BOYD LILLY,

_____ Grievant,

v. Docket No. 98-PEDTA-358

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Boyd Lilly (Grievant) is employed by the West Virginia Parkways Economic Development and Tourism Authority (Parkways), as a Security Officer at its Beckley South facility (Beckley South). This grievance is a consolidation by Parkways of two grievances, designated by Parkways as 98-11, regarding the manner in which Lynne Roaché (Roaché) drove through a parking lot (parking lot incident), and 98-12, regarding Parkways' investigation of the parking lot incident. Grievant wants Roaché to receive a written reprimand and/or a three-day suspension without pay, and also that a complete and professional investigation be conducted.

Both grievances were denied at Level I, on May 19, 1998, by Immediate Supervisor Rick Deeds (Deeds), and at Level II, on June 2, 1998, by William K. Forrest (Forrest). These grievances were appealed to Level III, and a hearing was conducted on August 27, 1998, before Hearing Examiner Donald L. Lake. He denied these grievances on September 14, 1998. Grievant appealed his grievances to Level IV, where a Level IV hearing was held before the undersigned administrative law judge, at the GrievanceBoard's Beckley office, on November 10, 1998, February 11, 1999, and March 11, 1999. At that hearing, Grievant was represented by Jerry Lilly, Fred Elmore, and himself, and Parkways was represented by A. David Abrams, Jr.,

Esq. The parties were given until April 20, 1999, to submit proposed findings of fact and conclusions of law. This deadline was extended to May 3, 1999, and then to June 1, 1999, and finally to June 8, 1999. This consolidated grievance became mature for decision on that date.

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

FINDINGS OF FACT

1. Grievant is employed by Parkways as a Security Officer at Beckley South. He is the President of Local 3229 of the AFSCME/West Virginia State Employees Union. 2. On January 2, 1992, the West Virginia Ethics Commission issued a Final Decision, holding that Roaché used state vehicles and gasoline for personal recreational activities such as hunting and fishing trips. The Ethics Commission recommended to Parkways that Roaché be dismissed.

3. Roaché was not dismissed, but was suspended without pay for six months and fined $1,200.00.

4. Grievant and other Parkways employees harbored ill will towards Roaché, and felt that Roaché should have been dismissed.

5. Prior to the parking lot incident, Grievant posted a cartoon, ridiculing Roaché for his use of state vehicles for private purposes, on union bulletin boards at BeckleySouth. (See footnote 1) Someone also placed a copy of this cartoon in an interdepartmental mail envelope addressed to Roaché, and slipped it under the door of his office. Roaché was upset by the cartoon.

6. At approximately 5:30 p.m. on April 27, 1998, Grievant was standing beside the car of Cheryl Porterfield (Porterfield), speaking to her through the driver's window. Porterfield was parked in a narrow, congested area of Beckley South's parking lot. Roaché, who was leaving work, accelerated his pickup truck as he approached Grievant and Porterfield, because he did not want to speak to Grievant, due to the cartoon described above, and because he feared aggravating his heart condition. Roaché passed Grievant at a distance of approximately five feet, but did not swerve toward him, or otherwise attempt to hit him.

7. James Simmons (Simmons) and Gary Wykle (Wykle) were the only other eyewitnesses to this incident.

8. Roaché was driving too fast for the conditions in the parking lot.

9. Later on April 27, 1998, Grievant twice called his immediate supervisor, Rick Deeds (Deeds), at home and told him of the parking lot incident.

10. On the day after the incident, Forrest heard of it from Deeds. That day, Forrest took a written statement from Porterfield and a verbal statement from Roaché before concluding that Roaché had driven too fast for the congested conditions in theparking lot. Forrest could not immediately take statements from Simmons and Wykle, as they were away from the facility working. Deeds later took their statements.

11. Grievant was offered a chance to make a formal complaint, regarding the parking lot incident, to the State Police, but declined to do so. **(See footnote 2)**

12. Roaché received a verbal reprimand as a result of this incident.

13. Also as a result of this incident, speed limit signs were placed in the parking lot.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

With his grievances concerning the parking lot incident and its investigation,Grievant has raised a claim that Parkways maintained an unsafe workplace. Although Grievant did not specify "unsafe workplace" during his Level III testimony, because his claim regarding the parking lot incident may fairly be viewed as an allegation that Parkways maintained an unsafe workplace; because he stated "I feel threatened" in his Statement of Grievance; and because the grievance procedure is intended to provide "a simple, expeditious and fair process for

resolving problems. . .," Grievant will be considered to have raised an unsafe workplace claim. W. Va. Code §18-29-1.

During the lengthy Level IV hearing, Grievant also attempted to raise claims of discrimination, harassment, favoritism, and retaliation for his union activity, and challenged the outcomes of several past grievances, and the Ethics Commission decision regarding Roaché. However, it is well-settled that a Grievant cannot employ the grievance procedure to attack a final decision in a prior grievance. See Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 16, 1994); Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991). Similarly, the undersigned has no authority to review the Ethics Commission decision regarding Roaché, or the decisions of any other tribunal. See Carr v. Monroe County Bd. of Educ., Docket No. 98-31-401 (Apr. 12, 1999).

Furthermore, the West Virginia Supreme Court of Appeals and this Grievance Board have consistently held that a grievance may not be granted at Level IV unless the theory upon which relief was awarded was developed at the lower levels. Hess v. W. Va. Dep't of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993); Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. ofEduc., Docket No. 94-27-958 (April 13, 1995). As in this case, the lower level transcripts in Hess revealed no attempt by Grievant to raise his new theories, and no decision by any hearing examiner to incorporate these new issues into this grievance. Accordingly, Grievant's claims of discrimination, harassment, favoritism, and retaliation for union activity will not be addressed.

Employers in West Virginia have a general duty to provide a safe workplace. "Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged. . ." W. Va. Code § 21-3-1. The purpose of this statute is to assure workers a reasonably safe workplace. Burdette v. Columbia Gas Transmission Corp., 198 W. Va. 356, 480 S.E.2d 565 (1996); Henderson v. Meredith Lumber Co., 190 W. Va. 292, 438 S.E.2d 324 (1993). An employer, owner of a place of employment, place of public assembly, or public building has a responsibility under this statute to maintain such a place in a reasonably safe condition. Taylor v. Sears, Roebuck & Co., 190 W. Va. 160, 437 S.E.2d 733 (1993); Pack v. Van Meter, 177 W. Va. 485, 354 S.E.2d 581 (1986).

This Grievance Board has jurisdiction to address workplace conditions that constitute a substantial detriment to, or interference with, an employee's health and safety. W. Va. Code § 29-6A-2(i). See; Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197C (May 4, 1999); Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD-545 (Oct. 13, 1998); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997); York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Guerin v. Mineral County Bd. of Educ., Docket No.92-28-422/459 (Jan. 31, 1996).

Grievant's contention that the parking lot incident constituted Parkways' maintenance of an unsafe workplace must fail. No witness, other than Grievant, testified that Roaché did anything more than drive at an excessive speed in a congested area of the parking lot. (Grievant testified that Roaché also glared or stared at him.) Certainly, he did not attempt to harm Grievant, as all witnesses, including Grievant, testified that Roaché would have had to veer approximately five feet, and collide with Porterfield's car, to strike Grievant with his vehicle. It is noted that such a collision would likely have injured Porterfield as well, and there is no evidence of hard feelings between Roaché and Porterfield. As opposed to maintaining an unsafe workplace, Parkways took immediate steps to ensure workplace safety, and to defuse the situation, by verbally reprimanding Roaché for his excessive speed, and by posting speed limit signs in the parking lot. Under these circumstances, it cannot be found that Parkways maintained workplace conditions that constituted a substantial detriment to, or interference with, an employee's health and safety. Olmsted, supra.

Grievant's contention that Parkways failed to adequately investigate the parking lot incident is similarly without merit. The evidence of record shows that Grievant's immediate supervisor, Deeds, twice took Grievant's telephone calls regarding the incident while at home and off duty, and informed Forrest of the situation the next day. Forrest immediately interviewed Porterfield and Roaché, and took immediate steps to remedy and defuse the situation, by reprimanding Roaché, posting speed limit signs in the parking lot, and offering Grievant an opportunity to register a complaint with the State Police. Significantly, Grievantdeclined to make such a complaint. It is hard for the undersigned to see what more Parkways should have done. Every eyewitness was interviewed, and the wrongdoer

disciplined, albeit not to Grievant's satisfaction. (See footnote 3) Grievant was unable to demonstrate a single fact that Parkways' investigation failed to discover, or even a single fact about the parking lot incident that is disputed. Under these circumstances, it cannot be concluded that Parkways' failed to conduct an adequate investigation.

It is clear that Grievant and other Parkways employees harbor ill will towards Roaché, and felt that he should have been dismissed for his use of state vehicles and gasoline for his hunting and fishing trips, as the Ethics Commission recommended. This was apparent from the testimony of Grievant and his witnesses, to say nothing of the cartoon, ridiculing Roaché for his use of state vehicles for private purposes, posted on union bulletin boards at Beckley South, and slipped under the door of his office. However, it was within Parkways' discretion not to implement the Ethics Commission's recommendation, and Grievant has no standing to contest the punishment, six months suspension without pay and a fine of $1,200.00, imposed on another employee, absent a showing that he has been harmed in some way by that action. Super v. Randolph County Bd. of Educ., Docket No. 99-42-043 (Mar. 5, 1999); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Wagner v.Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979).

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

CONCLUSIONS OF LAW

1.

In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. A grievant cannot employ the grievance procedure to attack a final decision in a prior grievance. See Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 16,

1994); Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991).

3. A grievance may not be granted at Level IV unless the theory upon which relief was awarded was developed at the lower levels. Hess v. W. Va. Dep't of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993); Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (April 13, 1995).

4. Employers in West Virginia have a general duty to provide a safe workplace. "Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged. . ." W. Va. Code § 21-3-1. The purpose of this statute is to assure workers a reasonably safe workplace. Burdette v. Columbia Gas Transmission Corp., 198 W. Va. 356, 480 S.E.2d 565 (1996); Henderson v. Meredith Lumber Co., 190 W. Va. 292, 438 S.E.2d 324 (1993). An employer, owner of a place of employment, place of public assembly, or public building has a responsibility under this statute to maintain such a place in a reasonably safe condition. Taylor v. Sears, Roebuck & Co., 190 W. Va. 160, 437 S.E.2d 733 (1993); Pack v. Van Meter, 177 W. Va. 485, 354 S.E.2d 581 (1986).

5. This Grievance Board has jurisdiction to address workplace conditions that constitute a substantial detriment to, or interference with, an employee's health and safety. W. Va. Code § 29-6A-2(i). See; Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197C (May 4, 1999); Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD-545 (Oct. 13, 1998); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997); York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996).

6. A grievant has no standing to contest the punishment imposed on another employee, absent a showing that he has been harmed in some way by that action. Super v. Randolph County Bd. of Educ., Docket No. 99-42-043 (Mar. 5, 1999); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979).

7. Grievant failed to prove, by a preponderance of the evidence, that Respondent Parkways maintained an unsafe workplace.

Accordingly, the grievance is DENIED.

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.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated June 18, 1999

Footnote: 1

Grievant credibly testified at Level IV that this cartoon was also directed at other members of Parkways' management, although no evidence was presented of other Parkways managers using state vehicles for private purposes.

Footnote: 2

At various points during his Level III and IV testimony, Grievant maintained that he did not want anyone from Parkways investigating this incident, and that he wanted Parkways' regular team of investigators to investigate.

Footnote: 3 ***Grievant urged that Parkways' Personnel Policy II-4, Series II, entitled Personnel Actions, mandated a one to three day suspension for Roaché. However, this policy appears to suggest, but not mandate, a written reprimand for a first offense safety violation. This policy further provides that its guidelines "are to be considered merely as guidelines to be considered. . . . [w]hether to follow a specific level of discipline in a particular case remains in the Authority's discretion."***