DR. CLAUDIUS ONI

v. Docket Nos. 93-BOD-515/408/302

BOARD OF DIRECTORS/BLUEFIELD STATE COLLEGE

DECISION

The grievant, Dr. Claudius Oni, was employed by Bluefield State College (BSC) as Director of Student Support Services, a classified position, until his termination effective September 15, 1992. He filed a grievance over that action November 5, 1992. (See footnote 1) After denial at the lower levels, the grievant appealed to Level IV August 4, 1993 where a hearing was held November 12, 1993. Dr. Oni also filed six grievances between May 1992 and August 1992 protesting a series of personnel actions preceding and related to his dismissal, including a May 19, 1992 letter of reprimand, his placement on a June 4, 1992 plan of improvement, a June 26, 1992 performance evaluation, an August 13, 1992 suspension, an August 17, 1992 letter of reprimand, and the revocation of the grievant's "mailbox privileges" at BSC. He filed a seventh in December 1992alleging harassment on the part of his immediate supervisor. Those matters reached Level IV December 15, 1993 and were heard February 18, 1994. (See footnote 2) The parties submitted briefs in support of their positions by April 19, 1994.

Much of what transpired prior to the grievant's dismissal is not in dispute. (See footnote 3) The grievant had been employed by BSC in its Student Support Services (SSS) program since 1979. He was appointed Director of the program in 1988. As such, he was responsible for seeing that a variety of services, including but not limited to tutoring, academic and "life management" counseling, and developmental reading instruction were provided to eligible BSC students. (See footnote 4) Since the program is funded by the United States Department of Education (USDE), the job entailed completion of grant proposals, compliance with numerous regulations, and the submission of various reports to the federal government outlining program goals and accomplishments. The grievant supervised a smallstaff which included student tutors, a secretary and a licensed counselor.

SSS is a component in BSC's Student Services Department (SSD) which has been headed by Dean Larry Mangus since July 1989. Dean Mangus was the grievant's immediate supervisor during

all times relevant herein.

The grievant's August 20, 1990 evaluation, the first performed by Dean Mangus, ranked him as either 4-Area of Strength or 3-Acceptable Performance in all but one of the twenty-six categories listed. Dean Mangus assigned the grievant a score of 2-Area of Weakness in the remaining category "Exhibit good health; absences from work infrequent." Dean Mangus commented on the evaluation that the grievant had "the reputation of not being available during the work day and being absent from campus." The grievant responded by including the comment "My absences are job related or I am at a conference. Thank you for bringing this to my attention." He did not otherwise protest the evaluation.

By memo dated October 22, 1990, BSC Director of Financial and Administrative Services Randolph Grimm advised Dean Mangus that the grievant was consistently ignoring his requests for keys to new locks which had been installed in the SSS offices in May 1990. Mr. Grimm also advised that the grievant had not followed proper procedures in obtaining the new locks and, as a result, the vendor of the equipment and services had not been paid. Dean Mangus subsequently admonished the grievant in an October 22, 1990 memo for the failure to follow proper accounting procedures and hisrefusal to provide BSC's maintenance division the new keys. In an October 25, 1990 memo, the grievant apologized for his failure to turn over the keys but denied any irregularities in the purchase procedure. The grievant turned over a key to Administrative Services which fit all offices in SSS except his own.

On August 9, 1991, Dean Mangus completed a performance evaluation of the grievant which ranked him as 4-Area of Strength or 3-Acceptable Performance in all but two of the twenty-six standards. The grievant was again scored 2-Area of Weakness in the section regarding the employee's absences from work. Dean Mangus gave him the same score in the category, "Submit accurate reports at times designated." Attached to the evaluation were written comments by Dean Mangus to the effect that the grievant exhibited strong interpersonal abilities and excellent research skills but that he had been consistently late in complying with requests for reports and data related to the Student Support Services program and was "generally late in getting to work in the mornings." The grievant attached a statement to the evaluation to the effect that he was not consistently late with reports and that he was not generally late for work. He did not, however, file a grievance over the evaluation.

In an August 26, 1991 memorandum, Dean Mangus advised the grievant that since the same concerns had been noted in his last two evaluations, he wanted to make his expectations concerning the submission of reports and adherence to regular hours "perfectly clear." Dean Mangus continued,

> The college's normal work day is from 8:00 a.m. to 4:00 p.m. I expect you to be in your office by no later than 8:15 a.m. daily. If for some reason you cannot be there I need to be so informed. The Student Support Services area needs to be functioning when students are here and most of our students have morning classes.
>
> Reports and requests for information need to be submitted by the established due dates.
>
> If you need clarity on the above please see me.

There is no evidence of record that the grievant requested any clarification of Dean Mangus' directives. Indeed, in a September 12, 1991 memorandum to Dean Mangus, the grievant acknowledged that the expectations were "quite clear." He went on, however, to explain his belief that students in his program could be better served if he were allowed to alter his schedule to 9:00 a.m. to 5:00 p.m., 10:00 a.m. to 6:00 p.m. or 11:00 a.m. to 7:00 p.m. The grievant also stated in the memo that since he was an "exempt professional staff" he did not understand "how his tardiness was established." (See footnote 5) Dean Mangus subsequently denied the request for a schedule change.

By memorandum dated September 19, 1991, Dean Mangus advised the grievant that he had, on that date, called the grievant's office every five minutes beginning at 8:05 a.m. and did not receive an answer until 8:35 a.m. He admonished the grievant to adhere to his directives in the August 26, 1991 memo.

In March 1992, Dean Mangus determined that the grievant had habitually ignored his order regarding his working hours during the preceding months and that he had not followed BSC hiring policies in the appointment of two tutors to the SSS Services program. He also concluded that the grievant had sloppily completed reports; had failed to keep appointments with students; and had instructed his staff to "cover up" for him when he was not present. In a March 27, 1992 memo, Dean Mangus directed the grievant to provide "a full and complete report" on these matters. The grievant

provided a response in a March 30, 1992 memo. Essentially, he denied the allegations of poor work performance and failure to adhere to the established work schedule.

On April 28, 1992, Dean Mangus sent the grievant at least eight memos in which he either admonished him for failing to follow BSC policies or requested the submission of certain reports or documents. In one of the memos, Dean Mangus advised the grievant that he had eliminated his personal mailbox at SSS and that the program would henceforth have only one mailbox. The grievant provided responses to the admonishments and requests in memos he issued to Dean Mangus on April 30, 1992. He filed a grievance on July 15, 1992, protesting the elimination of his personal mailbox. (See footnote 6)

In a May 4, 1992 letter, Dean Mangus suspended the grievant for five days without pay from May 5 to May 9 for "clearinsubordination." Dean Mangus explained in the letter that documentation gained through conversations with the grievant's staff, faculty members, colleagues and personal observations indicated that he had continued his "practice of reporting to work between 10:00 in the morning and 1:00 in the afternoon." Dean Mangus also advised that during the suspension period "a complete review" would be made of the grievant's performance as Director of SSS. The grievant filed a grievance over the suspension on June 5, 1992. He subsequently filed a petition for a writ of mandamus in the Circuit Court of Kanawha County alleging that BSC had failed to respond to the grievance within the timelines set forth in W.Va. Code §18-29-4 and was in default per W.Va. Code §18-29-3(a). This grievance has never reached Level IV. (See footnote 7)

On or about May 12, 1992, the grievant sought medical treatment for depression and anxiety. He reported to the treating physician that stress associated with his job and "severe conflicts" with his supervisor were the reasons for his healthproblems. The physician directed the grievant not to work for a period of two weeks and provided him a statement to that effect. It appears from the record that the grievant was absent from work due to illness for two or three days in May 1992.

On May 15, 1992, Dean Mangus was advised by Administrative Services that it still had not been furnished a key to the grievant's office. Dean Mangus reprimanded the grievant in a May 19, 1992 letter for his failure to furnish the key; directed him to deliver a copy of the key to Administrative Services; and instructed him to provide written confirmation that he had done so. In a June 4, 1992 response, the grievant acknowledged that he had not furnished the key but that he did not believe Administrative Services needed the key since he cleaned his own office. He asked that Dean Mangus

remove the letter from his personnel file. Dr. Oni also filed a grievance over the reprimand.

On May 29, 1992, Dean Mangus held what he termed a "pre-termination investigative meeting" with the grievant. During this conference, the two discussed at length what Dean Mangus perceived as problems in the grievant's performance over the preceding six weeks, including the grievant's alleged tardiness. At the conclusion of the meeting, Dean Mangus asked the grievant to reduce to writing his "commitments" to the SSS program. The grievant complied with the following June 1, 1992 memo.

> This is a follow-up to our conference of May 29, 1992. As discussed, I am committed to the following:
>
> 1. Administering the project in accordance to federal and institutional guidelines and procedures.
> 2. Communicating with my staff with written backup for verbal communique when it is necessary, and providing opportunity for clarification.
> 3. Submitting reports and requested information in a timely fashion.
> 4. Providing leadership and assistance to my staff.
> 5. Adhering to the time and effort outlined for my position.
> 6. Providing support for other college components when possible.
>
> The above list is for your review. Please contact me if I need to elaborate on any of

them. Thank you for your cooperation.

Dean Mangus and the grievant met again on June 1, 1992 to continue their discussion and decide on a course of action to correct the perceived deficiencies. In a June 4, 1992 "follow-up" letter, Dean Mangus accepted the grievant's "commitments" but advised that he was placing him on an improvement plan for a period of six months. He also cautioned the grievant that his performance would have to improve drastically or he would be replaced. The plan consisted of the following twelve directives.

1. I am accepting your memo of June 1, which is attached, as a commitment and a base for the plan for improvement.

2. You are expected to report to work and be available to students during their normal hours on the campus, i.e., 8:00 am - 4:00 pm, unless prior arrangements are made. As indicated in previous memos, you are to call my office if you are unable to report to work on time.

3. You are expected to follow institutional policies and operating procedures in all areas. If you have any questions about a specific area or item, you should discuss it with me.

4. You are expected to follow the federal guidelines and timelines in regards to the student support services' grant.

5. All materials requested by your office are to be submitted on or before the due date and in the appropriate fashion.

6. You are to keep your secretary fully informed as to your whereabouts if you are not in your office.

7. You are to provide me with a full accounting for all of the keys that you had made to all of the offices in the student support services' area.

8. You are expected to keep me fully informed of all activities in the student support services area including, but not limited to, staff duties and performance, planned activities, progress toward meeting goals and objectives for the new grant year, the proposal for the funding for the 1993-94 program year, the evaluation for the 1991-92 program year, and the budget for the 1992-93 program year.

9. You are expected to deal with any and all concerns that are raised in the report, yet to be submitted, by Title IV evaluator, Mr. Reginald Williams.

10. All reports and items and commitments are to have my approval prior to their submission or implementation.

11. You are expected to develop a mutually beneficial and collegial relationship with all areas in the student services' division.

12. If you are in doubt about any area, issue, or item, I expect you to check with me. I am to be fully informed on all matters.

In a letter of the same date, the grievant advised Dean Mangus that his letter of commitment was not an "admission of guilt" and should not be considered a concession on his part that his performance had been inadequate. He requested that Dean Mangus' letter be removed from his personnel file and subsequently filed a grievance over Dean Mangus' refusal to do so.

On June 16, 1992, a BSC student angrily reported to Dean Mangus' office that she had not been paid for hours in which she had served as a tutor in the SSS program. Dean Mangus called the

grievant's office and was told that he had left for lunch at 2:00 p.m. and had not returned. Dean Mangus made further attempts to reach the grievant at his office until 4:00 p.m. without success. In a June 17, 1992 memo, Dean Mangus advised the grievant of his efforts and demanded an explanation as to why he had not adhered to the improvement plan's directive that he keep his secretary fully informed of his whereabouts. No response was forthcoming.

Dean Mangus completed a June 26, 1992 evaluation of the grievant's performance in which he ranked him as unacceptable in ten of the twenty-six standards. A grievance was filed over this evaluation shortly thereafter.

On July 7, 1992, Dean Mangus informed the grievant that he had not received any response to his June 17, 1992 memo and that other requests for information or explanations contained in memos of June 8, June 16 and June 19 had also been unanswered. The grievant made the required responses on or about July 9, 1992. As to the inquiry regarding the tutor who had not been paid, he explained that he did not leave for lunch on the date in question until 2:30 p.m. and that his secretary did know of his whereabouts.

On August 3, 1992, Dean Mangus' office received a call at approximately 8:30 a.m. that newly-hired counselor Connie Vest had arrived at the SSS offices but could not gain access to the area because no one in the program had yet reported for work. DeanMangus went to the offices but could not locate the grievant. He also could not locate the grievant's automobile in the parking area designated for SSS staff. He again concluded that the grievant had violated the terms of the improvement plan and the various other directives regarding his work hours. Beginning August 4, 1992, Dean Mangus made attempts each morning to verify the grievant's time of arrival on campus. To this end, he made calls to various staff members in SSS or was present in the program's offices at 8:00 a.m. His handwritten notes made during these efforts reflect that the grievant did not report to work at 8:00 a.m. on any morning between August 3 and August 12 and that he arrived after 9:00 on two occasions and at 10:30 a.m. on one occasion.

At approximately 8;15 a.m. on the morning of August 13, 1992, Dean Mangus received a call from SSS that candidates for a full-time tutor position were due for interviews and that the grievant had not arrived. He was also advised that other members of an interview committee were not aware that they were to conduct interviews that day. Dean Mangus again proceeded to the SSS offices but could not locate the grievant. He eventually assembled a committee and conducted the interviews. Upon the

grievant's arrival, Dean Mangus advised him that he was suspended for six days without pay for ignoring his directives regarding work hours. On August 17, 1992, Dean Mangus issued the grievant a written reprimand for his failure to conduct the interview process for the tutor position properly. Dr. Oni also grieved these actions.

Also in August 1992, Dean Mangus continued an effort beginning as early as May 1991 to establish a system whereby the grievant and perhaps other SSS staff members could be reached after hours in the event a student required counseling during such times. He issued several memos directing the grievant to develop such a plan and asked him for his unlisted home telephone number on numerous occasions. The grievant generally responded that no such system was needed. He refused to provide the telephone number.

On August 26 and 27, 1992, the grievant called Dean Mangus' office and reported that he was ill and would not be at work. On August 27, 1992, Reginald Williams, Education Program Specialist for the United States Department of Education, issued the results of an audit he performed on the SSS program in April 1992. While the report was generally favorable, it included findings of several deficiencies which required a response from the college by September 27, 1992. Dean Mangus subsequently left instructions with the SSS staff that when the grievant next called he was to be directed to call his office immediately.

On August 28, 1992, the grievant called the SSS offices and advised that he was ill and would not be at work. On the morning of August 31, 1992, the grievant called the SSS offices and reported that he was still sick and that he would likely not be reporting for work the remainder of that week.

On September 2, 1992, Dean Mangus sent the grievant a certified letter advising him of the receipt of Mr. William's report and asking that he prepare a response within twenty-fourhours of his return from leave. Later that afternoon, the grievant called the SSS offices and was advised by tutor Melody Howell that Dean Mangus needed to speak to him immediately. Ms. Howell then advised Dean Mangus that the grievant had called and had been given his instructions. The grievant did not contact Dean Mangus. He accepted delivery of the letter on September 16, 1992.

On September 4, 1992, the grievant again called SSS and was again advised by Ms. Howell of Dean Mangus' directive. The grievant chose not to call Dean Mangus.

On or about September 6, 1992, Dean Mangus discovered that the then-current federal grant for the SSS program would expire at the end of the 1993-94 school year and that the college's draft

proposal for a new grant covering school years 1994 through 1997 was due during the week of September 13, 1992. He also learned that a final proposal would be due shortly thereafter. Dean Mangus determined that the proposal was a matter of critical concern.

On September 8, 1992, at approximately 8:25 a.m., Tom Blevins, BSC's Director of Teacher Education and Instructional Technology, called Dean Mangus' office at the grievant's request and advised that the grievant would not be in that day for health-related reasons. (See footnote 8) Later that day Dean Mangus sent the grievant a letter via United Parcel Service (UPS) inquiring whether he had completed the 1994-97 draft proposal. Dean Mangus concluded the letter by asking the grievant to contact him about the matter at "hisearliest convenience." The letter was delivered to the grievant's residence on September 9, 1992. He made no response.

As of September 15, 1992, the grievant had not reported to the SSS offices or Dean Mangus since Dr. Blevins' September 8, 1992 call. By certified letter dated September 15, 1992, Dean Mangus advised the grievant that he was dismissed from his position effective that date. Dean Mangus explained in the letter that he had determined that the grievant had been absent from work since August 25 and had not contacted anyone at the school since September 8. He further advised the grievant that he considered this failure to report to be a violation of that portion of the June 4 improvement plan which required him to contact his, Dean Mangus', office if he was unable to report for work. Dean Mangus further stated that the grievant's actions constituted a violation of Section 7.3 and Section 7.3.1 of the Board of Directors Classified Handbook which provide,

> An employee must notify his/her immediate supervisor and follow established procedures for absences from work. Under certain conditions disciplinary action may result when the employee provides an invalid reason for an absence.

> Absence from work for three consecutive work days without explanation or authorization may be deemed an automatic resignation.

He concluded by advising the grievant that he considered his failure to report to be an abandonment of his position.

May 19, 1992 Letter of Reprimand

The grievant asserts that he violated no BSC policy or regulation by withholding the new key to his office and that he wasfollowing what he believed to be a practice established by his predecessors in the Director's position. He further contends that Dean Mangus acted arbitrarily and capriciously by issuing the reprimand without talking to him about the matter. BSC asserts that the import of Dean Mangus' October 22, 1990 letter was that the grievant was to deliver to the maintenance department all keys to the offices and his failure to do so constituted misconduct. BSC asserts that a reprimand was commensurate with the offense.

In disciplinary matters, the employer must prove by a preponderance of the evidence that the employee committed the acts with which he is charged. Howard v. Marshall University, Docket No. BOR-88-094 (Oct. 18, 1988). Further, when the employer's policies or regulations do not fix a penalty for a particular offense, the punishment imposed may be reviewed. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991). Board of Directors (BOD) personnel policies relating to disciplinary action against classified employees are generally worded and do not specifically address the use of written reprimands nor do theyt specify a penalty for the offense for which the grievant was charged in the May 19, 1992 reprimand. For the reasons discussed below, the undersigned concludes that BSC carried its burden on this particular action and that the penalty was not disproportionate to the offense.

The grievant testified at Levels II and IV that the SSS Director's office had always been under separate key from the other offices in the department and that when he received Dean Mangus'October 1990 memo to deliver the keys to the maintenance department he "followed the same format." He also further testified, however, that the reason he declined to turn over the key was his fear that Dean Mangus would enter his office during his absence. The grievant stated that this fear was predicated on a conversation with Dean Mangus in which the Dean stated that he had entered another employee's office after hours. Finally, the grievant also asserted that since he cleaned his own office, he "did not see why [maintenance] needed access to that particular room."

The record supports that the grievant understood or should have understood from Dean Mangus' October 22, 1990 memo that he was to turn over all keys to the offices in SSS on that date. At best, his refusal to relinquish the key to his office was insubordinate behavior. That the grievant asserted unequivocally that he retained the key to his office because of his apprehension regarding Dean Mangus and then provided two other different reasons for his failure to do so casts some doubt upon

the credibility of his assertions. In any event, none of the reasons constitute a valid defense to the charge. The grievant's contention that his failure to turn over the key was consistent with past practice in SSS is specious. While there was no evidence to rebut his testimony that the key to his office had always been kept separate from those to the other offices in SSS, there was no evidence that prior directors did not provide copies of their keys to administrative services and/or their supervisors.

While it is doubtful that the grievant had well-founded privacy concerns, it is clear that he did not have the authority to react to such concerns by withholding the key to his office. The office was "his" only to the extent that he was assigned to work there. The grievant was likewise without authority to determine on his own that because he did not desire custodial services, he could retain the key. The record reflects that administrative services needed the key for other reasons, including emergencies which might necessitate an after-hours entry into the office.

The undersigned further finds that a written reprimand for the grievant's insubordinate behavior was not excessive. To the contrary, the penalty appears tolerant given that the refusal to provide the key had at least the potential for creating problems and costs for BSC. Accordingly, the grievant's challenge to the reprimand is **DENIED.**

June 4, 1992 Plan of Improvement

The grievant asserts that this plan was disciplinary in nature and BSC therefore, has the burden of proving by a preponderance of the evidence the deficiencies on which it was based. He asserts that BSC has failed to meet that burden and that the plan was arbitrary and capricious. At Level II, BSC accepted that it had the burden of proof in the matter and at Level IV the college's counsel did not assert otherwise. BSC maintains the evidence fully supports that the grievant was deficient in the areas outlined in the plan and that it was implemented in accordance with allapplicable BOD policy. For the reasons discussed below, the undersigned concludes that the grievant's claim must be rejected.

The Education and State Employees Grievance Board has held that while certain aspects of employee improvement plans can be considered disciplinary in nature, i.e., they typically contain allegations of deficiencies, such plans are more "rehabilitative" than punitive. Accordingly, an employee who makes allegations that a plan of improvement is arbitrary or violative of some policy or

regulation of the employer, must bear the burden of proving those charges by a preponderance of the evidence. See, e.g., Goodman v. Putnam County Bd. of Educ., Docket No. 93-40-133 (July 8, 1993). However, since BSC accepted the burden at the lower levels and the matter was for the most part litigated on that basis, the evidence is analyzed herein accordingly. Since there was no BSC or BOD policy relating to improvement plans submitted by either party, the undersigned's review of the evidence is limited to a determination of whether BSC has shown that the deficiencies contained in the plan actually existed and whether the plan was otherwise implemented in a fashion which was not arbitrary or capricious.

Dean Mangus testified extensively about his reasons for placing the grievant on the plan. On each facet of the plan, he recounted the events which caused him to conclude that the grievant was deficient in that area. His testimony and the plan itself demonstrate that his main concerns were the grievant's alleged tardiness in reporting to work and his failure to submit neededpaperwork timely and accurately. BSC also offered extensive documentation to corroborate Mr. Mangus' testimony.

The grievant similarly testified about each portion of the plan and either disavowed the deficiencies outright or offered explanations which, if accepted, tended to mitigate against their seriousness. The essence of that testimony was that the deficiencies were contrived and that the improvement plan was merely a part of Mr. Mangus' ongoing efforts to harass him.

Conclusions regarding the propriety of the plan are to a large extent dependent on the relative credibility of Mr. Mangus and the grievant. For a number of reasons, it is concluded that Mr. Mangus was more the more credible witness. First, Mr. Mangus, by his demeanor during examination, exhibited a greater level of conviction in his statements than the grievant. Second, Mr. Mangus' answers were more spontaneous and responsive to questions. The grievant's answers almost invariably appeared calculated. It appeared that he was continuously attempting to discern counsel's reason for posing a particular question prior to answering it. Finally, the grievant was simply unresponsive or evasive when asked a great many significant questions. Accordingly, where the testimony of Dean Mangus and the grievant conflicted, and the conflict related to matters of significance, that of Dean Mangus was considered more credible.

As noted, Dean Mangus' testimony was corroborated by an extensive "paper trail" of documents maintained since his initial determination in August 1990 that the grievant was not adhering toa regular schedule and was not timely and/or accurately completing certain reports. While the grievant

also offered documentation to support portions of his testimony, it did not provide the degree of corroboration achieved by BSC's evidence.

After a thorough review of all testimony and documents related to the June 4 improvement plan, it is concluded that the college has demonstrated by a preponderance of the evidence that, as of the date of the plan, the grievant had established a pattern of reporting to work late and leaving early; on occasion the grievant's whereabouts were unknown to the SSS staff and Dean Mangus; the grievant was unresponsive to Dean Mangus' directives to adhere to a regular schedule; the grievant was consistently late in responding to various inquiries from Mr. Mangus regarding the SSS program; and the grievant's failure to adhere to a regular schedule as directed and his failure to accurately and timely respond to Dean Mangus' requests impeded the effective operation of SSS, the larger Student Services Department and perhaps other BSC departments.

It is further concluded that the grievant conceded these deficiencies in his conference with Dean Mangus on May 29, 1992; the grievant's memorandum of June 1, 1992 constituted a written confirmation of those concessions; Dean Mangus had good reason to include in the plan a warning to the grievant that his failure to adhere to its terms could result in dismissal; the plan was finalized only after the grievant had been provided an opportunity to provide input and responses to Dean Mangus' concerns; andpersons, including Dean Mangus, were available and willing to provide any assistance the grievant may have needed to comply with the provisions of the plan. In short, it is concluded that BSC has demonstrated by a preponderance of the evidence that the deficiencies noted in the plan did exist and that the plan was developed and implemented in a manner which was not arbitrary or capricious. Accordingly, the grievance initiated over the plan is **DENIED.**

It should also be noted and perhaps stressed that the determinations regarding the improvement plan are of considerable significance to the remaining claims. The plan highlights the nature of the grievant's shortcomings as of the time it was developed and Dean Mangus' efforts to correct the problems. Most if not all the evidence presented on the plan is relevant to the inquiry into the subsequent disciplinary actions taken against the grievant and the above conclusions are, to a large extent, dispositive of the grievant's claims regarding those actions.

June 26, 1992 Performance Evaluation

___The grievant asserts that this evaluation was "arbitrary, capricious, and without justification."

Specifically, he contends that there was no basis for Dean Mangus to conclude that he was deficient in any of the areas noted on the evaluation. The college responds that the evaluation was an accurate assessment of the grievant's performance for the preceding year and that it complied with all pertinent BOD policy.

Little discussion of the evidence on this grievance is needed. The evidence presented on the evaluation is essentially the same as that presented on the improvement plan. The record supports that except for the deficiency indicated in the area "Communicate ideas effectively in speaking and writing," the evaluation was an accurate assessment of the grievant's performance over the preceding year. The evidence related to that rating is insufficient to conclude that the grievant's communication skills were "unacceptable" during that period. (See footnote 9) This finding, however, is insufficient to conclude that the evaluation was otherwise flawed to the point that it was arbitrary.

Of significance is that the grievant on this particular complaint concedes that he sometimes did not report to work at the times designated by Dean Mangus but asserts that he was merely trying to accommodate a student need for his services in the evening hours. He argues that Dean Mangus was arbitrary and capricious in his refusal to allow the requested adjustments in his schedule. Implicit in these assertions is that the need for evening services "overrode" Mr. Mangus' directives.

The record does not support that the grievant was providing evening services to any student or that such services were needed on the BSC campus. Rather, it clearly demonstrates that the grievant simply did not want to keep regular hours and that heconsistently ignored the directives. The evidence submitted by the grievant is wholly insufficient to conclude that the Dean's decision to require the grievant to adhere to a "daily" schedule was arbitrary. (See footnote 10) Accordingly, this grievance is also **DENIED.**

August 13, 1992 Suspension

The grievant asserts that BSC failed to prove by a preponderance of the evidence that he was late in reporting to work on August 3, 4, 5, 6, 7, 10, 11, 12 and 13, 1992 as alleged. He again asserts, apparently in the alternative, that "the rule that grievant must be present at 8:00 a.m. is arbitrary and capricious." Implicit in this assertion is that the grievant was, therefore, free to ignore the rule. The college maintains the evidence fully supports that the grievant was tardy on the days in question and that, given Dean Mangus' numerous admonishments and warnings, the suspension was justified. The

College denies that the schedule was arbitrary or capricious.

BSC presented the testimony of Dean Mangus and SSS Counselor Connie Vest. The grievant presented his testimony and that of SSS secretary Kim Necessary and Division of Arts and Sciences SecretaryVenita Hodges. (See footnote 11) The grievant's witnesses generally supported his assertion that on the days in question he arrived at his office between 7:50 a.m. and 8:15 a.m. Ms. Vest confirmed Dean Mangus' testimony that the grievant was late on each day. After a careful review of the testimony it is concluded that Dean Mangus and Ms. Vest provided the most credible and reliable account of the grievant's arrival times. Their testimony establishes that the grievant arrived at work at 8:30 a.m. on August 3rd; at 9:00 a.m. on the 4th; at 10:30 a.m. on the 5th; at 8:15 a.m. on the 6th; at 8:15 a.m. on the 7th; at 9:30 a.m. on the 10th; at 8:30 a.m. on the 11th; at 8:45 a.m. on the 12th; and between 8:35 a.m. and 8:45 a.m. on the 13th.

Since it is undisputed that the grievant had been given several clearly worded directives to adhere to an 8:00 a.m. to 4:00 schedule, proof of his tardiness is also proof of insubordination. Further, for the reasons previously discussed, the record does not support that the directive was arbitrary and capricious. Moreover, the grievant cites no support for his assertion that he was justified in ignoring the directives on the basis of his belief that it was arbitrary. As a general rule, an employee may disobey the orders of a superior who is entitled to give such orders only when the directive appears illegal or hazardous. See, Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Clearly, Dean Mangus' order that the grievant adhere to anestablished schedule was one which he was empowered to make and one which the grievant had no legally cognizable reason to ignore. Accordingly, this grievance is also **DENIED.**

August 17, 1992 Letter of Reprimand

The grievant asserts that the College has failed to prove that he was guilty of any of the charges cited in the reprimand. Specifically, he asserts that the failure to notify the interview committee members that they were to conduct interviews on the morning of August 13, 1992 was his secretary's omission and not his. BSC disagrees that the evidence supports that the secretary was to blame and maintains that in any event the grievant ultimately bore the responsibility for the error.

Determinations regarding the testimony of the secretary, Kim Necessary, are for the most part dispositive of this grievance. When questioned about the events surrounding the interviews on the

morning of August 13, Ms. Necessary stated with certainty that the grievant had directed her to notify the candidates of the date and time of the interviews. On the issue of whether the grievant had also instructed her to contact the members of the interview committee, she explained that the grievant may have so directed her and that she forgot to carry out the direction. Essentially, she could not recollect whether the grievant did or did not give her that instruction. The grievant testified that he was certain that he instructed Ms. Necessary to contact the members.

The record otherwise generally supports that notifying the committee members was a task which the grievant would most likelyhave delegated to Ms. Necessary. It also supports that there was no policy or past practice which mandated that he perform the duty himself. Ms. Necessary's concession that the grievant may have assigned her that task is more supportive than contradictory of the grievant's testimony on the issue. Since BSC produced no other evidence tending to show that the grievant was remiss in the matter, it must be concluded that the college has failed to show by a preponderance of the evidence that the grievant was derelict in his duties. Accordingly, this grievance is **GRANTED** and the college is **ORDERED** to remove the reprimand from the grievant's personnel file. (See footnote 12)

Closure of the Grievant's Mailbox

___It is undisputed that Dean Mangus on April 28, 1992, for reasons which need not be recounted here, ordered that a mailbox in the colleges's mail room which the grievant had been assigned since 1979, be closed. It is also undisputed that the grievant was unequivocally notified of this action on or about the same date. The grievance was not filed until July 18, 1992 and BSC asserts that it was untimely. The grievant contends that it was not until July 15, 1992 that he learned that other BSC directors were still assigned individual mailboxes and that he filed within fifteen days of learning of this disparate treatment. He also asserts that the action was arbitrary and capricious.

Because the undersigned ultimately concludes that the grievant's dismissal must be upheld, it is not necessary to make definitive rulings on the assertions regarding the timeliness of the complaint or the grievant's contentions on its merits. A finding that the grievant was properly dismissed effectively renders moot the grievant's request that his private mailbox "be reinstated to him." See, Jones v. Summers County Bd. of Educ., Docket No. 94-45-153 (Nov. 16, 1994). It is simply noted that the record supports that Dean Mangus acted in a "heavy-handed" manner by closing the mailbox

without warning or subsequent explanation. (See footnote 13) Further, although the grievance, when viewed as a separate complaint, was most likely not timely filed, the evidence on the circumstances surrounding the action has been afforded weight in the review of the grievant's charge of harassment. Harassment is defined in W.Va. Code §18-29-3(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Since W.Va. Code §18-29-4(a)(1) permits an employee to file a grievance within fifteen days of the most recent occurrence of a continuing practice, it is appropriate to consider the complaint timely to the extent that it is a part of that charge.

Harassment and Termination

The grievant's charge of harassment is essentially a defense raised in each of the grievances, including that filed over the dismissal. According to the grievant, Dean Mangus became angry at him for his refusal to teach a three-hour life management course in August 1990 and that the ensuing performance evaluations, improvement plan, suspensions, reprimand and dismissal were simply manifestations of that anger. He does not assert, however, that the dismissal be overturned on that basis. Instead, he requests damages in the amount of $5,000.00 for "emotional distress and mental anguish." (See footnote 14)

___The grievant further contends that at the time of the dismissal, he was on approved sick leave and therefore could not have abandoned his position as indicated in Dean Mangus' September 15, 1992 letter. He denies that he had any duty to contact Dean Mangus during his leave. The grievant also denies that while on leave he received directions from his staff to call Dean Mangus. Finally, he contends, apparently in the alternative, that any failures to acquire formal approval of his use of sick leave after September 8, 1992, were the result of his depression and anxiety which were directly attributable to Dean Mangus' on-going harassment.

BSC asserts that the grievant was under a duty per the June 4, 1992 plan of improvement and numerous other written directives to call Dean Mangus whenever he was not going to be at work for any reason and that his failure to do so after September 8, 1992 constituted a refusal to obey an order. The college also asserts, as did Dean Mangus in the termination letter, that the grievant's failure to call after that date constituted abandonment of his position under Section 7.3.1 of the Classified Employee's Handbook. For the reasons hereinafter discussed, the undersigned concludes that the grievant has failed to show that Dean Mangus engaged in harassment as that term is defined

in W.Va. Code §18-29-2(n) and that the college has demonstrated that the dismissal was justified.

As indicated in the foregoing discussion, the record supports that Dean Mangus acted in a "heavy-handed" manner in closing the grievant's personal mailbox. It also supports that he acted in similar fashion with respect to several other matters. It is concluded, however, that his actions fell far short of "repeated or continual disturbance, irritation or annoyance" which was "contrary to the demeanor expected by law, policy and profession." Essentially, the evidence presented at all levels reflects that Dean Mangus began his efforts to correct the perceived deficiencies in the grievant's performance in a rather benign manner but became impatient as those efforts proved unsuccessful and the grievant habitually disregarded his directions, particularly those related to his work hours. It further reflects that this impatience and perhaps a certain amount of sheer frustration caused him to "nit-pick" when latitude was called for. It appears that the grievant's denunciation of his written "commitments" in June 1992 was a turning point in Dean Mangus efforts and that he understandably then decided to concentrate on documenting the grievant's failings rather than assisting him correct them.

The record as a whole, however, simply does not support that Dean Mangus was engaged in an on-going and necessarily elaborate plan to harass and eventually dismiss the grievant and, therefore, contrived the documentation or fabricated other evidence on the grievant's shortcomings. As indicated previously, BSC established that those shortcomings were substantial and that they had significant effects on the operation of SSS. Accordingly, the grievant's harassment claim is **DENIED.**

It is questionable whether the grievant's failure to report to either Dean Mangus or the SSS offices after September 8, 1992, can be considered an abandonment of his position. As of that date, Dean Mangus had good reason to be concerned over the grievant's absence and his failure to respond to his urgent letters and directions to contact his office. However, he also had good cause to believe that the grievant's continued absence was for the same reason as previously reported, namely his health. The referenced policy seems intended to address situations where the employee has provided no explanation for absences and has not sought any authorization to take sick leave. Essentially, it is concluded that the policy is triggered when there is no rational basis for a supervisor to conclude, given the circumstances surrounding theabsence, that an employee will return to work. This was not the situation in the grievant's case. This conclusion, however, is not dispositive of the grievance.

The termination letter was broadly worded and did not advise the grievant that the action was

taken simply because of his failure to adhere to the referenced policy. The clear import of the letter is that the grievant had failed once again to adhere to Dean Mangus' directives to keep him fully apprised of any circumstances which might prevent him from keeping regular work hours. Indeed, the letter and the record as a whole fully support that the dismissal was a culmination of failed efforts to force the grievant to obey those directives. It is the nature of the grievant's conduct and not the label assigned to it by BSC which should govern the determination of whether his dismissal was justified. Mason County Bd. of Educ. v. State Superintendent of Schools, 274 S.E.2d 423 (W.Va. 1981).

At best, the grievant's failure to report after September 8, 1992, on the status of his health problems or provide a date on which he might be expected to return was neglectful of his duties. At the very least, the policy on absences and Dean Mangus' numerous directives and expressions of concern over his adherence to regular work hours placed such duties upon him. It is not accepted that the SSS staff did not relay to the grievant Dean Mangus' urgent requests. It is also not accepted that the grievant's health problems were so severe that he was unable to call Dean Mangus or respond to his written inquiries over Mr. William's report andimpending deadline for a new grant proposal. The evidence establishes that it is more likely than not that the grievant chose not to report or respond for the same reasons he chose to ignore the numerous previous orders given by Dean Mangus.

Little analysis is needed to conclude that the grievant's conduct was also insubordinate. He received several orders from Dean Mangus, relayed by the SSS staff, to contact his office at once, yet he chose not to report at all. The grievant does not cite and the undersigned is unaware of any authority by which an employee's use of sick leave exempts him from obeying such directives of a superior. The extent of the grievant's disregard for those directives is clearly demonstrated when it is recognized that the orders required nothing more than a telephone call to Dean Mangus' office.

In summary, it is concluded that BSC has proven by a preponderance of the evidence that beginning as early as 1990, the grievant established a pattern of reporting to work late; failing to complete various tasks timely and in compliance with college policy; providing false or incomplete accounts regarding his adherence to established work hours; and ignoring the orders of his immediate supervisor to adhere to such hours. It is further concluded that BSC has proven that these deficiencies were clearly and concisely communicated to the grievant and that although he was given the opportunity to improve, such conduct continued and culminated in his failure in September 1992

to respond to his supervisor's direct orders to contact him regarding his absencesfrom work and matters of urgent concern to the SSS program. Such conduct constitutes cause for dismissal under BOD's personnel policies. Accordingly, the grievance is **DENIED** and the dismissal is upheld.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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 Education and 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: December 30, 1994

Footnote: 1It appears that the grievant made a timely request for an informal conference with his supervisor per W.Va. Code §18-29-4(a)(1) but the conference was not held until October 19, 1992. The supervisor's response was made October 30, 1992.

Footnote: 2The Level IV hearings were largely supplemental to the rather extensive hearings held at the lower levels. The transcripts of the lower level proceedings and attached exhibits are part of the record herein. It is also noted that while at times the evidence presented at the two Level IV hearings was focused upon a particular grievance, the parties agreed that the undersigned should consider the entire record relevant to all claims made by the grievant.

Footnote: 3The record in the case is extensive and a recitation of all the evidence presented is not practically possible. Nor is it practical to set forth an extensive analysis on each of a considerable number of points on which the evidence conflicts. The undersigned has carefully reviewed that evidence and has attempted to relate the most relevant portions and summarize the analysis.

Footnote: 4It appears that the eligibility was income or need-based.

Footnote: 5Apparently, "exempt status" was in reference to the applicability of wage and hour laws to the grievant's position and not to his status as an employee in BSC's classified service. It should be noted that the grievant makes no legal argument that the operation of any federal or state statute regarding the wages and hours of professional employees prohibited BSC from imposing a particular schedule upon him.

Footnote: 6As hereinafter discussed, BSC asserts that this grievance was not timely filed.

Footnote: 7The undersigned is aware that the Kanawha County Circuit Court denied the petition by order dated May 23, 1994, and that the grievant has effected an appeal of that order to the West Virginia Supreme Court of Appeals. It is noted that while the grievant has never filed an appeal of the suspension to the Education and State Employees Grievance Board, the circumstances surrounding the action were necessarily broached and to some extent litigated during the course of the hearings on the grievances which are the subject of this decision. The undersigned has made no conclusions herein regarding the propriety of the suspension or whether the grievant was guilty of the underlying charges. Some limited consideration of the evidence offered on the matter was necessary, however, in order to fully analyze the grievant's charge of harassment and BSC's assertion that the grievant's termination was the culmination of a progressive disciplinary approach to the perceived problems in his performance.

Footnote: 8Dr. Blevins testified at Level IV that he was a close friend of the grievant's.

Footnote: 9This conclusion is also supported by the undersigned's review of the numerous memoranda and letters of record written by the grievant. With minor exception, those documents reflect that the grievant was quite competent in his writing skills and that he had no difficulty in conveying his ideas in clear and concise terms.

Footnote: 10Essentially, the only evidence offered was testimony to the effect that another employee under the Dean's supervision was allowed flexibility in his schedule. Further testimony, however, established that the employee was engaged in various aspects of BSC's athletic program and the nature of his duties required the flexibility. The grievant presented little if any evidence that the services of SSS were needed after 4:00 p.m. The college's unrefuted testimony on the issue reflects that a majority of BSC students are commuters as opposed to campus residents and generally complete their school day by 2:00 p.m.

Footnote: 11Ms. Hodges' worksite was located near the grievant's office.

Footnote: 12It is recognized that, in light of the ultimate conclusions regarding the grievant's dismissal, this relief is de minimus.

Footnote: 13The Level II evaluator reached the conclusion that Dean Mangus acted "arbitrarily and capriciously" but also found that the matter was moot in light of his further conclusion that the dismissal was justified. The undersigned finds it unnecessary to agree or disagree with the evaluator's characterization of Dean Mangus' actions.

Footnote: 14The grievant cites Graf v. W.Va. University, 429 S.E.2d 496 (W.Va. 1992) as supportive of his assertion that the Education and State Employees Grievance Board is authorized to make such awards. While the undersigned finds it doubtful that Graf stands for such a proposition, it is unnecessary to reach that question.