THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TERRY J. TUTTLE,

Grievant,

v.

DOCKET NO. 07-DOH-353

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Terry Tuttle, on March 2, 2007, after he was suspended for 21 days without pay. His statement of grievance reads:

> I was wrongly accused of the charge of sexual harassment of another employee. It did not happen.

The relief sought by Grievant is "[c]ompensation for the twenty one lost days, overtime, (See footnote 1) and tenure. I am requesting all information collected during 1st investigation lead by Greg Phillips and Anthony Poletta, and 2nd investigation lead by DJ Jordan and Anthony Poletta."

Grievant's supervisor responded to the grievance at level one on March 2, 2007, stating he could not grant the relief requested. Grievant appealed to level two on March 13, 2007, and a conference

was held on that date. The level two response states that the second level supervisor had no authority to grant the relief requested. Grievant appealed to level three, and a hearing was convened on March 22, 2007, at which time Grievantasked to waive level three and proceed to level four. A level four hearing was held before the undersigned Administrative Law Judge On November 1, 2007, in the Grievance Board's Westover office. Grievant was represented by counsel, Susan L. Riffle, and Respondent was represented by Jennifer Francis Alkire, Attorney, Legal Division of the Division of Highways. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on November 30, 2007.

Synopsis

The letter suspending Grievant, dated February 13, 2007, states he is being suspended for workplace harassment. The letter describes the incident resulting in the suspension as follows:

> On July 18, 2006 you harassed a fellow employee, Donna Jones by attempting to pinch her breast with a “Litter Gitter” (See footnote 2) during your lunch break. Subsequent discussions with witnesses showed that this did happen. You have been present during EEO and Sexual Harassment Briefings in which you have been made aware that this type of behavior [is] not acceptable.

Respondent argued the charges against Grievant had been proven, and the punishment imposed was comparable to that punishment normally imposed for sexual harassment. Grievant denied the charges against him. He noted the details of the alleged incident were unclear, pointing to inconsistencies in the testimony of the witnesses with regard to where Carl Ross, Brian Richards, Donna Jones, and Grievant were when the incident supposedly occurred, and he noted inconsistences overall in Mr. Ross' variousstatements. He argued Respondent failed to show how the complaint came to the attention of the appropriate officials at DOH, noting inconsistencies in the testimony of the various witnesses with regard to this issue. Finally, Grievant argued the proper procedure was not followed for reporting a sexual harassment complaint.

Having carefully reviewed the evidence presented in this case, the undersigned concludes that the sole witness to testify at the hearing to support the claim that Grievant used a “litter gitter” to pinch, or attempt to pinch a female co-worker's breast, was not a credible witness; and that the unsworn written statement of the alleged victim should be given no weight. Respondent did not prove the charges against Grievant.

The following Findings of Fact are made based upon the record developed at the level four hearing.

Findings of Fact

1. Grievant is employed by the Department of Transportation/Division of Highways ("DOH"), as an Equipment Operator 2 in Marion County.

2. Donna Jones was a temporary worker employed by DOH in Marion County. She was a Craftsworker, and July 18, 2006, was her last day of work.

3. Ms. Jones and her vocational counselor met with Jeff Black, DOH Human Resources Director, sometime in August 2006, to discuss full-time employment with DOH. During this meeting, Ms. Jones told Mr. Black that Grievant had grabbed her breast with a litter gitter during work hours on her last day of work. Ms. Jones had not reported this to anyone else at DOH prior to this.

4. Mr. Black asked Ms. Jones to provide him with a written statement describing the incident. Mr. Black received a written statement which states that Ms. Jones was sittingin a crew cab at lunch time talking to Carl Ross and Brian Richards, who were standing outside the crew cab on opposite sides, when she felt something grabbing and pinching her breast. The statement continues that she looked over and Terry Tuttle was using a litter gitter to grab and pinch her breast, and she told him to stop it and pushed it away. The statement is signed "Donna S. Jones," and bears the date "Sept. 13, 2006." Respondent's Level Four Exhibit 1. It is not a sworn statement, and Ms. Jones was not called as a witness at the hearing because she was in California. No excuse was offered for the failure to provide her testimony by telephone or deposition.

5. After talking with Ms. Jones in August 2006, Mr. Black contacted Greg Phillips, District Manager for District 4, Butch O'Hagan, Acting Highway Administrator for Marion County, and possibly Anthony Paletta, District 4 Administrative Services Manager, and advised them that an investigation into these allegations should be conducted. None of these gentlemen was aware of the allegations until Mr. Black contacted them.

6. Sometime during the week of August 7, 2006, Mr. O'Hagan questioned DOH employee Brian Richards about the incident reported by Ms. Jones. Mr. Richards told Mr. O'Hagan that he did not see "anything out of the way" on Ms. Jones' last day of work. Respondent's Level Four Exhibit 3.

7. On August 14, 2006, Mr. O'Hagan called DOH employee Carl Ross at home, while he was

off work on sick leave, and asked him if he “witnessed anything involving Donna Jones and Terry Tuttle on [Ms. Jones'] last day of work.” Mr. Ross said he had. Mr. O'Hagan then asked Mr. Ross if Mr. Tuttle had “touched Donna on the breast with a litter pick-up instrument and he said yes.” Mr. Ross told Mr. O'Hagan that Mr. Richards had also seen this occur. Respondent's Level Four Exhibit 3. 8. On August 17, 2006, Mr. O'Hagan confronted Mr. Richards, telling him he knew he was in the truck when the incident involving Mr. Tuttle and Ms. Jones occurred, and he needed a statement from him. He gave Mr. Richards a sheet of paper, told him he could use his office, and closed the office door. Mr. Richards wrote the following statement: “[t]he last day Donna Jones work[ed] at the doh I saw a crewman with a litter picker grab her breast. I do not remember who the person was that did it, but remember the incident.” Respondent's Level Four Exhibit 4. Mr. Richards signed this statement, but it is not a sworn statement.

9. Mr. Richards did not testify at the level four hearing.

10. On August 21, 2006, Mr. Ross provided Mr. O'Hagan with a written statement, as follows:

> On the last day of Donna Jones' work time here, we were parked at the church on Prickett's Fort Road eating lunch. There were four of us at the crew cab, Donna, myself, Terry Tuttle and Brian Richards. Donna was in the back seat, the rest of us were outside of the truck. Tuttle teased Donna about it being her last day and that he could give her a hard time now. He reached into the crew cab with the grabbers that you use to pick up trash and tried to pinch her breast three or four times. She told him to quit after the first time. She tried to take the grabbers away from him. After the fourth time, he chuckled and then quit.

Respondent's Level Four Exhibit 5. Delores Woods, an Office Assistant employed by DOH in Marion County, typed the statement for Mr. Ross after he wrote it.

11. Mr. Paletta conducted an investigation into the allegations. Mr. O'Hagan told him that Mr. Ross, Mr. Richards, and Grievant were present when the alleged incident occurred. Mr. Paletta interviewed these three employees, and a couple of other employees, whose names he could not recall. He did not interview Ms. Jones. 12. Mr. Paletta concluded from his investigation that, during the lunch break on July 18, 2006, Grievant was sitting in the front seat of a crew cab on the drivers' side, Ms. Jones was in the back seat of the crew cab on the passenger side, Mr. Ross was standing outside the crew cab on the drivers' side, and Mr. Richards was sitting in the front seat of the crew cab. He did not know where the litter gitter was before Grievant allegedly picked it up.

13. When Mr. Paletta interviewed Grievant sometime after August 21, 2006, Grievant provided him with a written statement that simply said the alleged incident did not happen. Grievant told Mr.

Paletta he would not have been in the crew cab.

14. Sometime after Mr. Paletta concluded his investigation, Ms. Woods (who had typed Mr. Ross' statement) called Mr. O'Hagan and told him Mr. Ross had called her and told her he wanted to change his story to say he did not see Grievant grab Ms. Jones' breast with a litter gitter. She told Mr. O'Hagan that Mr. Ross had told her he was being threatened, but he would deny he had told her this. Ms. Woods and Mr. Ross are cousins.

15. At some point Mr. Richards also changed his story, and said he did not see anyone grab Ms. Jones' breast with a litter gitter.

16. After Mr. Ross recanted, Dawn Jordan, an EEO Manager for DOH, was assigned by Mr. Black to investigate the allegations, and the credibility of Mr. Ross and Mr. Richards. Ms. Jordan did not conduct a new investigation of the allegations. She believed she was only to evaluate the credibility of the statements of Mr. Ross and Mr. Richards.

17. Mr. Ross told Ms. Jordan he did not want to go through with his statement because Mr. Tuttle was facing disciplinary action. 18. Mr. Richards told Ms. Jordan that he did not “actually” see Grievant grab Ms. Jones' breast with the litter gitter, and denied he had witnessed the alleged incident. He told her that Mr. O'Hagan had intimidated him into providing a written statement which was not true. He told her that when he told Mr. O'Hagan he had not seen anything happen, Mr. O'Hagan told him he was a liar. He told her the story was being discussed by other employees, and that's how he came up with the written statement.

19. Mr. Ross changed his story back to his original statement when he testified at the hearing on November 1, 2007. Mr. Ross stated Grievant was standing outside the crew cab on Ms. Jones' last day of work at lunch time. Ms. Jones was in the back seat of the crew cab. He stated Grievant reached through the window of the crew cab with the litter gitter about three times, Ms. Jones swatted the litter gitter away and told him to stop, and Grievant did so.

20. Mr. Ross testified that his supervisor, Jay Bartlett, came to his house after he gave his statement in August and told him he wanted Grievant fired. He testified that Mr. Bartlett came to his house several times thereafter, and called him several times, and told him to change his story. (See footnote 3) He testified that another DOH employee told him Mr. Bartlett and some other employees were thinking they could make up stories, apparently involving his infidelity, to tell Mr. Ross' wife to try to get him to change his story. Mr. Ross stated he recanted because he was afraid these

employees would take this action, and he chose his family. Mr. Ross testified that the reason he was going back to his original version ofevents was that Mr. Bartlett was no longer his supervisor, and he could no longer do anything to him “jobwise,” and because he did not like lying.

21. Mr. Ross appeared nervous during his testimony. He was fidgety, there were many pauses in his answers, he kept licking his lips, and he lowered his voice at the end of sentences at times.

22. Sometime prior to July 18, 2006, Grievant had been asked to testify on Mr. Ross' behalf when Mr. Ross was charged with sexual assault, and Grievant had refused to testify in support of Mr. Ross.

23. Mr. Ross is not a credible witness. He has changed his story twice, he appeared nervous when giving testimony under oath at the level four hearing, he has given different reasons for recanting to different people, and the reasons he gave in his testimony at the level four hearing for recanting, and for going back to his original story, are internally inconsistent.

24. Mr. Richards never said that he saw Grievant grab Ms. Jones' breast with a litter gitter.

25. By letter dated February 13, 2007, Grievant was suspended for 21 days without pay for workplace harassment for attempting to grab Ms. Jones' breast with a litter gitter.

26.

Grievant did not grab, or attempt to grab, Ms. Jones' breast with a litter gitter.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by apreponderance of the evidence. *W. Va. Code* § 29-6A-6; (See footnote 4) *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent did not meet its burden of proof in this case. Despite the seriousness of these allegations, which resulted in a 21-day suspension for Grievant, the DOH employees involved in the investigation of the allegations did not maintain a detailed record of how they came to learn of the allegations, when the investigation began, how the investigation began, or when key witnesses were

interviewed. The only DOH employee who ever spoke to Ms. Jones about the alleged incident was Mr. Black. Mr. Paletta's testimony about what he had been told about the location of Grievant and the witnesses when the incident allegedly occurred, was completely different from the written statements given by Mr. Ross and Ms. Jones. Ms. Jordan testified that she was only supposed to evaluate the statements of Mr. Ross and Mr. Richards to determine which statements were true, but every other witness testified she was to conduct a new investigation. The only eyewitness presented by Respondent at the level four hearing was Carl Ross, and Mr. Ross' credibility is at issue. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Mr. Ross did not report the incident. He was first asked about it on August 14, 2006, almost a month after the alleged incident, when Mr. O'Hagan called him at home and asked him, according to Mr. O'Hagan's notes, “if he witnessed anything involving Donna Jones and Terry Tuttle on her last day of work. He said yes. I ask[ed] if Tuttle touched Donna on the breast with a litter pick-up instrument and he said yes. He made thecom[m]ent later that Brian Richards also [saw] it.” Thus, when Mr. Ross first acknowledged that the allegations of Ms. Jones were true, he did so by confirming what he was told had happened, rather than putting the story into his own words.

Mr. Ross later stated he did not see Grievant pinch Ms. Jones' breast with a litter gitter. He then went back to his original story when he testified at the level four hearing. By this time, Mr. Ross'

credibility was already at issue, and he did nothing to regain his credibility in his testimony. His demeanor during his testimony was that of someone who was lying, and his testimony regarding why he recanted and then went back to his original story was not logical, and it appeared to the undersigned by the way he was telling the story, that he was making it up as he went. If Mr. Bartlett told him he wanted Grievant fired, why would Mr. Ross then change his story to say his previous allegations against Grievant were not true in order to please Mr. Bartlett? He stated he changed his story because he was afraid Mr. Bartlett and others would tell his wife he had been cheating on her, then stated he returned to the first version because Mr. Bartlett was no longer his supervisor and could not do anything to him on the job. However, his original concern had nothing to do with any on the job retaliation.

Mr. Richards' written statement was placed into evidence, but he was not called as a witness. Mr. Richards never said he saw Grievant pinch Ms. Jones' breast with a litter gitter. Ms. Jordan testified Mr. Richards told her that the only reason he wrote in his statement that he had seen someone commit this act was that Mr. O'Hagan intimidated him into writing the statement. Ms. Jordan concluded that Mr. Richards had seen Grievant pinch Ms. Jones' breast with the litter gitter because what he said made no sense to her,and he said “he didn't 'actually' see Grievant” do this. She concluded that the use of the word “actually” by Mr. Richards was significant.

However, DOH did not present Mr. Richards as a witness. Whether this was because it was determined that he was not a credible witness, or because he would not testify under oath to witnessing the incident, is unknown. His written statement will be given no weight by the undersigned.

Ms. Jones, the alleged victim, and the most important witness, was not called to testify. Respondent entered into evidence as Respondent's Exhibit 1 a statement, which bears the signature Donna Jones, and which Mr. Black stated was given to him at his request. This statement is hearsay.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6)

whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. (See footnote 5) *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31,1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

Ms. Jones' written statement describing the alleged incident is as follows:

> This is my written statement for the incident that happened on July 18th 2006[,] while I was employed as a temp for the W.V. Dept. Of Highways.
>
> I was working on the ditching crew out on Prickett Forts' road. It was lunch time. I was sitting in the back seat of the crew cab talking to Carl Ross who was on the opposite side of the truck outside, and Brian Richards who was standing outside the truck on the drivers side. When I felt something grabing and pinching my left breast, I looked over. Terry Tuttle had the thing used to pick up garbage and was pinching and grabbing my breast with it. I told him to STOP It! I pushed it away. Brian and Terry were laughing. Carl shook his head [and] said what is wrong with you Tuttle, he was mad. Terry then went back to truck and sat til lunch was over [and] we went back to work!

The statement of Ms. Jones was signed, apparently by her, but it was not given under oath, nor was it subject to cross-examination. Respondent provided no reason for the failure to take a sworn statement from Ms. Jones. This statement was not written until September 13, 2006, almost two months after the alleged incident. Ms. Jones did not report the incident until at least two weeks after it allegedly occurred, although Mr. Black had not noted the exact date of the meeting when she made these allegations. Respondent's counsel stated Ms. Jones could not be called as a witness, because she was in California. Respondent's counsel did not state whether she had taken up permanent residence in California, why her testimony could not have been taken by telephone, as was Mr. Black's, why no sworn statement was taken, or why her deposition was not taken prior to the hearing.

The statement of Ms. Jones is inconsistent with that of Mr. Ross, who stated that Grievant was standing outside the truck, and he, Mr. Richards, and Ms. Jones were talking. In fact, Mr. Ross' statement is that Grievant had been teasing Ms. Jones. Ms. Jones' version leads the reader to believe that Ms. Jones was not aware Grievant was present until she felt something pinch her breast. Ms. Jones' statement also indicates that this pinching did not occur more than once, and that as soon as she pushed the litter gitter away and told Grievant to stop, he did so. Mr. Ross' statement is that Grievant continued to pinch Ms. Jones after she told him to stop and tried to push the instrument

away.

Ms. Jones' statement is entitled to no weight in this instance. She was the most important witness, as she was the alleged victim, yet she never was called upon to give a sworn statement. Neither of the investigators ever interviewed her. She did not report the incident for at least two weeks, at a time when she was discussing permanent employment with the state. Finally, the statement is completely inconsistent with Mr. Ross' statement that Grievant was talking with Ms. Jones, Mr. Ross, and Mr. Richards prior to the incident.

Grievant denied the allegations. He was unable to say what he had been doing at lunchtime, or where he was on July 18, 2006, as by the time he was asked about this incident, so much time had passed that he did not know. He stated he normally ate lunch at his own vehicle, which is not a crew cab, or on the grass. He felt that Mr. Ross had made up the story to get back at him for not testifying for him when he had been charged with sexual assault. He told Mr. Phillips that his coworkers had told him Ms. Jones had made the comment, sometime prior to July 18, 2006, that “she would sue the state.”

The undersigned concludes that Grievant did not grab Ms. Jones' breast with a litter gitter, and his 21-day suspension without pay should be rescinded.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters 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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1)

demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*. 4. The only eyewitness called to testify at the level four hearing, Carl Ross, was not a credible witness.

5. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. (See footnote 6) *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

6. Ms. Jones' statement is entitled to no weight in this instance. She was the most important witness, as she was the alleged victim, yet she never was called upon to give a sworn statement, and Respondent did not provide any reason for not calling her to testify by telephone, or for the failure to take her deposition. Neither of the investigators ever interviewed her. She did not report the incident for at least two weeks. Finally, thestatement is completely inconsistent with Mr. Ross' statement that Grievant was talking with Ms. Jones, Mr. Ross, and Mr. Richards prior to the incident.

7.

Respondent did not prove the charges against Grievant.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to remove the 21-day suspension from Grievant's personnel file, to pay him for the 21 days he was suspended without pay, and to restore any other benefits he lost as a result of this suspension.

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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 Grievance 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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BRENDA L. GOULD

Administrative Law Judge

Date: January 3, 2008

Footnote: 1

No evidence was presented regarding any overtime which Grievant might have lost as a result of the suspension.

Footnote: 2

A litter gitter is a fiberglass instrument used by DOH employees to pick up trash from alongside the road. It is about two and a half feet long, and about1/2" to 3/4" in diameter, had two prongs on one end to pick up trash, and a trigger on the other end to operate the prongs.

Footnote: 3

Mr. Ross did not explain what story Mr. Bartlett wanted him to tell. It would seem to the undersigned that if Mr. Barlett wanted Grievant fired, Mr. Ross' story would be a good start.

Footnote: 4

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules,

which continue to control the proceedings in this case.

Footnote: 5

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).

Footnote: 6

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).