THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

T. M. D.[1],
Grievant,

v. **DOCKET NO. 2009-1528-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was first filed at level three of the grievance procedure by Grievant, T. M. D., on March 13, 2009, after he was suspended for 15 days without pay by Respondent, for the purpose of conducting an investigation into allegations that Grievant "desire[d] to bring firearms to work and to harm other employees and/or supervisors." The statement of grievance reads:

> The grievant has been discriminated against because of an established handicap and disability. Despite medical documentation restricting activities to sedentary to light duty, the grievant is given heavy duty assignments which has impaired his physical and emotional health and well-being; the grievant is constantly subjected to a hostile work environment of both supervisors and co-employees who demean, ridicule, and embarrass the grievant on a regular basis; that the hostile work environment also includes a constant flow of profanity and obscene comments. The discrimination has also resulted in the wrongful suspension of the grievant from February 27, 2009 through March 20, 2009 which suspension was without due process[2], without

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[1] The parties requested that Grievant be identified by his initials only in this Decision, to protect Grievant's privacy. Due to the nature of the charges, and the medical information placed into evidence, this request was granted.

[2] Grievant did not address his claim that he was not afforded due process in his Proposed Findings of Fact and Conclusions of Law, and this argument is deemed abandoned. As noted by the undersigned in an Order issued on July 21, 2009, in this

> adequate notice of the allegations against him, and alleged statements of co-workers were withheld from the grievant which precluded any meaningful defense. This is in violation of the West Virginia Constitution and the Constitution of the United States.

The relief sought by Grievant is "[r]einstatement of lost time, wages, benefits, and tenure; admonition to the supervisor of the Department of Transportation to abide by physical limitations on the part of the grievant which preclude anything more than sedentary or light duty; reprimand to supervisor and co-workers for harassment[,] discrimination, and hostile work environment." A second grievance was filed at level three on March 23, 2009, when the 15 day suspension was extended for an additional 10 days. A third grievance was filed on July 7, 2009, contesting the termination of Grievant's employment by Respondent, and seeking "reinstatement of position, lost time, wages, benefits and tenure."

Two days of hearing were held at level three before the undersigned Administrative Law Judge on June 9, 2009, prior to Grievant's termination, and December 8, 2009, at the Grievance Board's Westover, West Virginia office. Grievant was represented by William T. Fahey, Esquire, Fahey Law Office, and Respondent was represented by Jennifer F. Alkire, Attorney, DOH Legal Division. This matter became mature for decision on or about January 22, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law. On January 22, 2010, Grievant filed an "Objection to Respondent's Supplemental Proposed Findings of Fact and Conclusions of Law and Motion to Strike,"

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matter, the Courts and the Grievance Board have upheld suspensions pending an investigation, even when the suspension was for an indefinite period (*Mills v. Regional Jail and Correctional Facility Authority*, Docket No. 06-RJA-256 (April 30, 2007), which was not the case here. Further, when an employee is alleged to have made a threat to bring a firearm to the workplace and shoot co-workers, the only reasonable course of action by an employer is to remove that employee from the workplace.

objecting to certain statements made by Respondent's counsel in her proposals. That Motion requires some discussion.

Motion to Strike

First, Grievant's Motion in large part is essentially a rebuttal argument, not argument in support of a Motion to Strike. While the parties did not request leave to file rebuttal arguments, the undersigned will nonetheless allow this filing to remain in the record. Second, this is not a court, but an administrative body. There is no jury here which requires instruction, and the undersigned would not be inclined to strike argument from the record. The evidentiary record was developed at the hearings in this matter, and the undersigned can rely only on the evidentiary record in making factual determinations. Clearly the arguments of neither party can supplement the evidence in the record.

Specifically, however, Grievant objected to Respondent's Proposed Findings of Fact 2, 22, 23 and 24, asserting that these Proposed Findings go beyond the record.[3] The undersigned has reviewed the record, and finds no merit in these objections. The record clearly supports Respondent's proposals.

Grievant asserted that Respondent wrongfully relied on past medical records in Proposed Findings 34 through 37. These documents were placed into the record without

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[3] Despite Grievant's counsel's objection to Respondent "going outside the record," Grievant's counsel did not hesitate to do the same, stating that "upon information and belief, a number of the employee statements collected in the investigation were supportive of the Grievant. . .", and attaching documents to this Motion as exhibits which documents were not placed into the record at the hearings. The undersigned does not consider such statements or documents to be part of the record and will not consider them in rendering this decision. Grievant's counsel also in his own Proposals referred to a State Police investigation, yet was unable to elicit any evidence of such an investigation from any witnesses at the hearing. Grievant's counsel's statements are not evidence.

objection, the information in these records are now facts in this record, and Respondent is not precluded from using these facts in its proposals. Whether the facts are relevant to the issues is a matter about which the parties may disagree.

Grievant objected to Proposed Finding of Fact 56 as a blatant misrepresentation, however, having reviewed the objection and the Proposed Finding, it is unclear what Grievant is asserting is a misrepresentation.

The undersigned agrees with Grievant that Proposed Conclusion of Law 11 that the statements "of over 30 DOH employees who regularly worked with Grievant substantiated Burl Williams' initial report that Grievant had threatened to shoot and/or kill various co-workers" is not supported by the record. Only a few of these statements were placed into the record, and the record does not reflect what the remaining statements were. However, the undersigned views this as simply a proposal not supported by the record, which is not all that uncommon, and there is no need to strike the Proposal. The remainder of Grievant's Motion need not be addressed as it relates to issues which the undersigned has concluded are moot.

Synopsis

Grievant was dismissed from his employment by Respondent because he made threats to bring a gun to work and shoot specific employees. Respondent proved that Grievant made such threats, and that it was justified in terminating his employment. Grievant was not suspended or dismissed because of his disability, and his disability did not excuse Grievant's behavior, nor did the dismissal constitute discrimination.

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

Findings of Fact

1. Grievant was employed by the Division of Highways ("DOH" or "Respondent"), as a Transportation Worker 2 in Brooke County, West Virginia. He had been an employee of DOH since 1995.

2. Grievant was first employed by DOH as a Transportation Worker 1, performing custodial work at the Brooke County Headquarters in Wellsburg. He was hired as a person with a disability. Grievant had been in a life threatening automobile accident and suffered multiple debilitating injuries, including broken bones in his legs and traumatic brain injury.

3. In 1997, Grievant chose to complete a position description form describing his duties, in an effort to become classified as a Transportation Worker 2, and he was placed in that classification. Grievant listed that he performed duties such as shoveling hot mix and gravel, changing tires on dump trucks, cleaning culverts, flagging, assisting in loading trucks, and putting chains on trucks.

4. DOH supervisors and employees in Brooke County were not aware of any restrictions on making work assignments to Grievant, except that he had to be provided a ten minute break every hour when he was flagging.

5. Robert Crawford has been employed as a Transportation Worker by DOH at the Brooke County Headquarters for less than two years. Mr. Crawford worked with Grievant for about one year. He observed that Grievant often became angry, as frequently as every other day, with his anger ranging from mild irritation to rage. He heard Grievant state that he wanted to kill Brooke County Highway Administrator Craig Sperlazza, and co-workers Dave Williams and Dave Dalessio on more than one occasion, and while he

believed Grievant was joking at times, sometimes Grievant seemed serious. Near the beginning of 2009, Grievant repeatedly told Mr. Crawford that he wished he had a gun "to kill Craig and Dave[,] he would blow there [sic] fucking heads off." On more than one occasion, Grievant asked Mr. Crawford, who is a combat veteran, where to shoot someone for a "fast kill," and how it felt to kill someone. At first Mr. Crawford felt that Grievant's inquiries and threats to kill co-workers were idle threats, but as Grievant became more and more upset over time, he came to believe that Grievant might be serious. Mr. Crawford did not report his concerns.

6. One day in August 2008, Mr. Crawford saw Grievant tell an employee, Sue Custer, to perform a particular task. When she did not do so quickly enough, Grievant jumped in the truck and sped toward her, stopping just short of her. Mr. Crawford thought Grievant was going to hit her with the truck.

7. David Dalesio is a Craftsworker 2 employed by DOH in Brooke County, and has known Grievant since 1995. Mr. Dalesio observed that Grievant was often angry at work, and that he appeared to hate Mr. Sperlazza. In the fall of 2008, Mr. Dalesio heard Grievant say he wanted to kill Mr. Sperlazza. Mr. Dalesio believed Grievant's angry behavior had become more intense during the last year, and he was afraid to work with Grievant at times because of his temper. One day Mr. Dalesio observed that Grievant was outraged when he stated he wanted to kill Mr. Sperlazza, and he believed Grievant meant it. Mr. Dalesio did not report his concerns because he did not want to cause trouble.

8. David Williams has been an Equipment Operator 2 in Brooke County for about seven years, and has known Grievant since he began his employment with DOH, and thought they were friends. On January 14, 2009, Grievant became angry with David

at work, and starting screaming at him at the top of his voice, calling him obscene names, and threatening him. David described Grievant as "going berserk." David was afraid that Grievant was going to start beating on him when he called on him to step outside, and was concerned as Grievant had told David that if he ever started beating someone he would beat them to death because his job would be over. David filed a grievance about this incident, stating in the grievance that Grievant was unsafe to be around. Both David and Grievant were given written reprimands for this confrontation at the workplace. David was told by a co-worker, Burl Williams, that Grievant had threatened to kill David, and he was afraid that Grievant would carry out this threat, going so far as to request permission to carry his own pistol to work.

9. David Williams had previously seen Grievant get into an argument with Mark Griffith, and had heard Grievant say he was going to bring his father's service pistol in and "blow [Mr. Griffith's] brains out." He also observed Grievant screaming at other co-workers on more than one occasion, and saw Grievant throw a fit in the truck because the crew would not go to McDonald's for lunch. Grievant began pounding the back of the head rest with his fists while his co-workers were seated in front of him, and kicking the back of the seat, and he refused to stop. Mr. Sperlazza was called, and he came and got Grievant. On another occasion Grievant told David "he would like to see [David] Blackburn [a coworker] dead," after he and Mr. Blackburn had been screaming at each other.

10. After this incident with David Williams, Grievant appeared to Mr. Crawford to have been "pushed over the edge." Mr. Crawford observed that Grievant would start talking about David and "work himself into a fit of rage," and he would start shaking and mumbling that he wanted to "kill the fat S.O.B."

11. Burl Williams, an Equipment Operator 3 in Brooke County, has known Grievant since high school, and had worked with him at DOH since 1995. Burl was friends with Grievant and Grievant had been to his house. Burl had heard Grievant say numerous times over the last three years that he hated Mr. Sperlazza, and would like to kill him. Burl had observed that over the previous year Grievant had become more and more angry with management and his co-workers.

12. Sometime in February 2009, Burl Williams heard Grievant in the break room asking another employee the difference between a 7 mm Mauser and a 7 mm Magnum. Grievant then approached Burl and told him he would like to bring a 38 stub nose to work and shoot someone. He then said he should not have said that, and left. Burl's observations led him to believe that Grievant might follow through with his threat, and after discussing his observations with his wife, he called Mr. Sperlazza after work and relayed what he had heard. Burl is now afraid that Grievant may harm him.

13. Mr. Sperlazza viewed Grievant as a good worker, but has seen him be disruptive over the years, and found his behavior to be unpredictable. He observed that Grievant had become more aggressive, angry, and irrational over the last couple of years, and that although he had in the past been able to reason with Grievant, it had become more difficult to communicate with him. Grievant would come to work angry at times and come into Mr. Sperlazza's office in a hostile manner, sometimes screaming. Mr. Sperlazza has had complaints from about half of the employees that they did not want to work with Grievant because of his aggressive behavior. Over the last several months of his employment, Mr. Sperlazza became intimidated by Grievant, as Grievant complained to

Mr. Sperlazza in an angry manner on a daily basis. Mr. Sperlazza is afraid that Grievant might hurt him or other employees.

14. The day after Burl Williams called Mr. Sperlazza about the gun conversation in the break room, Mr. Sperlazza informed Robert Whipp, the District 6 Engineer, of this conversation and they met with Mr. Williams. They called Krista Duncan in the DOH Legal Division, and Jeff Black, the Director of the Human Resources Division for DOH, and informed them of what had occurred. Mr. Black and Ms. Duncan advised Mr. Whipp to call Grievant in and verbally suspend him pending an investigation into the matter. Mr. Whipp called the Brooke County Sheriff's Office and asked if a Deputy could be present when he talked to Grievant, and the Sheriff and a Deputy came to his office and were present when he told Grievant he was suspended without pay, pending an investigation into the allegations.

15. On March 2, 2009, Grievant was notified in writing of the 15 day suspension without pay, "to conduct an investigation into behavior on your part that may violate West Virginia Division of Personnel's Workplace Security Policy. More specifically, it has been reported by employees that you have made statements indicating your desire to bring firearms to work and to harm other employees and/or supervisors." On March 20, 2009, the suspension was extended for an additional ten working days to conclude the investigation.[4] An investigator took statements from employees at the Brooke County Headquarters.

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[4] At the conclusion of this second period of suspension, rather than dismissing Grievant immediately, DOH placed Grievant on a leave of absence to allow him time to try to obtain disability benefits.

16. The week following Grievant's suspension, DOH requested that a uniformed officer sit in his car in the parking lot at the Brooke County Headquarters, and this security was provided. DOH also added a security camera in the parking lot at the Brooke County Headquarters, which allowed Office Assistant Beth Green to monitor vehicles coming onto the site.

17. Grievant provided to Respondent an "Independent Multiaxial Forensic Psychiatric Examination" of Grievant performed by Dr. Anil Ahoudary Nalluri, M.D., in May 2008. In his evaluation of Grievant, Dr. Nalluri found that Grievant "demonstrated a lightly disorganized thought process," "a moderate suicidal risk," decreased concentration, "significantly decreased" memory, "his degree of social judgment was found to be impaired," and that Grievant was a "high homicidal risk now due to his four major mental disorders." Dr. Nalluri concluded that Grievant "is totally and permanently impaired," that "expected results of treatment are considered poor," and that Grievant is not "capable of any gainful, remunerative employment due to his physical and psychiatric restrictions. His psychiatric conditions are chronic and unlikely to improve."

18. Grievant's four major mental disorders were not caused by Grievant's supervisors or co-workers, nor were they caused by his work assignments.

19. The record does not reflect that Grievant requested accommodation for issues associated with his decreased capacity to analyze social situations, properly interact with superiors and co-workers, and control his anger, or that DOH was capable of making accommodation for these mental disabilities.

20. On June 29, 2009, Grievant was dismissed from his employment with DOH, effective that date, for "making threatening statements regarding your desire to shoot or

kill coworkers and/or supervisors. More specifically, several employees have heard you talk about killing coworkers/supervisor, including Craig Sperlazza, David Williams and David Dalesio. You inquired of a coworker who had been in the military where to shoot a person for a fast kill and how it felt to kill someone. You inquired of coworkers about different types of guns. Your actions in this regard are unacceptable in the workplace and present an untenable situation for the agency, given its duty to provide a safe and secure working environment for its employees." In making the determination to discharge Grievant, Mr. Black reviewed the statements taken by the investigator and concluded that Grievant's coworkers felt threatened by him, and he took into consideration the conclusion of Dr. Nalluri that Grievant presented a "high homicidal risk."[5]

21. On August 21, 2002, Grievant received a written reprimand for "use of profanity in the workplace, you failed to work harmoniously with your co-worker, and you acted in a threatening, violent manner towards Ashley Perkins." Grievant had jumped off the roller he was operating and chased Ms. Perkins.

22. On January 5, 2004, Grievant received a three day suspension without pay, which was later reduced to a one day suspension without pay, for "shouting and using obsentities [sic] toward Ms. Green [the office assistant]." Anger management counseling was requested, and Grievant was sent to an interpersonal communication course.

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[5] Grievant's counsel questioned Mr. Black's focus on this conclusion, asking him at the hearing whether this was the only thing he gleaned from this evaluation of Grievant. Certainly this conclusion by Dr. Nalluri is alarming, and directly related to the allegations against Grievant, and required Mr. Black's attention, and that of those close to Grievant.

Grievant attended one day of this training and was then asked to leave because he was shouting obscenities, and the instructor feared Grievant would attack her.[6]

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. *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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.'

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[6] Grievant's counsel elicited testimony from Mr. Black that the preceding evening Mr. Black had seen Grievant smoking what looked like marijuana while he was driving a state owned vehicle, and reported this, causing a search of the truck to be conducted which produced no evidence of marijuana. Mr. Fahey suggested this was a false accusation, which Mr. Black denied. Regardless of whether the accusation was inaccurate, this did not serve to justify Grievant's outburst in this class. It will be noted that documents placed into the record lead the undersigned to conclude that the suggestion that Grievant would smoke marijuana was not baseless.

Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

The West Virginia Division of Personnel ("DOP") has in place a Workplace Security Policy, which is applicable to all state employees. With regard to "Threatening or Assaultive Behavior," it provides as follows:

> 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. . . . In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following:
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> -- the perception that a threat is real;
> -- the nature and severity of potential harm;
> -- the likelihood that harm will occur;
> -- the imminence of the potential harm;
> -- the duration of risk, and/or
> -- the past behavior of an individual.

"[W]ith regard to terminations for cause, and workplace security violations specifically, employers have substantial discretion regarding employment decisions." *Burkhammer v. Dep't of Health and Human Res.*, Docket No. 03-HHR-276 (Nov. 12, 2003).

Respondent demonstrated good cause for Grievant's dismissal. Respondent demonstrated that Grievant engaged in behavior at the workplace which was inappropriate, screaming at co-workers, approaching them in a threatening manner, and becoming so angry that he would go into a rage. Grievant went so far as to threaten to beat co-workers

to death, and to kill them, telling co-workers he was going to shoot particular individuals, a severe and specific threat. Grievant was out of control, and likely incapable of controlling his rage. It is clear that Grievant on many occasions approached various co-workers in a hostile and threatening manner, and that several of his co-workers, having observed his outrageous behavior, were afraid that he would act on his threats. Whether Grievant was serious or not, such threats of violence have no place in the workplace, and Respondent did not abuse its discretion by treating them as serious and removing Grievant from the workplace. *Burkhammer, supra.*

Grievant denied that he had made any statement threatening to bring a gun to work and shoot his co-workers. Grievant stated that he had no desire or intent to hurt anyone, but that he had said it would not bother him if someone shot every one of his co-workers. Grievant stated he does not own a firearm. He stated he did not know why his co-workers had turned on him.

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*.

The undersigned does not find Grievant's statements to be reliable. It is clear that Grievant's capacity to perceive and communicate is impaired by his disability, as is his memory. When he becomes angry, he often, as David Williams stated, goes berserk. While Grievant may not be lying, it would not be surprising that he would not remember making such outrageous statements, and his recall of what he said is not reliable.

This is an unfortunate situation. It is clear that Grievant's escalating anger control issues are directly related to the trauma suffered by him many years ago, and the mental impairment he now has. DOH put up with Grievant's outrageous behavior for many years, and provided him with gainful employment. However, the undersigned has no doubt that Grievant can no longer work effectively for DOH, and that if he were returned to his employment, it would only be a matter of time before he completely lost control and hurt someone. It does not appear that Grievant's behavior is correctable through progressive discipline. While Grievant's attorney suggested in his questioning that there was some possibility that Grievant's behavior could improve with proper psychiatric care, there is no evidence in the record that Grievant has taken any steps to obtain such care.

Grievant argued he was discriminated against as a disabled individual under the Americans with Disabilities Act ("ADA"). It is well-settled that the "Grievance Board does

not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). *Adkins v. Dep't of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005); *Teel v. Bureau of Employment Programs Workers' Compensation Div.,* Docket No. 01-BEP-466 (June 10, 2002). *See Prince v. Bd. of Trustees/W. Va. Univ.*, Docket No. 7-BOT-276 (Nov. 5, 1997); *Keatley v. Mingo County Bd. of Educ.*, Docket No. 95-29-257 (Sept. 25, 1995)." *Ruckle v. Dep't of Health and Human Res.*, Docket No. 04-HHR-367 (Dec. 22, 2005).

Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination" as that term is defined in W. VA. CODE § 6C-2-2(d), includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest, supra.* For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant presented no evidence that any other DOH employee had ever engaged in behavior similar to Grievant's and been treated differently.

The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112. A person making a claim of discrimination under the ADA bears the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. In a typical ADA case, the claimant must prove:

> (1) he was in the protected class;
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> (2) he was discharged;
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> (3) at the time of the discharge, he was performing his job at a level that met his employer's reasonable expectations; and
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> (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

Ennis v. Nat'l Ass'n of Business & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995). Grievant did not present evidence to support a finding that the discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. To the contrary, the continual, specific threats of violence made by Grievant left Respondent no choice but to discharge him in order to maintain a safe workplace. Grievant asserted that he was subjected to a hostile work environment by Respondent, and proper

accommodations were not made for his disability.[7] Even if the undersigned accepted all of Grievant's allegations that Respondent's conduct was outrageous as true, it would not justify Grievant's behavior. "Grievant cited no possible accommodation that would allow his behavior." *Miller v. Higher Educ. Policy Comm'n*, Docket No. 03-HEPC-340 (Jan. 21, 2004).

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without

[7] To the extent that Grievant is asserting that Respondent was required to take some action to accommodate his mental disabilities, there is no evidence in the record that Grievant made any request for such an accommodation, what that accommodation might be, or whether Respondent was able to make such an accommodation. While Respondent was at some point provided with medical evaluations, and in 2009 was provided with a psychiatric evaluation, the only accommodations requested by Grievant which are a part of the record are accommodations for his physical limitations.

wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. "[W]ith regard to terminations for cause, and workplace security violations specifically, employers have substantial discretion regarding employment decisions." *Burkhammer v. Dep't of Health and Human Res.*, Docket No. 03-HHR-276 (Nov. 12, 2003).

4. Respondent demonstrated good cause for dismissal of Grievant from his employment.

5. It is well-settled that the "Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). *Adkins v. Dep't of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005); *Teel v. Bureau of Employment Programs Workers' Compensation Div.,* Docket No. 01-BEP-466 (June 10, 2002). *See Prince v. Bd. of Trustees/W. Va. Univ.*, Docket No. 7-BOT-276 (Nov. 5, 1997); *Keatley v. Mingo County Bd. of Educ.*, Docket No. 95-29-257 (Sept. 25, 1995)." *Ruckle v. Dep't of Health and Human Res.*, Docket No. 04-HHR-367 (Dec. 22, 2005).

6. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the

employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant presented no evidence that any other DOH employee had ever engaged in behavior similar to Grievant's and been treated differently.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Administrative Law Judge

Date: March 10, 2010