THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANTHONY DAVID WILLIAMS,

Grievant,

v. **Docket No. 2009-1684-DOR**

ALCOHOL BEVERAGE CONTROL ADMINISTRATION,

Respondent.

DECISION

Grievant Anthony David Williams has been employed by the West Virginia Alcohol Beverage Control Administration ("ABCA") for ten years. The entire time he has been classified as an Equipment Operator 1 and assigned to the ABCA Warehouse in Nitro, West Virginia. By letter dated, June 16, 2009, Grievant was dismissed from employment by ABCA Commissioner Dallas S. Staples. Anthony Williams filed a grievance contesting his dismissal dated June 16, 2009, that he hand-delivered to the office of the West Virginia Public Employees Grievance Board on June 23, 2009. Grievant seeks the following:

> To be reinstated, to be cleared of charges of being hostile, and a chance to be heard on my complaints of harassment. And to have a chance to have character witnesses brought forward.[1]

A level three hearing was held on two separate days in the Grievance Board's Charleston office. The first day of the hearing took place on September 8, 2009, and the last day was October 16, 2009. Grievant Williams attended both hearings, pro se. Respondent ABCA was represented by Ronald R. Brown, Assistant Attorney General on

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[1] Pursuant to W. VA. CODE § 6C-2-4 (a)(1), Grievant filed this grievance directly at level three since he was challenging the termination of his employment

the first day. On the second day of the hearing, Assistant Attorney General Brown was joined by Harden C. Scraggs Jr., Assistant Attorney General.[2] ABCA General Counsel Anoop Bhasin, Esquire, attended the hearings as the Respondent client representative. The parties agreed to submit post hearing fact/law proposals that would be postmarked no later than November 5, 2009. The proposals for both parties were received at the Grievance Board on November 4, 2009, and the grievance became mature for decision on that day.

Synopsis

Respondent dismissed Grievant for allegedly challenging his supervisor's authority, using inappropriate language, harassing fellow employees, exhibiting unprofessional conduct, leaving work early under a false excuse and punching a fellow employee. Grievant argues that his behavior is consistent with the work environment at the ABCA warehouse and no worse than the behavior of most other employees, including his supervisor. Grievant does not deny that he engaged in a physical confrontation with a fellow employee but asserts that they both were active participants and it is unfair for him to be dismissed and the other employee to escape punishment completely. Finally, Grievant notes that the fight took place off State property outside of the workplace and is therefore not appropriate for discipline by his employer.

Given the overall circumstances and daily conditions of employment at the ABCA warehouse, Respondent failed to prove that Grievant was guilty of workplace harassment or creating a hostile work environment. Respondent did prove that Grievant struck a fellow

[2] Assistant Attorney General Scraggs also prepared the Proposed Decision submitted on behalf of Respondent ABCA.

employee in the face with his fist just outside the property of the warehouse facility. The altercation was related to an incident that occurred at work and took place immediately following work. There was a sufficient rational nexus between the incident and Grievant's employment to justify Respondent taking disciplinary action against Grievant.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Williams was employed as an Equipment Operator 1 by the ABCA in 1999. He has served in that capacity at the ABCA Nitro Warehouse continually since that time.

2. On April 16, 1999, Grievant received a copy of the Division of Personnel Workplace Security Policy and signed an Acknowledgment Form stating that he had read and understood the policy. He further acknowledged that violation of the policy could result in disciplinary action including dismissal. Respondent's Exhibit 3.

3. The Nitro Warehouse of the ABCA employs mostly men. The employees engage in taunting of fellow employees and often use coarse and vulgar language with one another. Grievant participated in this activity but not to any greater extent than the remaining employees.

4. In July 2006, Grievant had a dispute with his immediate supervisor, Bradie Shaffer, after Mr. Shaffer told Grievant to get to work while Grievant was on a break. Grievant believed he was being treated unfairly and he and his supervisor entered into a loud dispute. Grievant and Supervisor Shaffer took this dispute to Distribution Center Manager, Ed Hart, who talked to the two men until they calmed down. Grievant took

vacation time for the rest of the day. No disciplinary action was taken against Grievant as a result of this incident.

5. Upon leaving Mr. Hart's office, Grievant confronted co-worker, Kim Canterbury, and rhetorically asked why she could just sit around but he got in trouble for taking a break. The two entered into a heated conversation and another co-worker came and led Grievant away.

6. Ms. Canterbury brought this situation to Ed Hart's attention while they were riding together to a trade show. Ms. Canterbury went on a distilleries tour after returning from the trade show. Grievant came to talk to Ms. Canterbury when she returned from the distilleries tour and "from that day [Grievant] did not say one unkind word to [her]." Respondent's Exhibit 4, (Statement of Kim Canterbury to ABCA Investigator Dale Mason.)

7. In November 2008, Grievant and Supervisor Bradie Shaffer had another dispute over whether Grievant was wearing his required uniform. Grievant was wearing a tee-shirt under an ABCA jacket. Supervisor Shaffer told Grievant that he was out of uniform because he did not have on an ABCA tee-shirt as well as the uniform jacket. Grievant and his supervisor entered into a loud dispute that once again was settled when they went to Manager Hart's office. Grievant went home and changed his shirt. No disciplinary action was taken against Grievant related to this matter.

8. Grievant and Supervisor Bradie Shaffer generally did not get along well. However, everyone agreed that Grievant performed his job extremely well. He held productivity records in performing the duties to which he was assigned.

9. Supervisor Shaffer and Kim Canterbury joked with each other about Grievant possibly "going postal" and how they did not like the way he acted.

10. On the morning of June 3, 2009, Bernard Miller and Grievant Williams were unloading a truck at the warehouse. They were discussing that it would go faster if they had some help when Jeremy Hayes walked by. Grievant called out for Mr. Hayes to help them and Mr. Hayes kept walking to the checking station.[3]

11. That morning, Jeremy Hayes was assigned to help Harley Keeling[4] with the inventory count at the warehouse.

12. Grievant followed Mr. Hayes to the checking station and asked Hayes to help unload the truck. Mr. Hayes responded that he was helping Mr. Keeling with the inventory. It was apparent to Mr. Miller that Mr. Hayes and Grievant could not hear each other due to the din in the warehouse even though they were shouting at each other. Grievant turned and went back to the truck and Hayes followed. At some point in this discussion, each threatened to whip the other's ass.

13. Grievant and Mr. Hayes went to Manager Hart's office to settle the dispute. After hearing both men, Manager Hart indicated that it was clearly a misunderstanding and told both men to return to work.

14. At approximately 1:30 p.m., Grievant returned to Manager Hart's office and informed Hart that Grievant felt the morning dispute was more than a misunderstanding because Hayes had suggested that they could take it outside and settle it. Manager Hart said that he would get Mr. Hayes' side of the story and deal with the situation.

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[3] The warehouse was very noisy and Mr. Miller theorized that Hayes did not hear Grievant ask him for help.

[4] Most of the witnesses referred to Mr. Keeling as "Blue" or "Blue Creek" which is a nickname he is known by at the Warehouse.

15. During the summer months, ABCA employees at the Nitro Warehouse are given the option to come to work an hour early and leave an hour early. Mr. Hayes had accepted that option and his work day ended at 2:00 p.m. Grievant did not exercise the summer hours option and his work day ended at 3:00 p.m.

16. On June 3, 2009, Grievant took an hour of leave time and left work at around 2:00 p.m. The reason Grievant gave for leaving work early was that he needed to pick up his wife.

17. Upon leaving work, Grievant parked his truck near the stop sign just off the property of the ABCA Warehouse. While this was not the only route by which employees could leave the warehouse, it was the one that the majority regularly followed.

18. Jeremy Hayes left work at his usual quitting time, shortly after 2:00 p.m. Mr. Hayes was riding in a car driven by a co-worker, Jimmie Marcum. Mr. Marcum asked Jeremy if he wanted Marcum to stop if Grievant Williams was waiting for them and Hayes said "Yes."

19. Upon seeing Grievant standing by the road outside the warehouse parking lot, Mr. Marcum pulled up so that the passenger side of the car was facing Grievant and stopped. Grievant and Hayes exchanged words through the rolled-down window of the car and Hayes declined to get out. Grievant hit Hayes in the head at least two times.

20. Mr. Marcum began to drive away but Hayes told him to stop after the vehicle had traveled a short distance. Hayes exited the vehicle and ran at Grievant, whereupon they fell to the ground and commenced a short bout of physical combat. After striking a few blows, the two men disengaged and went to their respective vehicles and left.

21. Jeremy Hayes filed a criminal complaint against Grievant Williams with Sergeant J. M. Pack of the West Virginia State Police on June 4, 2009. After conducting an investigation Sergeant Pack turned his findings over to the Prosecuting Attorney for Putnam County who decided that it was a mutual combat incident and declined to pursue criminal charges against anyone involved. Respondent's Exhibit 4 and Grievant's Exhibit 2.

22. Mr. Hayes was not disciplined for his participation in the fight with Grievant.

23. A predetermination conference was held with Grievant. A dismissal letter was hand-delivered to Grievant on June 16, 2009. Grievant's employment was terminated at that time. The alleged conduct that was the basis for the dismissal was: challenging his supervisor's authority on two occasions, threatening, harassing and using inappropriate language toward other employees; and, on June 3, 2009; leaving work early without authorization, falsifying leave records, waiting for a co-worker at the end of the access road and punching the co-worker several times.

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 a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the

evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

I. Hostile Work Environment:

A great deal of the testimony in this matter was directed at establishing that Grievant's behavior constituted a hostile work environment. One of the charges in the dismissal letter stated the following:

> On numerous occasions you have threatened using inappropriate language, harassed or exhibited unprofessional conduct towards employees at the WVABCA Warehouse so that the employees are uncomfortable around you.

Respondent's Exhibit 2.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris, supra*); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris, supra* at p.23. In *Oncale supra*, the United States Supreme Court emphasized the

importance of considering the social context in which the behavior occurred in making a hostile work place analysis. The court noted:

> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field - even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. *Id,* at 82.

Respondent attempted to prove that Grievant made a hostile environment for Ms. Canterbury. However, in her statement made to the ABCA investigator, she noted that her major run-in with Grievant occurred in 2006. She spoke with Manager Hart, who said he would look into the situation. When Ms. Canterbury returned to the office, she noted a distinct change in Grievant's behavior toward her. She stated, "[w]hen I returned Anthony came over to me and started talking to me. From that day on he did not say one unkind word to me." Ms. Canterbury no longer works at the ABCA Warehouse. There is simply no evidence that Grievant was creating a hostile work environment for Ms. Canterbury at the time of his dismissal or for the past three years.[5]

The facts also do not support that Grievant created a hostile work environment for any of the other workers in the warehouse. The vast majority of the warehouse employees are male and they regularly engage in banter that includes coarse and vulgar language.

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[5] Ms. Canterbury also alleged that Grievant was rumored to keep a loaded firearm in his truck that he used for duck hunting during his thirty minute lunch breaks. Those allegations were totally unsubstantiated and beyond the realm of credulity.

The employees often goad each other and it sometimes leads to aggravation by one party or another. All witnesses, including Grievant, agreed that Grievant also used vulgar language and exchanged barbs with his co-workers. However, Grievant's conduct was no more offensive than the conduct of most of the remaining employees in the warehouse. The behavior in the warehouse seemed comparable to the stereotypical behavior of locker rooms or fraternity houses.[6] In this social context, Grievant's behavior did not create a hostile environment and Respondent did not meet the burden of proof in establishing that charge.[7]

II. The Physical Altercation:

The next allegation relates to the fisticuffs that took place after work on June 3, 2009. At that time, Grievant was a permanent State employee in the classified service. Permanent State employees who are in the classified service 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. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 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 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v.*

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[6] The undersigned is referring to stereotypical behavior and does not intend to imply that all such settings are rife with foul language and horseplay.

[7] Supervisor Shaffer engages in the exchange of heated invectives and vulgar language with his subordinates. A supervisor is expected to set an example of appropriate behavior for subordinates and may be held to a higher standard of conduct. *See Cobb v. Dep't of Admin./General Services Div.*, Docket No. 97-Admin-404/455 (May 26, 1999).

W.Va. Dept. of Finance and Administration, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Grievant had a verbal dispute with Jeremy Hayes regarding the unloading of a truck at the warehouse. Thereafter, Grievant was overheard telling someone on his cell phone that he was going to "whip the mother fucker's ass," and "what can they do . . . I'm off State property." Testimony of Jimmy Marcum, Level Three Hearing. Grievant filled out a leave slip stating that he was leaving work an hour early to pick up his wife and left work early without informing his supervisor. He then waited just off the ABCA Warehouse Property for Mr. Hayes and when Hayes arrived in a vehicle and rolled down the window, Grievant hit Hayes in the head with his fist, two or three times.

Respondent avers that this conduct is in violation of the Workplace Security Policy with which Grievant agreed to comply, and constitutes sufficient conduct to justify Grievant's dismissal. Section III. C. of the West Virginia Division of Personnel Workplace Security Policy states, in part, the following:

> Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. . . .

Id, at 3. The use of the word "shall" creates a mandatory duty for management to discipline

an employee who engages in conduct described in this section.[8] Grievant's behavior was undoubtedly assaultive and discipline was justified. Grievant's conduct was intentional and showed a willful disregard for the Workplace Security Policy, the employer's leave policy and the general safety of himself and his co-worker. Such conduct constitutes good cause for disciplining Grievant. *Oakes, supra*.

III. Rational Nexus:

Grievant's main defense is that the fisticuffs occurred after work and off the employers property; therefore, the conduct was beyond the purview of the ABCA and the Workplace Security Policy did not apply.[9] Generally, what a State employee does away from work is beyond the employer's realm of influence. However, "if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond V. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976). *See also Boehm v. Dep't of Health & Human Res*. Docket No. 05-HHR-441 (May 18, 2006); and *Hensley v. Dep't of Health & Human Res.* Docket No. 04-HHR-375 (Jan. 28, 2004).

The fight that took place away from the workplace was a direct extension of the verbal exchange that happened in the warehouse. The incident occurred as the combatants were

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[8] "It is well established that the word 'shall,' in the absence of language in a statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." *Syllabus point 2, Perry v. Barker*, 169 W.Va. 531, 289 S.E.2d 423 (1982).

[9] The goal of the policy is to ensure the safety and welfare of State employees and the general public *in the buildings and on the grounds of the State Capitol Complex, as well as in all other State government workplaces*. (Emphasis added) West Virginia Division of Personnel Workplace Security Policy, Section III.

leaving work and very near the ABCA Warehouse property. Moreover, the physical attack of a co-worker, based upon a workplace disagreement, will undoubtedly have a negative effect on the employer's operation. Co-workers and supervisors will be reluctant to correct errors or enforce rules if the activity could lead to a physical confrontation on the way home. Additionally, it would be difficult for employees to operate as a cohesive team if they feared a disagreement could lead to a violent reprisal. There was a rational nexus between Grievant's conduct away from work and his employment. Respondent was justified in disciplining him for this behavior.

V. Mitigation:

Grievant argues that it is unfair for his employment to be terminated while the other participant in the fight escaped discipline completely. This argument raises the issue of mitigation. "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The 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 Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

The first area of inquiry is the employee's past work record. At one point in his tenure with the ABCA, Grievant went through a difficult period where he was chronically late for work. Ultimately, Grievant received a short suspension for that conduct and it has not been an issue for quite some time. Respondent has alleged that Grievant participates in taunting other workers and the use of vulgar language. While that may be true, Grievant's workplace behavior is consistent with the social context that exists at the Warehouse and appears to be no worse than that of other employees including Supervisor Shaffer. Moreover, he has never been disciplined in any way for this alleged behavior. On the other hand, Grievant has given the ABCA ten years of faithful service and is considered to perform his duties at the warehouse more efficiently and effectively than any other employee in his classification. By and large, Grievant's past work history is good.

The next inquiry goes to the clarity of the rules violated. There is no doubt that workplace violence cannot be tolerated. The Workplace Security Policy is clear and unequivocal. There may be some confusion as to whether it applies to physical altercations away from work, but there is no doubt that civilian fighting anywhere outside the boxing ring is not appropriate conduct.

The final inquiry is whether mitigating circumstances justify a reduction in the punishment imposed. One of the mitigating circumstances to be considered is whether the punishment is clearly disproportionate to the employee's offense. *Overbee*, *supra.* In judging whether the penalty is disproportionate, it is appropriate to examine the discipline

imposed upon others for similar conduct. *Farr v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0532-MAPS (Jan. 2, 2009).

Under the circumstances, it is extremely difficult to reconcile the fact that Grievant was fired and Jeremy Hayes received no discipline. Jeremy Hayes was certainly not a totally innocent victim. He actively participated in the verbal workplace dispute that led to the fight. The testimony indicated that both men were shouting and threatening each other. More importantly, Mr. Hayes knew that Grievant had left work early and was waiting for him. Mr. Hayes was riding with Jimmy Marcum and Grievant was gesturing for them to stop, but he was not blocking the road. If Mr. Hayes had not instructed Mr. Marcum to stop and had not rolled his window down to exchange further words with Grievant, the entire confrontation would have been avoided. Finally, after Grievant hit Mr. Hayes, Mr. Marcum began to drive away. Again, Mr. Hayes instructed Mr. Marcum to stop the car. Hayes got out of the car and ran at Grievant, tackled him and the two continued the fight.[10]

Grievant cannot be treated differently from his co-workers. If ABCA believes it needs to stop this type of behavior, as well it should, all employees exhibiting such behavior must be disciplined for this type of behavior, not just Grievant. The only difference between the conduct of Grievant and Hayes is that Grievant gave a false excuse and left work early. He also delivered the first blows that started the fight. These activities certainly justify Grievant receiving greater discipline than Mr. Hayes. In this case however, dismissal compared to no

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[10] The Putnam County Prosecuting Attorney decided that Mr. Hayes was a mutual combatant and did not pursue criminal charges against either man. While the burden of proof in a criminal prosecution is significantly higher than in grievance proceedings, the Prosecutor must have felt that reasonable jurors would believe that Mr. Hayes contributed sufficiently to the fight to make it unlikely that he could get a conviction against Grievant.

action is so disproportionate that it indicates an abuse of discretion. Mitigation is appropriate to address the disproportionate punishment administered. Given the serious nature of Grievant's misconduct and the disproportionate disciplinary action, a six-month suspension is appropriate. Consequently, the grievance is GRANTED to the limited extent that the discipline given to Grievant is reduced from dismissal to a six-month suspension. Grievant must be reinstated on December 4, 2009, since he was first suspended on June 4, 2009.

To be clear, no one should read this Decision to hold that a State employee may not be dismissed from employment for physically attacking a co-worker.[11] In this situation, the undersigned does not have the option of imposing discipline on Jeremy Hayes to bring the discipline given to the two combatants into reasonable proportion. Rather, the only remedy available is to mitigate the discipline given to Grievant. Under different circumstances dismissal may very well be justified.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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[11] It is common for public employers to impose a suspension for hitting a co-worker rather than terminating the offenders employment. *See Boehm, supra*; and *Hensley*, *supra.* See also *Hoover v Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); and, *Hicks v. Mingo County Bd. of Educ.*, Docket No. 02-29-216/257 (June 24, 2003) (both involving a public school employee striking a co-worker). *See also Parham v. Raleigh County Bd. of Educ.*, 192 W.Va. 540, 453 S.E.2d 374 (1994) (affirming a ten day suspension for a teacher who slapped a student).

2. The Grievance Board follows the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris, supra*).

3. Whether workplace behavior creates a hostile work environment often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and administrative law judges to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. *Oncale, supra.*

4. Respondent did not prove that Grievant's conduct created a hostile work environment in the social context of the ABCA Nitro Warehouse.

5. Permanent state employees who are in the classified service 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. 1,

Oakes v. W. Va. Dep't of Finance and Admin., 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 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam).

6. Respondent proved, by a preponderance of the evidence, that Grievant's misconduct was intentional and of a substantial nature. Grievant's misconduct was more than a technical violation of workplace rules and was serious enough to justify the imposition of discipline by his employer.

7. "If a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976). *See also Boehm v. Dep't of Health & Human Res*. Docket No. 05-HHR-441 (May 18, 2006); *Hensley v. Dep't of Health & Human Res.* Docket No. 04-HHR-375 (Jan. 28, 2004).

8. Respondent proved, by a preponderance of the evidence, that Grievant's misconduct away from work, bore a sufficient rational nexus to his employment to justify discipline by his employer for that misconduct.

9. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[M]itigation 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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

10. Given the totality of the evidence, Grievant proved, by a preponderance of the evidence, that the penalty imposed upon him was clearly disproportionate to the offence committed when compared to the penalty imposed upon other employees who committed similar misconduct. Mitigation of the punishment is appropriate. *Farr v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0532-MAPS (Jan. 2, 2009).

Accordingly, the grievance is GRANTED to the limited extent that the dismissal of Grievant from employment with the ABCA is reduced to a suspension of six months beginning on June 4, 2009, and ending on December 4, 2009. In all other respects, the grievance is DENIED. Respondent is ORDERED to reinstate Grievant to employment in his previous classification, assignment and duties at the ABCA Nitro Warehouse beginning December 4, 2009.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: NOVEMBER 25, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE