BEFORE THE WEST VIRGINA PUBLIC EMPLOYEES GRIEVANCE BOARD

DARREN[1] SHORES,

Grievant,

V. **DOCKET NO. 2009-1583-DOT**

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Darren Shores ("Grievant") challenges the decision of Respondent West Virginia Parkways Economic Development and Tourism Authority ("Parkways") to discharge him from his employment. The May 26, 2009, "Statement of Grievance" simply states "[t]ermination without good cause." As relief, the Grievant seeks "[t]o be made whole including restoration of job with full benefits and tenure and back pay with interest."

As this grievance is disciplinary in nature, Grievant filed directly to Level Three. W.VA. CODE § 6C-2-4(a)(4). A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on October 13, 2009, at the Grievance Board's office in Charleston, West Virginia. Grievant appeared by and through his representative, Gordon Simmons, UE Local 170. Respondent appeared by and through its counsel, A. David Abrams, Jr. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about November 13, 2009.

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[1] Throughout several notices and documents contained within the file, Grievant's name is misspelled "Darrea." This misspelling is likely attributable to messy penmanship on the original grievance filing. Grievant's first name is spelled "Darren." Level Three, Testimony of Darren Shores.

Synopsis

Grievant, a toll collector, willfully and wantonly grabbed a toll patron's fingers as the patron pulled away in his vehicle. Grievant let go of the patron's fingers after the patron cried out in pain. Thereafter, the Grievant told a co-worker that he would bet that the patron would never do that again. The patron suffered injury causing him to seek medical attention. Grievant was discharged from his employment.

Though Grievant was an at-will employee, Respondent accepted the burden of proving the incident in question by a preponderance of the evidence. Assuming it had the burden, Parkways has proven its claim by a preponderance of the evidence. Grievant has not established by preponderant evidence that his discharge violated a substantial public policy. Accordingly, this grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was employed by Respondent Parkways as a full-time toll collector at its Barrier B Toll Plaza near Pax, Fayette County, West Virginia.

2. The Grievant was hired by Parkways on February 25, 2002.

3. Parkways' employees are trained in the method of how to collect tolls. These methods are designed to prevent physical injury to both the collector and the patron. Toll collectors are taught to put their palm out, require the patron to place the money in the palm and then grasp the money. A collector should not put his or her palm out until the patron's vehicle comes to a complete stop. *See* Level Three, Respondent's Exhibit 4.

Grievant received training on how to properly collect tolls.

4. Toll collectors are also trained in customer relations. Level Three, Respondent's Exhibit 5. They are expected to "provide first-class service," "display a constructive approach" and be professional. *Id*.

5. At approximately 6:35 p.m. on May 11, 2009, Grievant was working Lane 6 on the southbound side of the toll barrier at the Barrier B Toll Plaza. Lane 6 is the lane furthest left at the Barrier and is used in conjunction with a tandem booth in Lane 5, which is a reversible lane.

6. Joseph Moore, of Richmond, Virginia, went through the Grievant's toll lane at approximately 6:35 p.m. on May 11, 2009.

7. Mr. Moore was injured when the toll collector, Grievant, willfully and wantonly held onto Mr. Moore's fingers when he handed the worker the toll amount. Mr. Moore came to a complete stop and handed Grievant the toll. Level Three, Testimony of Joseph Moore. Grievant did not let go of Mr. Moore's fingers as the vehicle moved forward. That action on the part of the Grievant caused the toll patron's arm to extend backward until it was stopped by the window frame of the vehicle he was driving. The patron cried out in pain and the Grievant released his hold on the patron's fingers. *Id*.

8. Grievant's conduct resulted in injury to Mr. Moore's arm and shoulder. *Id*. Mr. Moore sought medical care for his injuries.

9. Mr. Moore initially stopped but, because of the heavy traffic volume, elected to continue on to his home in Richmond. Thereafter, he reported the incident by email at 2:06 a.m. on the morning of May 12, 2009, to Parkways. Level Three, Respondent's Exhibit 1.

10. Tracy Tucker, another Parkways' toll collector was working in the same toll

booth as the Grievant at the time the incident occurred. Level Three, Testimony of Tracy Tucker. She was working the "opposite" lane of traffic. Mrs. Tucker did not observe the actual injury to Mr. Moore, but did see a vehicle matching the description of Mr. Moore's vehicle at the toll booth. *Id*. During the shift in question on May 11, 2009, Grievant made an admission to Tracy Tucker that he squeezed the fingers of a toll patron. He stated "I bet he will never do that again" to Mrs. Tucker. *Id*. Upon hearing this statement Mrs. Tucker asked Grievant if the driver attempted to bend Grievant's wrist back? Grievant replied "yes" and stated that he "squeezed the patrons fingers."

11. The Grievant, when questioned by D. E. Ratcliff, Barrier Supervisor, about his possible involvement in the incident, told the supervisor he had no involvement whatsoever and was not aware of the incident.

12. The Grievant, within a day or so after the incident, again admitted to Tracy Tucker his involvement in the injury of Joseph Moore when he advised her that the "'old man' called Doug on me" or words to that effect.

13. On May 22, 2009, Grievant was discharged from his employment with Parkways. Level Three, Respondent's Exhibit 2.

14. The Parkways Authority's written Personnel Policy II-4,[2] "Discipline and Discharge," provides for first offense dismissal for acts of physical violence on the job and other harmful acts of a substantial nature. Level Three, Respondent's Exhibit 6.

15. Grievant has received approximately nineteen (19) written warnings or written

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[2] Though this document is referred to as a policy, it is merely a guideline "to be considered by Supervisors in administering discipline." Level Three, Respondent's Exhibit 6. Hence, the policy is not mandatory and does not alter the employee-employer "at-will" relationship.

reprimands for his failure to meet performance standards and his usage of leave time. *See* Level Three, Respondent's Exhibits 9-30. Grievant has not grieved any of these warnings or reprimands.

16. Grievant is an at-will employee.

Discussion

"Employees of [Parkways] are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. VA. CODE § 29-6-10. *See Simmons v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 96-PEDTA-019 (July 31, 1996); *Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991)." *Boyd v. Parkways Economic Development and Tourism Auth.*, Docket No. 00-PEDTA-243 (Feb. 28, 2001). This Grievance Board has determined that Parkways' employees are at-will employees who may be discharged from their employment at any time, with or without cause. *Stelling v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 01-PEDTA-507 (Mar. 21, 2002); *Oakes v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 00-PEDTA-337 (Sept. 25, 2002). As at-will employees, Parkways' employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. *Wilhelm v. Dep't of Tax and Revenue*, Docket No. 94-L-038 (Sept. 30, 1994), *aff'd Wilhelm v. W. Va. Lottery*, 198 W. Va. 93, 479 S.E.2d 602 (1996)(per curiam). *See Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

Parkways did not rely upon its ability to discharge Grievant as an at-will employee for

any reason, but rather, accepted the burden of proving the charge that Grievant wantonly held on to a toll patron's fingers causing injury. *Respondent's Proposed Findings of Fact and Conclusions of Law*, 8. Even if it is assumed that Parkways has the burden of proving its claims by a preponderance of the evidence, Parkways readily accomplished the task. The record is clear that the Grievant's conduct constitutes a "harmful act of a substantial nature" and is in direct contravention of Parkways' policy. Indeed, Parkways' policy list "harmful acts of a substantial nature" and "acts of physical violence" as "Examples of Possible First Offense Dismissals." Level Three, Respondent's Exhibit 6.

On May 11, 2009, Mr. Moore drove into Lane 6 at Toll Barrier B near Pax, West Virginia. He came to a complete stop.[3] He handed Grievant his toll amount. Grievant took the money, and for reasons unclear, grabbed onto Mr. Moore's fingers. He held them until Mr. Moore cried out in pain. Then, he let go and made a supercilious statement to a co-worker regarding the incident. Mr. Moore was injured and thereafter sought medical treatment.

Grievant did not directly argue his discharge contravened a substantial public policy. Rather, Grievant outright denies that the incident happened. 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

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[3] Mrs. Tucker testified that she saw the vehicle and did not see "brake lights." However, she stated that she did not see the exchange between Grievant and Mr. Moore. Mr. Moore specifically testified that he came to a complete stop. In light of Mr. Moore's ability to directly observe the event, it is found that Mr. Moore's testimony is most reliable on this point.

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' information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Grievant testified that May 11, 2009, was a "good day" at work and he had no recollection of the events in question. Level Three, Testimony of Darren Shores. He did not recall making any statements to Mrs. Tucker, his co-worker, on May 11, 2009. *Id*. He testified that he did not make any statements about the incident to Mrs. Tucker after May 11, 2009. *Id*. He stated that he has never pinched or grabbed a patron's hand. *Id*.

Insofar as Grievant testified that the incident on May 11, 2009, did not happen, Grievant's testimony is not credible. Nor is the Grievant's testimony concerning the post-May 11, 2009, statement made to Mrs. Tucker believable. Clearly, Grievant has a motive to deny the facts of the incident: he wants to keep his job. His testimony is in direct contradiction to the testimony of victim, Mr. Moore. Mr. Moore testified with vivid detail of the incident. Similarly, Grievant's testimony contradicts the testimony of his co-worker, Mrs. Tucker. There is no evidence that would suggest that either Mr. Moore or Mrs. Tucker have any motive to lie. In fact, the record suggest that Mrs. Tucker and Grievant were quite friendly and got along well. Level Three, Testimony of Darren Shores.

As an ancillary matter, Grievant argued that his discharge was somehow in retaliation for a past complaint of Parkways' violation of wage and hour law. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of

reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the Respondent or an agent;
> (3) that the Respondent or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). Once a prima facie case of reprisal or retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller*, *supra*. *See Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26- 56 (Sept. 29, 1989).

Several months prior to May 11, 2009,[4] Grievant was asked to drive to his work site for a meeting. The meeting was not part of his normal shift. Grievant believed he should be paid for attendance at the meeting, contacted the West Virginia Division of Labor and then had a conversation with a Parkways' representative about payment. Ultimately, without the filing of any formal complaint, Grievant and several other employees were paid for the meeting. Grievant has not established a causal connection between his informal complaint

[4] From the Grievant's testimony, it appears that the time lag between these two incidents is approximately six months.

and his discharge because it is clear that he was fired because he willfully and wantonly grabbed a patron's fingers. Even assuming such a causal inference could be drawn from the facts, Parkways has established a legitimate reason for discharging Grievant from his employment.

In summation, the record is clear that the Grievant willfully and wantonly held a patron's fingers while the patron's car moved forward. This caused physical injury to the patron. The Grievant has not established or alleged a violation of substantial public policy. There is no indication that anything short of discharge would be appropriate given the facts presented. This grievance must be denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. "Employees of [Parkways] are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. VA. CODE § 29-6-10. *See Simmons v. W.Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 96-PEDTA-019 (July 31, 1996); *Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991)." *Boyd v. Parkways Economic Development and Tourism Auth.*, Docket No. 00-PEDTA-243 (Feb. 28, 2001). As such, Parkways' employees are at-will employees. *Stelling v. W. Va. Parkways Economic Development and Tourism Auth.*, Docket No. 01-PEDTA-507 (Mar. 21, 2002); *Graley*, *supra*.

2. At-will employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. *Wilhelm v. Dep't of Tax*

and Revenue, Docket No. 94-L-038 (Sept. 30, 1994), *aff'd Wilhelm v. W. Va. Lottery*, 198 W. Va. 93, 479 S.E.2d 602 (1996)(per curiam). *See Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

3. Grievant's position was at-will. As such, he bears the burden of proof to establish a violation of substantial public policy. *Washington v. Adjunct General's Office/Mountaineer Challenge Academy*, Docket No. 05-ADJ-074 (Apr. 21, 2005). If this burden is not met, the reasons for the termination are not at issue, and the termination stands. *Wilhelm*, *supra*.

4. Grievant was discharged for willfully and wantonly holding on to a toll patron's fingers and causing injury. Grievant's discharge did not contravene any substantial public policy.

Accordingly, this grievance is **DENIED**.

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 WEST VIRGINIA 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: December 1, 2009

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Mark Barney
Administrative Law Judge