STEVEN GLAZER,

Grievant,

v.

DOCKET NO. 02-HEPC-191

HIGHER EDUCATION POLICY COMMISSION/

CONCORD COLLEGE,

Respondent.

D E C I S I O N

Grievant, Steven Glazer, filed this grievance against his employer, the Higher Education Policy Commission/Concord College ("Concord") on July 1, 2002, protesting his suspension without pay by letter dated June 21, 2002, and requesting reinstatement and to be made whole financially. A level four hearing was held in the Grievance Board's Beckley, West Virginia, office on August 21, 2002, and this matter became mature for decision on September 21, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Jeffrey G. Blaydes, Esq., Donnelly & Carbone, and Concord was represented by Jendonnae L. Houdyschell, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Concord's Exhibits

Ex. 1a -

Photograph of Art 101 classroom, with seat assignments initialed by Temperance Bennett, Latasha Dowell, Joshua Ratliff, and Tony Lambdon.Ex. 1b -
Photograph of Art 101 classroom.

Ex. 1c -

Photograph of Art 101 classroom.

Ex. 1d -

Photograph of Art 101 classroom.

Ex. 1e -

Photograph of Art 101 classroom.

Ex. 2 -

Photographs of Temperance Bennett's left eye and temple area.

Ex. 3 -

Incident Report..

Ex. 4 -

May 17, 2002 letter from Jerry L. Beasley to Steven Glazer.

Ex. 5 -

June 21, 2002 letter from Jerry L. Beasley to Steven Glazer.

Ex. 6 -

May 13, 2002 memorandum from Dean W. Turner to Dr. Jerry L. Beasley.

Grievant's Exhibits (See footnote 1)

Ex. 1 -

May 8, 2002 letter from Steve Glazer to Temperance Bennett.

Ex. 2 -

May 9, 1997 Bluefield Telegraph, Concord Does Dada.

Ex. 3 -

Notebook.

Ex. 4 -

> July 3, 2002 letter from Dean W. Turner to Steven M. Glazer; August 1, 2002 letter from Dean W. Turner to Steven M. Glazer; August 2, 2002 letter from Steve Glazer to Dean Turner.

Testimony

Concord presented the testimony of Latasha Dowell, Temperance Bennett, James P. McCabe, Jerry Beasley, Tim Mainland, Deborah Curry, and Dean Turner. Grievant testified in his own behalf, and presented the testimony of James Biggs, Jr., Peter Formato, Ryan McInturff, Thomas Lambdon, Joshua Ratliff, Charity Goff, and Dr. Ron Burgher.

The material facts of this grievance are set forth in the following findings.

FINDINGS OF FACT

1. Grievant is employed as an Assistant Professor of Art at Concord College, and has been a member of the faculty at Concord since 1989.

2. As part of his duties at Concord, Grievant teaches two sections of Art 101A, a survey course that is among three core courses required to be taken by all students, both art majors and non-art majors. 3. At the end of each semester, Grievant combines both sections of the 101A courses for a final lecture in the Dada period of art. He has done this for thirteen years, or twenty-eight (28) times, including summer sessions. Grievant's “Dada Lecture” is quite famous at Concord, and draws a crowd of Art 101A students, non-students, and staff. (See footnote 2)

4. In order to communicate the spirit of the Dada movement, Grievant has incorporated elements of Dada art into his final lectures. Participants, including Concord faculty and students who had experienced the Dada lecture before, play musical instruments and sing; wrap themselves in plastic and pose in class; throw objects; smash televisions; and toss candy to students. Typically, Grievant provides ambient noise, and might even allow a television to run silently during the lecture. As these things occur, Grievant lectures and shows slides. As Kathy Kish, a reporter for the Bluefield Daily Telegraph wrote in a May 9-15, 1997, article entitled “Concord Does Dada,”

> The very act of students smashing television sets, throwing objects, and yelling to express themselves is art too, and that is why it is on the cover of this issue. It is Dada art.

LIV G. Ex. 2.

5. As a result of the Daily Telegraph article, Dean Turner, Dean of Concord College, discussed “clean-up” issues relating to the class with Grievant. In particular, DeanTurner noted that a window had been broken, which Grievant explained happened when a gust of wind blew the door shut. In addition, Director of Public Security James P. McCabe had met with Grievant with regard to the “trashed” condition of the classroom after the lecture. This was the only time Dean Turner or any member of Concord administration addressed the Dada lecture with Grievant, and no disciplinary action was taken with respect to the broken window, smashed television, or condition of the classroom.

6. On May 8, 2002, Grievant's final Dada lecture was scheduled in the Art 101 classroom. The Art 101 classroom is a large lecture room with arena seating, and the professor's podium stands down in front of the graduated rows of seats. There is a door to the side in the front of the classroom, and a door in the back of the classroom.

7. For purposes of the lecture, Grievant had darkened the room, and posted signs that students were not to turn on the lights during the lecture. At the time of the lecture, there were approximately eighty (80) students in the room. Concord Ex. 4. At the very beginning of the lecture, Grievant slammed the door in front of the classroom, then ran around to the back door.

8. In nearly every Dada lecture he had given to date, Grievant entered the room through the back door, yelled “Dada!”, and threw a ceramic coffee mug down a long descending staircase approximately five to six feet wide, with the purpose of smashing it against the wall in front of the room.

9. On May 8, 2002, Grievant came through the back door, yelled “Dada!”, and as he threw the coffee mug, he tripped, causing the mug to veer off its intended course. It grazed the cheek of Thomas Lambdon, and struck Latasha Dowell in the upper back andright arm. It then bounced off her and hit Temperance Bennett, who was sitting next to Ms. Dowell, in the right temple, lacerating the skin above her left eye. Ms. Bennett was seated on the aisle of the staircase where Grievant meant to throw the mug. Concord Ex. 1a.

10. Both Ms. Dowell and Ms. Bennett screamed, and Ms. Bennett fell out of her chair into the stair case. Grievant ran down the stairs to see what had happened, and by that time Ms. Dowell and

another student were assisting Ms. Bennett. Grievant noticed Ms. Bennett was bleeding, and asked a student to get paper towels for her. One student responded and left the room. Grievant then asked some female students to assist Ms. Bennett to the restroom. Ms. Dowell and another student helped Ms. Bennett out of the classroom and to the women's restroom. Ms. Bennett was able to walk out of the classroom on her own.

11. During the general commotion, Grievant said to the class and Ms. Bennett that “it was not supposed to happen like this.” After Ms. Bennett and Ms. Dowell left the room, Grievant apologized to the class and told the class he would write Ms. Bennett a letter of apology immediately after class, which he did. (See footnote 3) G. Ex. 1.

12. Grievant did not do anything more after the women left his classroom to assist them, but proceeded with his lecture.

13. Ms. Bennett and Ms. Dowell left the restroom, and Ms. Dowell attempted to get Grievant's attention through the window in the door to the classroom, but he did not see her. The students then walked to the campus infirmary. Ultimately, Ms. Bennett hadto have three stitches above her left eye (Concord Ex. 2), and Ms. Dowell has experienced pain in her back and arm, requiring physical therapy. (See footnote 4)

14. News of the incident traveled around campus, and an investigation ensued over the next week or so, culminating in a report by Mr. McCabe. The report included approximately seventeen (17) statements from students who had been present for the Dada lecture. Concord Ex. 3.

15. Based on the report, and on recommendations from Dean Turner and Deborah Curry, Vice-President for Student and Staff Affairs, President Jerry Beasley determined he would terminate Grievant's employment from Concord, and so informed him by letter dated May 17, 2002. Concord Exs. 4, 6. The letter states in part:

> The charges against you fall under the categories of Section 12.1.2 and Section 12.1.5 of Series 9. Section 12.1.2 addresses “conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related or other discriminatory practices,” and Section 12.1.5 addresses “substantial and manifest neglect of duty.”

Concord Ex. 4.

The letter goes on to state:

> I believe the severity of this incident, the endangering of several students, the lack of proper care after the incident for the students and the injuries sustained by two students as a direct result of your actions justifies your dismissal. You have breached your duty of care to these students, and your conduct has impaired your ability to effectively carry out your teaching responsibilities to these students. Your behavior resulted in injury that should have been foreseeable to the two students mentioned above and in distress, disruption and anger among other students in your class. In fact,both injured students have refused to be in the same room with you to make a make-up final examination, so that you cannot complete the course with respect to these two students. Your work history, as I have reviewed it, does not mitigate in favor of your retention.

Concord Ex. 4.

16. Grievant met with President Beasley to discuss the matter, and President Beasley decided to suspend Grievant, rather than terminate him, which he did by letter dated June 21, 2002. Concord Ex. 5. President Beasley suspended Grievant for the summer 2002 session and the fall 2002 session, a period of approximately seven months, without pay, and ordered to him to stay off campus for the entire duration.

DISCUSSION

It is well-settled that in disciplinary matters the employer bears the burden of proving the charges against an employee by a preponderance of the evidence. Knuckles and Burdette v. W. Va. Bd. of Directors, Docket No. 99-BOD-123/131 (Sept. 28, 1999); Miller v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to is. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Typically, state employees receive “just cause” protection because of their status under civil service protections. By virtue of their status as tenured professors, teachers in the West Virginia college and university system receive like protections. “Just cause” protection can be found within the Procedural Rule for the West Virginia Higher EducationPolicy Commission for “Academic Freedom, Professional Responsibility and Tenure,” Title 133 Series 9. The same protections can be gleaned from similar language present in the Concord College Faculty Handbook. G. Ex. 3. The language in the Procedural Rule is as follows: (See footnote 5)

12.1 Causes for Dismissal: The dismissal of a faculty member shall be effected only pursuant to the procedures provided in these policies and only for one or more of the following causes:

12.1.1 Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct;

12.1.2 Personal conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices;

12.1.3 Insubordination by refusal to abide by legitimate reasonable directions of administrators;

12.1.4 Physical or mental disability for which no reasonable accommodation can be made, and which makes the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties.

12.1.5 Substantial and manifest neglect of duty; and

12.1.6 Failure to return at the end of a leave of absence.

While the Procedural Rule speaks to dismissal, Concord has applied the Rule to Grievant's suspension, and charged him with violations of Sections 12.1.2 and 12.1.5. Concord Ex. 4. Thus, Concord has the burden of proving those charges by a preponderance of the evidence. (See footnote 6) Concord maintains that Grievant “substantially impaired his fulfillment of his institutional responsibilities by carelessly and negligently propelling a mug over the heads of students and causing two of them serious injury. His responsibilities to this institution include conducting his classes in a safe and orderly manner. Although as a teacher, he has some academic freedom as to how he presents his course material, this freedom does not include the right to jeopardize the safety and welfare of his students.” Concord's Proposed Findings of Fact and Conclusions of Law, pp. 7-8.

In support of this position, President Beasley testified his primary concern was the “well-being of the student.” He contends Grievant “breached his duty of care to the students,” and injury should have been “foreseeable.” He indicated that throwing an object in a darkened room was negligent “whether he slipped or not.” Moreover, it is evident from President Beasley's letters to Grievant of May 17 and June 12, 2002, that he was concerned with Grievant's handling of the matter after the mug was thrown.

There is no doubt that Grievant, having performed this act twenty-eight (28) times, did not feel he was placing his students in jeopardy, and certainly there was no intent on his part to cause injury to

his students. Nevertheless, it is not entirely unforeseeable that the act of throwing a ceramic mug from the back to the front of a crowded classroom with enough force to smash it against the wall might result in injury. To that extent, and deferring to Concord's interpretation of Rule 12.1.2, the undersigned concludes Grievant failed to provide a safe environment to his students on May 8, 2002. Concord also charged Grievant with Rule 12.1.5, “substantial and manifest wilful neglect of duty.” This charge relates to Grievant's conduct after the accident occurred, and the testimony differs on this point.

Ms. Dowell testified she was hit in the back and on the arm by the mug, which then bounced off her and hit Ms. Bennett in the eye. Ms. Dowell sat for a minute, then looked to her right and saw Ms. Bennett on the floor covering her face. There was blood on her face, and Ms. Bennett was screaming and crying. Ms. Dowell testified Grievant came down the steps and said “it wasn't supposed to hit anyone,” but did not say he was sorry. Another student brought paper towels, and someone assisted her in taking Ms. Bennett to the restroom. They could walk on their own. Ms. Dowell testified that after she left the restroom, she peered in the window of the door to the classroom, trying to motion to Grievant that she needed to get her personal items, and to tell him she and Ms. Bennett were going to the medical center. She said Grievant turned away from her and did not acknowledge her or offer to help. Another student later brought her personal items to her dormitory.

Ms. Bennett testified she saw out of the corner of her eye “something flying over people's heads” and then the mug hit her. She fell out of her seat into the aisle, and did not know she was bleeding until she moved her hand. She testified Grievant walked down the steps and said “it was supposed to go over their heads,” but did not apologize or offer her any assistance. She and Ms. Dowell were accompanied to the restroom by another student, and then Ms. Dowell stood at the door to the classroom and waved to Grievant to open the door, but he just kept teaching. After that, they walked to the medical center. She received a written apology from Grievant a few days later. Ms. Bennett testified she was surprised Grievant did not offer to help, and her feelings were hurt.

Peter Formato, a student, was present at the Dada lecture on May 8. Grievant had asked him to run the slide projector, and he was standing at the top and back of the classroom behind a podium. He saw Grievant come through the door, and as he yelled “Dada,” and moved to throw the mug, he stumbled, and nearly fell. He saw a girl down front stand up crying, and then she sat down against the wall. Grievant looked disoriented after he stumbled, but then went down the steps to the girl. Mr.

Formato testified Grievant knelt down beside the girl, and stayed there until her friends walked her out. Mr. Formato testified the girls walked out of the classroom on their own, and did not appear to need assistance. He was not even aware of what had happened until Grievant went to the front of the class, told them one of the girls had received a cut, but that it was not serious, and he believed she would be alright. Grievant apologized to the class, and told them he hoped the girl would come back to class so he could apologize to her.

Thomas Lambdon attended the May 8, Dada lecture, and was seated directly behind Ms. Dowell. He testified the mug grazed his head before striking Ms. Dowell and Ms. Bennett. He testified Grievant ran down the stairs to Ms. Bennett and tried to calm her down, and asked someone to get paper towels. He heard Grievant ask Ms. Bennett if she was OK, and heard him apologize repeatedly, saying “it wasn't supposed to happen.” Mr. Lambdon testified Ms. Bennett kept screaming and crying the whole time. After the girls left the room, Mr. Lambdon testified Grievant was shaken up, and apologized to the class. Joshua Ratliff attended the lecture and was seated directly behind Ms. Bennett and beside Mr. Lambdon. Mr. Ratliff testified Grievant came down the steps to Ms. Bennett, asked someone to get paper towels, and apologized repeatedly. He said neither Ms. Bennett nor Ms. Dowell said anything, they just kept crying.

Grievant testified he tripped and lost his balance just as he threw the mug. The next thing he heard was a woman crying and he ran down the steps to her. He apologized to her, saying “it wasn't supposed to happen.” He could see a trickle of blood on her face, and asked someone to get paper towels. He also asked some female students to take her to the restroom. He testified Ms. Bennett had stopped crying by then, and she and two other women walked out of the classroom. He apologized to the class again, and was horrified by the accident. He looked around at the rest of the class, and decided it was professionally best to just go on with the lecture, especially as Ms. Bennett was able to walk out of the classroom by herself. Grievant testified he never saw Ms. Dowell at the window of the classroom door after the incident. He was only aware at that time that Ms. Bennett had been injured, and he wrote her a formal apology the minute he got back to his office after class. Grievant also went to his Department Chair, Professor Tim Mainland, later that day to inquire about Ms. Bennett's condition.

There were also several written statements taken from students in the Dada lecture by the investigator, James McCabe, some of which indicate Grievant immediately ran to Ms. Bennett and

apologized, some of which indicate he walked slowly to Ms. Bennett and just stood there, saying nothing, and some indicate conduct that falls somewhere in between. But of most interest to the undersigned is the statement of William Tee Fraley,written on May 13, 2002, wherein he writes: “I am writing this letter in response to the investigating officer[s] request to put my self in the girl's shoes and from her point [of] view decide if I thought Professor Glazer was attentive enough to her at the time of the incident.” R. Ex. 3. This sort of “objective” investigating contributes nothing to a search for the truth of just what occurred that day, and calls into question the entire investigative report, leading the undersigned to conclude that no weight can be given to any of the statements or conclusions found in that report.

What the undersigned can conclude from the testimony at level four is that Grievant more likely than not did run down the steps to Ms. Bennett, and did apologize to her at the time. However, Ms. Bennett and Ms. Dowell probably did not hear Grievant's remarks because they were screaming and crying, and all attention was focused on Ms. Bennett. Grievant did ask a student to get paper towels and asked another student to help Ms. Bennett to the restroom, and then apologized again to the whole class. Grievant did not see Ms. Dowell waving at the window of the classroom door.

What Grievant did not do was assist Ms. Bennett out of the classroom himself, offer to take her to the medical center, or make any other offer of assistance. He made a judgment call based on his observation of the extent of Ms. Bennett's injury, and the fact she could walk out of the classroom herself, and decided to continue with the Dada lecture. Clearly the administration at Concord had a problem with this judgment call, and determined Grievant's failure to assist the women constituted a “substantial and manifest neglect of duty.” Giving deference to Concord's interpretation and application of its own rules, the undersigned finds Concord has proven this charge. In determining the discipline to be meted out to Grievant, President Beasley sought the input of Dean Turner and Deborah Curry. Dean Turner testified he recommended termination based on Grievant's poor judgment, failure to adequately protect his students, and his disregard for the health and safety of Ms. Bennett and Ms. Dowell after the accident. He based his recommendation solely on the May 8, 2002 incident.

Vice President Curry also recommended Grievant's termination. She made her recommendation based on the severity of the incident and the potential for greater harm that could have occurred. She considered Grievant's behavior reckless, and believed he endangered students who are entrusted to

his care. She was also concerned that Grievant would allow Ms. Bennett to walk with a potential head injury. She testified she was concerned about Concord's liability, and wanted to send a message to the staff and students about what to do when students are injured. She felt this incident confirmed what she considered a pattern of Grievant's lack of concern for his students' well-being, although she did not expound on this “pattern.”

After President Beasley received the recommendations from Dean Turner and Vice President Curry, he met with Grievant to discuss his options. He told Grievant he would be weighing other factors besides the May 8, 2002, incident in determining discipline. For instance, he noted Grievant had low teaching evaluations, especially for a tenured professor, and that Grievant had never been promoted; Grievant had been counseled in the past about his apparent disdain for most students, especially those who were taking his courses merely for the Art credit; Grievant had low student evaluations; and, the majority of his students did not like him. President Beasley wanted the suspension to besevere enough to get Grievant's attention, and convince him he was going to have to educate in a different way. President Beasley testified when he asked Grievant if he would be throwing a mug again in his lecture, Grievant said his intent was to shock his students, and he did not know what else he could do but what he did. Grievant testified his response was that he did not know what else he would do, but he would not be throwing a mug. President Beasley also asked Grievant if he would pay for the students' medical bills, and Grievant responded he would think about it. President Beasley figured a seven-month suspension would amount to approximately $29,000, which he felt would cover the students' medical bills Concord would have to pay.

Grievant argues his 7-month suspension without pay is a denial of due process. It is well-settled that a tenured teacher has a protected property interest in his position, which raises constitutional due process considerations when a teacher is faced with termination of his employment. W. Va. Const. art. III, § 10. See Gilbert v. Homar, 520 U.S. 924, 928, 117 S. Ct. 1807, 1811, 138 L. Ed. 2d 120, 126 (1997); Board of Regents of State Colls. v. Roth, 408 U.S. 564, 578, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972). Generally, cases dealing with due process claims implicate a constitutionally protected property interest in employment dealing primarily with giving adequate notice or holding an adequate hearing prior to taking some disciplinary action against the employee. See Swiger v. Civil Serv. Comm'r, 179 W. Va. 133, 365 S.E.2d 797 (1987); Fraley v. Civil Serv. Comm'n, 177 W. Va. 729, 356 S.E.2d 483 (1987); Major v. DeFrench, 169 W. Va. 241, 286 S.E.2d 688 (1982); Clarke v.

West Virginia Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981); North v. West Virginia Bd. of Regents, 160 W. Va. 248, 233 S.E.2d411 (1977); Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977); Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977). The issue of an adequate notice or hearing is not presented by the instant case. Grievant was given an opportunity to present his side of the story, or respond to the charges, in the meeting with President Beasley, which occurred before he was suspended. Grievant received written notification of the charges, as well as confirmation of his 7-month suspension without pay.

However, the West Virginia Supreme Court has held, in Trimble v. W. Va. Bd. of Directors, 209 W. Va. 426, 549 S.E.2d 294 (2001), that in some cases, “because of the 'flexible' nature of due process ... constitutional due process principles may be used to determine whether disciplinary action taken by a higher educational institution against a tenured teacher is too severe for the infraction occasioning such discipline.” Trimble, supra; Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169 (1981). Trimble dealt with the dismissal of a tenured faculty member for insubordination, and the Court found:

> [C]onstitutional due process is denied when a tenured public higher education teacher, who has a previously unblemished record, is immediately terminated for an incident of insubordination that is minor in its consequences. Under such circumstances, due process requires the educational institution to impose progressive disciplinary sanctions in an attempt to correct the teacher's insubordinate conduct before it may resort to termination. W. Va. Const. art III, § 10.

Trimble, supra.

While Trimble dealt with termination, the underlying concepts would seem to apply to an unusually lengthy suspension without pay, constituting a substantial deprivation ofincome and benefits, and the undersigned will apply the principles set forth in Trimble to Grievant's 7-month suspension without pay.

When an employee is determined to have a property interest in his or her employment, the extent of due process required is determined as follows:

> The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Trimble, supra; Syl. pt. 5, Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164. See Syl. pt. 5, Major v. DeFrench, 169 W. Va. 241, 286 S.E.2d 688.

The Trimble Court looked to its decision in Oakes v. W. Va. Department of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980), for guidance, relying on its holding in that case that state employees cannot be disciplined except for a finding of "good cause", which meant "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than . . . trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." See footnote 14, 164 W. Va. 384, 264 S.E.2d 151. The decision in Oakes was based in part upon the fact "that nothing in the record indicate[d] that Mr. Oakes had a prior history of negligent or inefficient conduct in his supervision of the Capitol Post Office, nor that he had received any reprimands or been subjected to any disciplinary proceedings." See footnote 15, Oakes, 164 W. Va. at 386, 264 S.E.2d at 153. In Fox v. Board of Education of Doddridge County, 160 W. Va. 668, 236 S.E.2d 243 (1977), a case not involving constitutional due process, the Court looked at whether a teacher's unexcused absence from a parent-teacher conference constituted wilful neglect of duty warranting his dismissal. The teacher had been employed with the Doddridge County Board of Education for 23 years. The Court found that the dismissal was not supportable and made the following observations:

> We believe [dismissal was not warranted] for the simple reason that the punishment does not fit the misdeed. Unexcused absence from those occasions at which attendance is expected may be valid grounds for disciplinary action such as a temporary suspension from teaching responsibilities. But it does not follow that the same recalcitrant conduct calls for permanent banishment of the errant teacher from the school system. Suspension, responsibly exercised, may be a reasonable means of maintaining order and authority over school board employees. Dismissal undoubtedly has therapeutic disciplinary qualities, but we believe that dismissal predicated upon an isolated incident of unexcused absence from a parent-teacher conference is so unduly severe as to be arbitrary and unreasonable.

Fox, 160 W. Va. at 671-72, 236 S.E.2d at 246. See also Beverlin v. Board of Ed. of Lewis County, 158 W. Va. 1067, 216 S.E.2d 554 (1975) (determining that dismissal of teacher for unexcused absence during part of first school day to register for evening class at university was unreasonable, arbitrary and capricious).

The Court noted that Mr. Trimble's failure to attend several required meetings and refusal to

prepare syllabus constituted insubordination. Nevertheless, it stated that, “in view of his 19 years of service and unblemished record, the College acted arbitrarily and capriciously in terminating him,” and that

> due process required the College to utilize progressive disciplinary measures against him. This conclusion is in keeping with a long held principle by thisCourt that “'[a] teacher may not be lightly shorn of the privileges for which he [or she] fairly contracted.'” Fox v. Board of Ed. of Doddridge County, 160 W. Va. at 672, 236 S.E.2d at 246, (quoting White v. Board of Educ. of Lincoln County, 117 W. Va. 114, 125, 184 S.E. 264, 268 (1936)). In other words, “[t]he state may not convey a property interest, such as tenure, and then arbitrarily terminate employment in violation of that interest.” Wuest v. Winner Sch. Dist. 59-2, 607 N.W.2d 912, 918 (S.D. 2000).

Trimble, supra.

Applying the Trimble analysis to the instant case, where Grievant had never been disciplined before in his 13 years of teaching, or warned that his conduct was not in keeping with Concord's standards, Concord has failed to demonstrate why a 7-month suspension without pay was necessary or justified in this instance, and the undersigned finds its imposition of such a severe penalty was arbitrary and capricious, and should be mitigated.

This Grievance Board has determined that mitigation of the penalty imposed by an employer constitutes extraordinary relief, and is granted only when there is a showing that a particular punishment is so clearly disproportionate to the offense committed that imposition of such a penalty involves an abuse of discretion, Hosaflook v. West Virginia Division of Corrections, Docket Nos. 98-CORR-446/447 (Jan. 20, 2000), or the penalty is so harsh under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Frantz v. W. Va. Dept. of Health & Human Resources, Docket No.99-HHR-096 (Nov. 18, 1999). Lilly v. Dept. of Health & Human Resources, Docket No.00-HHR-093 (May 8, 2000). See Wilkerson v. Lincoln County Bd. of Educ., Docket No.99-22-420 (Mar. 27, 2000). Considerable deference is afforded to the employer's determination of the seriousness of the employee's conduct and the prospects forrehabilitation. Overbee v. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

"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).

President Beasley took into consideration the fact that Grievant had not been promoted at Concord and had low student evaluations, indicating that students did not like him. While student evaluations are important in determining tenure and promotion for college professors, they simply have no bearing on a disciplinary decision based on an incident such as this. Low student evaluations and the like are handled through the tenure and promotion application process, and the fact Grievant has not been promoted indicates he has already been penalized for his shortcomings.

President Beasley also took into consideration the estimated cost to Concord resulting from the students' injuries, and determined withholding Grievant's 7-month salary would serve as adequate compensation. (See footnote 7) There is simply no justification for suspending Grievant without pay for 7 months. There was no evidence that Grievant posed a dangerto students, staff, or property of Concord. (See footnote 8) Clearly, Grievant could have done more to assist the students after they were injured, but that does not warrant a half-year's salary. If Concord wants to recoup whatever costs it incurs as a result of the students' injuries, it can certainly do so in a manner that is not so financially devastating to one of its tenured professors. (See footnote 9) Concord owes a duty to its students, but it also owes a duty to its employees, and the decision to suspend Grievant for 7 months without pay, without any prior warning or discipline, will not be upheld. That being said, the undersigned also recognizes Concord has discretion in the interpretation and application of its rules, and in attempting to strike a balance between the rights of Grievant and of Concord, the undersigned concludes that a suspension without pay for the Summer 2002 term should suffice to send Grievant the appropriate message regarding his conduct and Concord's concerns about his attitude towards his students.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary maters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 2. Concord has proven Grievant's conduct of throwing a ceramic mug with enough force

to cause it to smash against a far wall in a crowded classroom constitutes “[p]ersonal conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities,...”, i.e., failure to provide his students with a safe learning environment. Section 12.1.2 of Series 9, Procedural Rule for the West Virginia Higher Education Policy Commission.

3. Concord has proven Grievant's failure to assist the injured students after the incident constitutes “substantial and manifest neglect of duty.” Section 12.1.5 of Series 9, Procedural Rule for the West Virginia Higher Education Policy Commission.

4. “[B]ecause of the 'flexible' nature of due process ... constitutional due process principles may be used to determine whether disciplinary action taken by a higher educational institution against a tenured teacher is too severe for the infraction occasioning such discipline.” Trimble v. W. Va. Bd. of Directors, 209 W. Va. 426, 549 S.E.2d 294 (2001).

5. State employees cannot be disciplined except for a finding of “good cause”, which meant “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than . . . trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151.

6 Applying the constitutional principles set forth in Trimble, supra, a 7-month suspension without pay for the accident which occurred in Grievant's classroom, when hehad never been disciplined or warned before about the exercise, constitutes a serious deprivation of his property interest in income and benefits.

7. Mitigation of the penalty imposed by the employer constitutes extraordinary relief, and is granted only when there is a showing that a particular punishment is so clearly disproportionate to the offense committed that imposition of such a penalty involves an abuse of discretion. Hosaflook v. W. Va. Div. of Corrections, Docket Nos. 98-CORR- 446/447 (Jan. 20, 2000), or the penalty is so harsh under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Lilly v. W. Va. Dept. of Health and Human Resources, Docket No. 00-HHR-093 (May 8, 2000); Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999).

8. Considerable deference is afforded to the employer's determination of the seriousness of the employee's conduct and the prospects for rehabilitation. Overbee v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Factors to be considered when considering whether to mitigate the punishment include the

employee's work history, past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and other mitigating circumstances. Knuckles/Burdette v. W. Va. State College, Docket No. 99-BOD-123/131 (Sept. 28, 1999); Jarvis v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

10. Grievant has proven that a seven-month suspension, without pay, is too severe a punishment and not in proportion to the offense committed, and should be mitigated.

Accordingly, this grievance is **GRANTED**, and Concord is hereby **ORDERED** to reduce Grievant's discipline to suspension without pay for the Summer 2002 school term. Concord is further **ORDERED** to immediately reinstate Grievant to his former position, and compensate him for all time served on suspension for the Fall 2002 term, including all salary and benefits to which he is entitled.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 7, 2002

Footnote: 1

Grievant's counsel moved for additional post-hearing evidence to be admitted to the record, over objection of Concord. The motion was denied.

Footnote: 2

According to Dr. Timothy Mainland, Chairman of the Division of Fine Arts and direct supervisor of Grievant, the Dada period was a response by artists to "horrendous" events occurring before and after World War I. Energized by a cynical view of their environment, artists demonstrated their reaction to world events by creating spontaneous, surprising, and shocking works of art; works of art that were unlike conventional, contemporary art forms, or were produced from the destruction of conventional works of art. LIV Test., Dr. Mainland.

Footnote: 3

Grievant was unaware that Ms. Dowell had been hit or hurt until her testimony at the level four hearing.

Footnote: 4

Both students testified they retained legal counsel almost immediately following the incident.

Footnote: 5

As a Legislative enactment, the Procedural Rule controls over a policy statement such as a handbook. It should be noted, however, that the language of the Handbook, promulgated in 1992, is nearly identical to the Procedural Rule. Both acknowledge that a faculty member may only be dismissed for cause.

Footnote: 6

It is noted that Concord presented no evidence to support any charge of sexual harassment, or of racial, gender-related, or other discriminatory practices under Procedural Rule 12.1.2.

Footnote: 7

No evidence was presented as to actual costs incurred by Concord at the time of the hearing with respect to the students' injuries.

Footnote: 8

Ms. Bennett and Ms. Dowell refused to be in the same room as Grievant when they returned to Concord to make up their missed final examination. Whatever the students' motivation might have been, there is no evidence that they feared further injury at Grievant's hands.

Footnote: 9

In effect, Concord is attempting to subrogate its claim against Grievant without proof of actual damages.