GARRETT OLMSTED,

Grievant,

v. **Docket Nos. 98-BOD-108**

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. He filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contesting his dismissal. A prior grievance, styled 98-BOD-545, alleged that BSC did not provide a safe workplace and condoned his harassment. (See footnote 1) 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. James Voelker, on February 16, 1998. The grievance was denied at Level II by Dr. Robert Moore, President of BSC (President Moore)(Moore), on March 31, 1998. 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 AssistantAttorney 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 through IV.

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 of the 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 becauseof 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 2)

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 those opposed 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. Perkins' father is Dr. David Perkins, Director of BSC's Greenbrier Community College Center in Lewisburg, who reports directly to President Moore.

19. On or about November 14, 1997, a racially charged poster, based upon aphotograph 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.

20. 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.

21. 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.

22. 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 car vandalized, and reported this incident to Bluefield Police and BSC's Office of Campus Security (Campus Security), naming Perkins as the vandal.

23. 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.

24. 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.

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

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. 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.

28. BSCs' investigation of these incidents was ineffective.

29. BSC failed to provide a safe workplace for Grievant, who was subjected to intimidation and being placed in reasonable fear of imminent physical harm.

30. 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.

31. 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.

32. 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.

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

34. At the end of the Fall, 1997 semester, Grievant's son inadvertently left Grievant alone on BSC's campus. Grievant became extremely anxious at being alone on the campus, and ran in panic from it to a nearby church.

35. Because of BSC's failure to provide a safe work place, Grievant requested sabbatical leave for the spring semester of 1998, which would be Perkins' last semester at BSC. President Moore denied his request, citing financial reasons.

36. By letter of December 16, 1997, Grievant changed his sabbatical leave request to a request for unpaid leave. Grievant cited his desire to write two books, as well as BSC's inability to assure his personal safety. President Moore denied his request.

37. By letter of January 4, 1998, Grievant informed President Moore that Grievant could not be expected to work in the unsafe conditions at BSC, that BSC's investigation of the incidents that made the campus unsafe was deficient, that BSC's presentation of evidence against certain students was inadequate, that he considered BSC's failure to provide a safe work place and grant him leave retaliation for his speaking out on the racial policies of the Moore administration, that the students who harassed, threatened, or endangered him would be present on campus, and that he could not return to the campus for the spring semester unless the unsafe working conditions were remedied.

38. By letter of January 8, 1998, President Moore informed Grievant that an “extensive” investigation of his safety concerns had been conducted by Akers, that the investigation revealed no probable cause to believe that unsafe working conditions existed at BSC, that unsafe working conditions could not be verified, and that he would be inviolation of 131 CSR 36 § 12.3, which describes abandonment of employment, if he did not return to work immediately.

39. By letter of January 11, 1998, Grievant reiterated his safety concerns, his criticism of BSCs'

investigation, and his contention that BSC's failure to provide him adequate protection or grant him leave was in retaliation for his speaking out on the racial policies of the Moore administration.

40. By letter of January 12, 1998, President Moore informed Grievant that his employment would be terminated on January 16, 1998, for neglect of duty and insubordination, Grievant having missed four days of work including one day of instruction.

41. By letter of January 14, 1998, Grievant reiterated his concerns, informed President Moore that he was under a psychiatrist's care, and that his psychiatrist had told him that returning to BSC's unsafe campus would be detrimental to his mental health. Grievant again informed President Moore that his failure to provide him adequate protection or grant him leave could only be seen as retaliation for his speaking out on the racial policies of the Moore administration.

42. By letter of January 16, 1998, President Moore informed Grievant's attorney that the deadline for Grievant's termination would be extended to January 21, 1998, so that a meeting could be scheduled between the parties.

43. By letter of January 21, 1998, President Moore informed Grievant that a pretermination hearing had been held, via teleconference, that Grievant was represented by his attorney at this hearing, that the attorney did not offer any information that would cause Moore to alter his intent to dismiss Grievant, and that Grievant's employment with BSC was terminated because he had abandoned his position. 44. Grievant had a good teaching record, and had been promoted and awarded tenure by BSC.

45. Grievant had never been the subject of disciplinary action by BSC.

46. Perkins graduated from BSC in the spring of 1998.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

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.

Generally, state employees can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985), § 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993). See Westfall v. W. Va. Dep't of Transportation, Docket No.97-DOH-349 (Jan. 16, 1998); Dillard v. W. Va. Dep't of Transportation/Div. of Highways, Docket No. 98-DOH-127 (Aug. 10, 1998).

Tenured faculty members of the State College System of West Virginia can be dismissed only for cause. 131 CSR 36 § 12.1. Tenure is a paramount professional and economic goal for a teacher and, as such, is a valuable property interest which may not be denied without due process of law. State ex rel. McLendon v. Morton, 162 W. Va. 431, 249 S.E.2d 919 (1978).

BSC terminated Grievant for allegedly violating Section 12.3 of the Procedural Rules of the State College System of West Virginia Board of Directors, Series 36, which states:

> Faculty who refuse to sign or execute an offered annual contract or notice of appointment by the date indicated by the institution for its execution, or who fail to undertake the duties under such document at a reasonable time, shall be deemed to have abandoned their employment with the institution and any rights to tenure or future appointment.

BSC concluded that Grievant abandoned his employment after he missed four days of work, including one day of instruction. However, BSC had failed to provide a safe workplace for Grievant, who was subjected to intimidation and being placed in reasonable fear of imminent physical harm. Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD-545 (Oct. 13, 1998).

This Grievance Board has considered few cases of dismissal for abandonment of position, and has never decided such a case where the grievant was a tenured college faculty member. The dismissal of a food service worker for abandonment of position was upheld where the employee failed to return from a medical leave of absence and failed, for 34 days, to respond to her employer's

inquiries as to when she would return to work.Lewis v. W. Va. Dep't of Health and Human Resources/Lakin State Hospital, Docket No. 94-HHR-1146 (Apr. 25, 1995). The dismissal of a correctional officer for abandonment of position was upheld where the employee missed four days of work, without providing any reason, after having received verbal counseling, a written warning, and a three-day suspension for leave abuse, and an eighteen-day suspension without pay for abandoning his post, and the employer's progressive discipline policy recommended dismissal under those circumstances. Smith v. W. Va. Dep't of Public Safety/Div. of Corrections, Docket No. 93-CORR-538 (May 17, 1994). The dismissal of a correctional officer for abandonment of position was upheld where the employee was absent from work, without any explanation, for nearly three years. Baire v. W. Va. Div. of Corrections, Docket No. 97- CORR-129 (Mar. 11, 1998).

Cause to dismiss a grievant for abandonment of position was not found, although his dismissal for insubordination was upheld, where grievant's absence of more than two weeks was adequately explained as sick leave. The administrative law judge noted that the purpose of an abandonment policy is to address situations where an employee has provided no explanation for an absence and has not sought authorization for leave. Oni v. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-515/408/302 (Dec. 30, 1994). The dismissal of a rehabilitation counselor for abandonment of position was reversed where the employee, described as “tenured,” missed, without explanation, nine days of work following a two month period of medical leave, but had not previously been disciplined. The employer argued that it dismissed the grievant primarily because he did not inform them as to his intentions and ability to return to work. This Grievance Board concluded that dismissal was too harsh a penalty under the circumstances, and that theemployer had established a mere technical violation of its policy. Moore v. W. Va. Dep't of Rehabilitation Services, Docket No. 95-RS-165 (July 31, 1995). The dismissal of a health service worker for abandonment of position was reversed where the employee missed, without explanation, four days of work following a period of emergency leave, but had never been the subject of disciplinary action for leave abuse, absenteeism or unauthorized leave, and had worked for the employer for two years and been promoted. This Grievance Board concluded that an employee's taking of emergency leave for a bona- fide purpose, after a timely request which was improperly denied by the employer, does not constitute an abandonment of position or cause for dismissal. Moore v. W. Va. Dep't of Health, Docket No. 89-H-013 (May 22, 1989).

From these decisions, it appears that an employee's disciplinary record regarding absence, the length of and the circumstances surrounding an employee's absence, and an employee's communication of his intentions regarding the reason for his absence and his return to work are factors to be considered in determining when a dismissal for abandonment of position is proper.

These factors are also considered in dismissal for abandonment of position cases concerning federal employees. Dismissal of a Navy employee for abandonment of position was upheld where the employee had received three prior suspensions under the employer's progressive discipline policy. Goulet v. Dep't of Navy, 37 M.S.P.R. 492. Abandonment of position is presumed to be voluntary, unless an employee establishes that the abandonment was the result of duress or coercion. Freedman v. Veterans Admin'n,, 23 M.S.P.R. 361.

Nationally, the issue of dismissal for abandonment of position has arisen primarilyin unemployment compensation cases. An employee who leaves work voluntarily, without good cause involving fault by the employer, is disqualified from receiving unemployment benefits. See generally W. Va. Code § 21A-6-3(1). Good cause for voluntarily leaving the workplace has been measured by an “ordinarily prudent person” standard, Hussa v. Employment Security Dep't, 664 P.2d 1286 (Wash.App. 1983), by the standard of the “average, able-minded, qualified worker,” Brown v. Unemployment Appeals Comm'n, 633 So.2d 36 (Fla.App. 5 Dist. 1994), and by the “reasonably prudent person” standard. Curry v. Gatson, 180 W. Va. 272, 376 S.E.2d 166 (1988). Good cause, involving fault by the employer, to voluntarily leave work was found where well-grounded safety concerns existed. Pinto v. Employment Div., 858 P.2d 177 (Or.App. 1993). Good cause, involving fault by the employer, to voluntarily leave work was found where threats of physical violence occurred, from which the employee could reasonably conclude that his personal safety was endangered. Condo v. Review Bd., 158 N.J.Super. 172, 385 A.2d 920 (App.Div. 1978), Coleman v. Employment Security Dep't., 607 P.2d 1231 (Wash. 1980). Good cause, involving fault by the employer, to voluntarily leave work was found where such threats of physical violence occurred, and were not addressed by the employer after repeated complaints by the employee. Domenico v. Bd. of Review, Dep't of Labor & Industry, 192 N.J.Super. 284, 469 A.2d 961 (App.Div. 1983). If racial or sexual harassment in the workplace would cause a reasonably prudent person to leave employment, the employee is not disqualified from receiving unemployment benefits. Curry v. Gatson, supra.

From these decisions, it appears that, in the unemployment context, a reasonable, prudent

employee's voluntary departure from employment is justified when valid safetyconcerns, including threats of physical violence, exist, particularly when such threats are not addressed by an employer who is made aware of them by the employee.

Grievant's situation was most closely analogous to that described in Moore v. W. Va. Dep't of Health, supra, although the circumstances that led to his dismissal were less compelling than those in Moore. Both grievant Moore and Grievant missed four days of work; however, Grievant repeatedly communicated the reason for his absence and his desire to return to work, where grievant Moore did not. Neither grievant Moore nor Grievant had ever been the subject of disciplinary action for leave abuse, absenteeism or unauthorized leave. Grievant Moore had worked for her employer for two years and been promoted. Grievant had worked for his employer for nine years, had been promoted, and also granted tenure. Both grievant Moore and Grievant made timely requests for leave, which were improperly denied by their employers. Neither absence constituted an abandonment of position or cause for dismissal. In fact, the circumstances that BSC alleges supported Grievant's dismissal were less compelling than those of any other dismissal for abandonment of position case considered by this Grievance Board.

The following quote from Moore is also appropriate to Grievant's grievance. “Respondent did not meet its burden of proof and show just cause for grievant's dismissal inasmuch as its application of policy authorizing dismissal of employee for abandonment of position was not warranted under the circumstances. Grievant's position with respect to how respondent might have properly dealt with h[is] absence is more compelling. . . Respondent acted in haste to dismiss grievant, who had never been previously disciplined for leave abuse or absenteeism, without first investigating the circumstances.”

Grievant's actions demonstrated a desire to preserve the employment relationship,not to sever it. Grievant did not keep his employer in the dark regarding his intentions and ability to return to work, but instead repeatedly expressed his desire to return to work at BSC, albeit at a safer campus.

Grievant had been advised by the Bluefield Police not to go on BSC's campus alone, and his psychiatrist had advised him not to return to the campus. A reasonable, prudent person would heed such professional advice. Grievant took every step available to him to avoid having to be on BSC's campus until after the Spring semester of 1998, when Perkins would graduate. He applied for a sabbatical, and then for an unpaid leave of absence. On five separate occasions, he informed

President Moore that BSC had failed to provide a safe working environment, and had failed to conduct an effective investigation into Grievant's situation.

President Moore testified credibly at Level IV that he relied on Campus Security Supervisor Rick Akers' (Akers) investigation of Grievant's complaints. He ordered Akers to get rid of the racially charged flier and the “green and purple people,” and assumed it was done. In a letter to Grievant dated January 21, 1998, Moore stated that Grievant's concerns had been adequately investigated and were unfounded. By letter of January 8, 1998, President Moore informed Grievant that an “extensive” investigation of his safety concerns had been conducted by Akers, that the investigation revealed no probable cause to believe that unsafe working conditions existed at BSC, and that unsafe working conditions could not be verified. However, instead of being “extensive,” Akers' investigation was ineffective. Olmsted, supra. Moore also testified that Grievant's request for a sabbatical could not be granted for financial reasons, and that Moore had not granted such a leave during his five year tenure as president, also for financial reasons. In his letters to President Moore, Grievant alleged that Moore's failure to provide him with a safe workplace or grant him leave could be seen as retaliation for his strident criticism of the racial policies of the Moore administration. Where constructive discharge is claimed by an employee to be the result of retaliation, the employee must prove sufficient facts to establish the retaliatory discharge. The employee must also prove that working conditions, related to the facts giving rise to retaliatory discharge, and created by or known to the employer, were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that the employee prove that the employer's actions were taken with the intent to cause the plaintiff to quit. Slack v. Kanawha County Housing and Redevelopment Auth'y, 188 W. Va. 144, 423 S.E.2d 547 (1992). To establish retaliatory discharge, an employee must prove that (1) he engaged in protected activity, (2) the employer was aware of the protected activity, (3) he was subsequently discharged and, (absent evidence tending to establish a retaliatory motivation), (4) that his discharge followed his protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

It is understandable that President Moore would not have appreciated Grievant's blistering attack on his racial policies contained in the paper “Why there are no Black Professors and only 7% African-American Enrollment at Historically-Black Bluefield State College,” the negative publicity focused

upon racial issues at BSC by Grievant's complaints, BSC having to enter into a compliance agreement with the Office of Civil Rights based on Grievant's complaint, or Grievant's complaints being aired at his presidential evaluation hearing in front of his five fellow presidents. Moore responded toGrievant's charges by writing that recent events at BSC were very troubling, and that untrue statements had been made, causing distress to BSC.

However, it is unnecessary to conclude that President Moore's refusal of Grievant's sabbatical and unpaid leave requests constituted retaliation by Moore for Grievant's advocacy, an activity which was both protected under and encouraged by BSC's Social Justice Policy. 131 CSR 56-2.1., See Olmsted, supra. President Moore's refusal of leave is adequately explained by his reasonable reliance upon the ineffective investigation conducted by Akers, which led him to wrongly conclude that Grievant's concerns were baseless. Olmsted, supra. Nevertheless, Grievant could not, as a reasonable, prudent person, have been expected to return to an unsafe work place, against police and medical advice. BSC has failed to meet its burden of proof and establish, by a preponderance of the evidence, that Grievant abandoned his employment. Therefore, some degree of mitigation of the penalty, dismissal, assessed by BSC against Grievant is appropriate.

Grievant bears the burden of demonstrating that his penalty, dismissal, was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Commission, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No.

95-CORR-252 (July 23, 1996). This Grievance Board has held that “mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant had a history of satisfactory work performance. He had been promoted by BSC, signifying that BSC acknowledged his:

> [e]xcellence in teaching; publications and research, accessibility to students, adherence to professional standards of conduct; professional and scholarly activities and recognition; significant service to the community and the college; experience in higher education and at the institution; possession of the doctorate, special competence, or the highest earned degree appropriate to the teaching field, granted by a regionally accredited institution, or special competence that is deemed to be equivalent to such academic credentials; potential for continued professional growth; and service to the people of the state of West Virginia. 131 CSR 36 § 7.1.1.

Promotion at BSC also acknowledges “ a significantly greater degree of skill, effort and responsibility than that of the employee's current position.” 131 CSR 62 § 13.1. President Moore testified credibly at Level IV that he had promoted Grievant and had no problems with his teaching.

Grievant had been granted tenure. Tenure “is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community.” 131 CSR 36 § 9.1. Tenure is granted upon evidence demonstrating:

> excellence in teaching; publications and research, accessibility to students; adherence to professional standards of conduct; professional and scholarly activity and recognition; significant service to the community and the college; experience in higher education and at the institution; possession of the earned doctorate, or the highest earned degree appropriate to the teaching field, granted by a regionally accredited institution, or special competence that is deemed to be equivalent to such academic credentials; potential for continued professional growth; and service to the people of the State of West Virginia. 131 CSR 36 § 9.1.

Grievant also had never been the subject of disciplinary action by BSC.

The undersigned finds that, by a preponderance of the evidence, mitigating circumstances exist for Grievant. As noted above, he had no disciplinary record, had been promoted and awarded tenure,

and was, as a reasonable, prudent person, obliged upon professional advice to absent himself from an unsafe workplace, and fully communicated his intentions regarding the reason for his absence and his return to work. These circumstances support a reduction in the clearly excessive penalty assessed against Grievant, in the interest of fairness and objectivity, and considering his long service with a history of otherwise satisfactory work performance. Pingley, supra.

The penalty assessed against Grievant was also disproportionate to the penaltiesemployed by the employer against other employees guilty of similar offenses. Phillips, supra. The undersigned notes that dismissal after an explained absence from four days of work is an unusually harsh penalty at BSC. Oni, supra. In Oni, BSC employed the remedy of dismissal where a non-tenured classified employee, who had repeatedly been admonished, reprimanded, placed on an improvement plan, and suspended for absences and insubordination, missed more than two weeks of work.

Therefore, the only issue remaining to be resolved is what remedy should 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 v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996). In another matter, a school board was directed to select an "appropriate employee," other than the grievant's principal, 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 toan 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 he be reinstated to his tenured position with the same length of service, tenure, salary, benefits, and all scheduled pay increases; unpaid leave for the Spring, 1998 semester, and an award of back pay and attorney's fees. However, attorney's fees and other “tort-like” forms of relief are not available from this Grievance Board. Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997).

As noted above, Grievant could not, as a reasonable and prudent person, have been expected to return, against police and medical advice, to an unsafe work place. If Perkins was not to be disciplined, some form of leave should have been granted to Grievant. President Moore testified credibly, and without contradiction, that sabbatical leave could not have been granted for financial reasons. Grievant's request for unpaid leave, made in his letter of December 16, 1997, however, offered a reasonable solution to the dispute underlying this grievance. A semester of unpaid leave, until Perkins graduatedand left the campus, would have substantially allayed Grievant's valid concerns about campus safety. Grievant's request for unpaid leave also reflected his desire to remain at BSC, where he had a fine record, at substantial personal financial sacrifice.

BSC's policy on personal leave of absence without pay states: “[a]n employee, upon application in writing and upon written approval by the institutional president or his/her designee, may be granted a continuous leave of absence without pay for a period of time not to exceed twelve (12) consecutive months provided all annual leave has been exhausted.” 131 CSR 35 § 9.1.

Therefore, BSC will be ordered to award Grievant personal leave of absence without pay, for the Spring, 1998 semester, in accordance with the terms of 131 CSR 35 § 9. BSC will further be ordered to reinstate Grievant to his position, with all back pay and interest thereon, tenure, length of service, benefits, and all scheduled pay increases to which he would have been entitled had he not been dismissed.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. BSC failed to provide a safe workplace for Grievant. Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD-545 (Sep. 24, 1998). 3. The Procedural Rules of the State College System of West Virginia Board of Directors, Series 36, provide that faculty who refuse to sign or execute an offered annual contract or notice of appointment by the date indicated by the institution for its execution, or who fail to undertake the duties under such document at a reasonable time, shall be deemed to have abandoned their employment with the institution and any rights to tenure or future appointment.

4. An employee's disciplinary record regarding absence, the length of and the circumstances surrounding an employee's absence, and an employee's communication of his intentions regarding the reason for his absence and his return to work are factors to be considered in determining when a dismissal for abandonment of position is proper. Lewis v. W. Va. Dep't of Health and Human Resources/Lakin State Hospital, Docket No. 94-HHR-1146 (Apr. 25, 1995), Smith v. W. Va. Dep't of Public Safety/Div. of Corrections, Docket No. 93-CORR-538 (May 17, 1994), Baire v. W. Va. Div. of Corrections, Docket No. 97-CORR-129 (Mar. 11, 1998), Oni v. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-515/408/302 (Dec. 30, 1994), Moore v. W. Va. Dep't of Rehabilitation Services, Docket No. 95-RS-165 (July 31, 1995), Moore v. W. Va. Dep't of Health, Docket No. 89-H-013 (May 22, 1989).

5. BSC has failed to meet its burden of proof and establish, by a preponderance of the evidence, that Grievant abandoned his employment.

6. When considering whether to mitigate a punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employeewas advised of prohibitions against the conduct

involved. Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

7. A grievant bears the burden of demonstrating that a penalty was clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action. Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

8. Grievant established, by a preponderance of the evidence, that he had a fine work record at BSC.

9. Grievant has met his burden of proof and established that mitigation of the clearly excessive penalty, dismissal, assessed by BSC against Grievant is appropriate.

10. 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 v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996); See Graf v. W. Va. Univ., 189 W. V. 214, 429 S.E.2d 426 (1992).

11. BSC's policy on personal leave of absence without pay provides that an employee, upon application in writing and upon written approval by the institutional president or his/her designee, may be granted a continuous leave of absence without pay for a period of time not to exceed twelve (12) consecutive months provided all annual leave has been exhausted.

Therefore, BSC is **ORDERED** to award Grievant personal leave of absence without pay, for the Spring, 1998 semester, in accordance with the terms of 131 CSR 35 § 9. BSCis further **ORDERED** to reinstate Grievant to his position, with all back pay and interest thereon, tenure, length of service, benefits, and all scheduled pay increases to which he would have been entitled had he not been dismissed.

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 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated October 21, 1998

Footnote: 1 *Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD- 545 (Oct. 13, 1998).*

Footnote: 2 *Mr. Hawthorne grieved his non-renewal in Hawthorne v. Board of Directors/Bluefield State College, Docket No. 97-BOD-252 (Nov. 5, 1997).*