster was offensive, racist, and sophomoric, but such speech is to be expected from college students as they test the limits of what constitutes acceptable public discourse. Furthermore, the distribution of the poster was a one-time occurrence, and so does not meet the “repeated or continual” element of harassment.

Similarly, a member of the Student Government Association telling Grievant that his problem was that he didn't know what color he was, and that he could be eliminated, did not constitute harassment. Whether the student meant that Grievant could be killed, which is the meaning Grievant took from the statement, or merely that he could be fired, such a statement could also reasonably be viewed as political discussion and not as the disturbance, irritation or annoyance of Grievant. There was also no showing that BSC knew of this statement until Grievant mentioned it as part of the grievance process, and thus BSC can not be said to have condoned it. Grievant's harassment claim must fail.

CONCLUSION

Much of Grievant's safe workplace complaint resulted from the ineffectiveinvestigation of his situation conducted by Akers, and the resultant exoneration of Perkins by the Student Conduct Committee. Investigating the fight challenge incident, Akers contacted only two witnesses who were present, only one of whom was in a position to hear the conversation. He forgot or ignored the statements of three witnesses, including John Olmsted and Irma Cabiness, that were given to him in Grievant's office. At every turn, he credited Perkins' account of events over Grievant's. He concluded, before Perkins' student disciplinary hearing, that no assault had taken place, and may well have advocated for Perkins at that hearing as Grievant testified, although his duty, as testified to by then-Chief of Student Affairs John Cardwell, was to state the case against the student. (See footnote 8) Grievant's contention that Akers interpreted the video tape at the hearing as showing that no assault took place is credible, because he did the same thing at the Level IV hearing. Akers, who testified that he received his copy of the racially charged poster from Perkins, was unable to remove the poster from campus, and could not even discover that the photograph on it originated in the state's second largest newspaper, although he would have learned this had he asked Grievant.

Akers testified at Level IV that he was unaware of any racial tension on BSC's campus, that he had never seen a “green and purple person” on campus, and consistently described Grievant's complaints using terms such as “supposedly” and “allegedly.”

Investigating the car swerve incident, Akers visited the scene only with Perkins before concluding that it had not occurred. Akers' attitude towards disturbances oncampus was demonstrated by his reaction to Perkins' altercation with Tibbs. Although he concluded that both assault and battery and disorderly conduct had occurred, Akers decided that this fight would have no effect on the Student Government Association or BSC and closed the investigation with no charges having been filed. At

that point, Akers was aware of complaints that Perkins vandalized a student's car, challenged Grievant to a fight, drove his car at Grievant, and fought with Tibbs. The undersigned concludes that Akers was, for whatever reason, strangely blind to Perkins' misdeeds and the resultant situation that Grievant faced at BSC.

Akers' ineffective investigation of Grievant's complaints led him to conclude, before the Student Conduct Committee hearing began, that Grievant's charge against Perkins was unfounded. Akers then described the incident at Dickason Hall, and interpreted the video tape, to the Committee. The Committee relied upon Akers' conclusion, and found that Perkins did not threaten Grievant. However, the Committee's reliance was mistaken, and BSC's Student Conduct Code was not enforced. Thus, disciplinary measures taken against a student who engaged in acts of intimidation, and placing a person in reasonable fear of imminent physical harm, were not effective. See York, supra.

It is understandable, although regrettable, that some white BSC students had become comfortable attending a predominantly white institution, and would not be open to Grievant's suggestion that the steady decrease in the number of black students and faculty was wrong. It is also understandable that some of these students would have acted inappropriately in expressing their opinions on this subject to Grievant, who was, after all, the most visible advocate of a position they opposed. However, Grievant's concerns were, by law, also those of BSC. The Social Justice Policy of the State College System of WestVirginia Board of Directors provides:

> [t]he State College System Board is committed to bringing about mutual understanding and respect among all individuals and groups at institutions in the State College System and in the Central Office of the State College and University Systems, and to eliminating all forms of discrimination as provided by West Virginia and federal law. 131 CSR 56-2.1.

This Interpretive Rule mandates that BSC “develop a program for social justice,” including “[a]ctivities, including education, which have a goal of eliminating prejudice or discrimination based upon race, color, national origin, sex, sexual preference, sexual orientation, age, religion, veteran status or disability from student life and working conditions in the institution.” It concludes, “[a]ll employees are expected to set the tone and help create an environment for positive change and results within the social justice area.” Grievant attempted to do so.

Grievant testified at Level IV that he felt abandoned by BSC's ineffective investigation of the fight

challenge and car swerve incidents and its resultant failure to effectively discipline Perkins under its Student Conduct Code. Grievant stated that he had felt unsafe on campus only once before, when a student's abusive husband concluded that Grievant was helping the woman leave the relationship. Grievant testified that campus security handled that incident promptly and effectively. In contrast, security's response to the situation underlying this grievance left Grievant feeling that he had no back-up. He felt that BSC forced him to prove his safety concerns beyond a reasonable doubt, when he should have been protected upon a minimal showing that he was in danger. In fact, that is substantially what took place.

Grievant has a tendency to characterize events in strong terms, but his testimonywas generally credible. Certainly, he did not fabricate the controversy underlying these events or the confrontation with Perkins testified to by six witnesses. He honestly and reasonably believed that his personal safety was at risk due to BSC's inaction. BSC has put forth no reason to explain why an employee of nine years, with no previous record of confrontations with students or administration members, would suddenly fabricate instances of threats and intimidation.

Finally, it is unnecessary to decide whether Perkins' position as an officer of the Student Government Association and son of a high BSC official played any role in BSC's remarkably deferential treatment of him. Grievant has met his burden of proof.

Therefore, the only issue remaining to be resolved is what remedy, if any, may be granted. W. Va. Code § 18-29-5 provides that "[h]earing examiners are hereby authorized and shall have the power to . . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article." This provision was construed by the West Virginia Supreme Court of Appeals in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), as follows: “[c]learly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.”

Consistent with this authority, this Grievance Board recently directed a school board to schedule cleaning and maintenance of the air conditioning system and classroom at a grievant's school "consistent with industry standards." Guerin, supra. In another matter, a school board was directed to select an "appropriate employee," other than the grievant'sprincipal, to render an independent

evaluation of a grievant's performance. Burdette v. Summers County Bd. of Educ., Docket No. 45-86-280-4 (Dec. 16, 1986). This Board has also granted relief to an employee assigned to a position for which she was not qualified. Roth v. Ohio County Bd. of Educ., Docket No. 35-89-025 (Feb. 28, 1990). Relief has been extended to an employee who was improperly dissuaded from intervening in a grievance. Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995). Equitable doctrines were cited in restoring sick leave to an employee whose misdiagnosis during an employer-directed medical examination had resulted in loss of 25 days' sick leave. Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987). Finally, this Board has denied the remedy being sought by a grievant (instatement to a coaching position), substituting an alternate remedy (reposting and re-evaluation). Giammerino v. Raleigh County Bd. of Educ., Docket No. 41-86-165-1 (Dec. 11, 1986).

As relief, Grievant asks that harassment by students, staff and faculty at BSC cease, that BSC provide a safe workplace, and that Perkins be disciplined. However, Perkins has graduated and is no longer subject to discipline by BSC. Therefore, in order to rectify conditions within BSC's control which contravened Grievant's rights under W. Va. Code § 18-29-2(a), BSC will be ordered to vigorously enforce its Student Conduct Code, its Social Justice Policy, and to increase efforts to remedy unsafe working conditions at BSC. Such enforcement shall include, but not be limited to, developing and implementing an effective procedure to investigate faculty complaints of student misconduct.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter:

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. BSC has a duty to provide its employees a safe place to work. Failure to do so constitutes “a substantial detriment to or interference with effective classroom instruction, job performance or the

health and safety of students or employees." W. Va. Code § 18-29-2(a); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996), York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996).

3. Grievant proved, by a preponderance of the evidence, that BSC failed to provide a safe workplace.

4. W. Va. Code §18-29-2(n) defines harassment as the repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

5. Grievant failed to prove, by a preponderance of the evidence, that he was the subject of harassment at BSC.

6. The Student Conduct Code of BSC seeks to promote the peaceful pursuit of intellectual activities, the free and peaceful expression of ideas, and to ensure the safety of persons engaging in those pursuits. It prohibits physical assault; harassment, intimidation or verbal abuse; and placing a person or persons in reasonable fear of imminent physical harm. 7. The Social Justice Policy of the State College System of West Virginia Board of Directors mandates that BSC be committed to bringing about mutual understanding and respect among all individuals and groups, and to eliminating all forms of discrimination as provided by West Virginia and federal law. BSC must have a program for social justice, including activities, including education, which have a goal of eliminating prejudice or discrimination based upon race, color, national origin, sex, sexual preference, sexual orientation, age, religion, veteran status, or disability from student life and working conditions in the institution. All employees of BSC are expected to set the tone and help create an environment for positive change and results within the social justice area. 131 CSR 56-2.1.

8. The West Virginia Education and State Employees Grievance Board has authority to "provide such relief as is deemed fair and equitable" in grievances arising under W. Va. Code § 18-29-1. W. Va. Code § 18-29-5; Guerin, supra; See Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992).

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to vigorously enforce its Student Conduct Code, its Social Justice Policy, and to increase efforts to prevent harassment and remedy unsafe working conditions at BSC. Such enforcement shall include, but not be limited to, developing and implementing an effective procedure to investigate faculty complaints of student

misconduct.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Educationand State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated October 13, 1998

Footnote: 1 *As filed, this grievance also contained a claim that Grievant's academic freedom had been denied. Respondent argued that this claim was abandoned at Level II. In any event, it was not pursued at Level IV, and is deemed abandoned.*

Footnote: 2 *Grievant was dismissed by BSC on January 21, 1998. Although both grievances were consolidated for hearing, the decisions will be issued separately.*

Footnote: 3 *At the conclusion of the Level IV hearing, Grievant sought to vouch the record for the purpose of showing that his wife was recently the victim of an armed attack by a person they believed to be Tom Perkins. This testimony was of no probative value and was not considered in the preparation of this decision.*

Footnote: 4 *Mr. Hawthorne grieved his non-renewal in Hawthorne v. Board of Directors/Bluefield State College, Docket No. 97-BOD-252 (Nov. 5, 1997).*

Footnote: 5 *Grievant notified the FBI because they were investigating racist hate fliers distributed at nearby Concord College. A student was later indicted on federal criminal charges for distributing the fliers.*

Footnote: 6 *Perkins confirms, in his letter and testimony, that he invited Grievant to "step around the corner," but wrote that he said this so that they could speak privately. Given the uncontradicted testimony of the witnesses regarding his physical posture and demeanor, this explanation is deemed not credible.*

Footnote: 7 *Respondent did not raise a First Amendment defense, at any level, to the distribution of the "green and purple people," or the racially charged poster, or to the statements made by members of the Student Government*

Association to Grievant.

Footnote: 8 *BSC destroyed the tape of this hearing without making a transcript. Accordingly, only the Level IV testimony of the participants can be considered regarding what happened at the hearing.*