THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

M.W.L.,[1]
Grievant,

v. **DOCKET NO. 2012-0533-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, M.W.L., on November 12, 2011, after he was dismissed from his employment by Respondent, Division of Natural Resources. The statement of grievance reads, "[w]rongful termination." The relief sought by Grievant is "[r]einstatement as a Natural Resources Police Officer with full restoration of seniority and benefits."

A level three hearing was held before the undersigned Administrative Law Judge on April 23, 2012, at the Grievance Board's Westover, West Virginia office. Grievant was represented by David L. White, Esquire, and Respondent was represented by Wiliam R. Valentino, Assistant Attorney General. This matter became mature for decision on July 3, 2012, on receipt of the last of the parties' written arguments.[2]

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[1] Because of the nature of the allegations against Grievant, Grievant asked that he be identified only by his initials in the Decision. Respondent did not object to this request, and this request was granted.

[2] The parties had agreed to simultaneous filing of the written arguments, and had agreed to extend the original deadline for filing to June 13, 2012. Grievant's counsel did not submit his written argument on this date, nor did he request an extension of time to do

Synopsis

Grievant was dismissed from his employment by Respondent after Respondent was informed by the Ohio equivalent of the Division of Natural Resources of some issues that had come to light during a polygraph examination conducted as part of Grievant's employment application with that agency. Respondent asserted that Grievant had withheld this information during the hiring process and should have disclosed it to Respondent at that time, and that the failure to do so, as well as the nature of the violations themselves, affected Grievant's credibility and demonstrated dishonesty. Respondent did not demonstrate that Grievant withheld information he should have disclosed during the hiring process, nor did it demonstrate that he would not have been hired had he disclosed the information. Further, the conduct for which he was fired occurred nine years before his dismissal and four to five years before he was hired, when he was a college student, and was so remote in time that there was no rational nexus between the pre-hiring conduct and Grievant's employment. Grievant was an excellent officer during his employment, demonstrating that he had put his adolescent behavior behind him. As to the one incident which occurred while Grievant was employed, Respondent did not prove the charges.

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so until after the deadline for filing had passed, and Respondent had submitted its written proposals. Respondent objected to the late filing on the grounds that Grievant had not shown good cause for failure to file his proposals by the deadline, going so far as to request a hearing to require the showing of good cause. Respondent did not argue that it was prejudiced in any way by Grievant's late filing. Respondent was advised that it could file a response to the late filed written arguments, and was given seven days from receipt to do so. Respondent felt this was an insufficient amount of time to respond, even though Respondent's counsel had time to submit a three page objection to the late filing. Respondent did, however, submit a short response to Grievant's written argument on July 3, 2012. While it would have been preferable for Grievant to have requested an extension of time for filing before the deadline, the undersigned finds that no party was prejudiced by the late filing, and that Grievant's written argument should be accepted as filed.

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

Findings of Fact

1. Grievant was employed by the Division of Natural Resources ("DNR" or "Respondent"), as a Natural Resources Police Officer, in Hardy County, West Virginia. He began his employment with DNR on August 30, 2007.

2. As a Natural Resources Police Officer, Grievant's duties were to enforce hunting, fishing, and litter laws, and to educate the public regarding these laws.

3. Sometime in 2011, Grievant applied for a job in Ohio in natural resources law enforcement. As part of the hiring process, Grievant was required to take a polygraph examination and answer a number of very specific questions related to whether he had ever violated the law. During the polygraph examination Grievant admitted to various violations of the law, some of which occurred before Grievant was 18 years old, and almost all of which occurred prior to his employment by DNR. Grievant believed that the polygraph examination was to be kept confidential, and did not authorize the release of this information. Personnel employed by this Ohio agency informed DNR personnel that Grievant had provided information during his polygraph examination indicating that he had violated the law on several occasions.

4. An investigation into the allegations was conducted by Mark Debord, DNR's Professional Standards Unit Coordinator.

5. By letter dated November 1, 2011, Grievant was notified that he was being dismissed from his employment by DNR Director Frank Jezioro, effective November 16,

2011. The grounds for dismissal were stated as criminal misconduct while employed by DNR and discovery of pre-hiring undetected crimes.

6. The alleged criminal misconduct while employed related to an hunting incident which occurred in 2008 in Delaware, when Grievant killed a buck deer. The dismissal letter states that in addition to the buck being shot by Grievant without a license, he is "still in possession of the mounted head of the illegally killed buck deer, which is a violation of West Virginia law. Given that your primary responsibility as a Natural Resources Police Officer is enforcing hunting and fishing laws, and considering your prior reprimand, this violation is simply intolerable and alone constitutes grounds for dismissal."

7. In 2008, Grievant traveled to Delaware for a few days, and while he was there he went deer hunting with his brother and a friend on the friend's farm. Grievant's friend was an officer with the Delaware equivalent of DNR. Grievant had applied for a reciprocal or complementary hunting license in Delaware in October 2008, but had not received the license. He had called about the license on more than one occasion, and finally called the Director of the Delaware equivalent of the DNR about this, as the Director was a personal friend of his. The Director told Grievant the license was on his desk. Grievant arrived in Delaware on or about November 11, 2008, Veteran's Day, which was a holiday, and he could not pick up his license. Grievant went hunting with his brother and his friend who was the Delaware DNR officer, without the license in his possession, and he shot a large buck that day. The next day he went to the Director's office to pick up his license so he could check the buck, and discovered that the reciprocal license did not include a buck tag. Grievant believed that he could kill a buck with the reciprocal license, but he had not researched the Delaware law on this issue. Grievant told the Director he had killed a buck,

and the Director told him to go buy a license and check the deer in, and Grievant did so. Grievant was not charged with a violation of the law. Grievant had the deer head mounted and brought it back to West Virginia.

8. The allegations of pre-hiring undetected crimes, as set forth in the dismissal letter, were manufacture and sale of false identification cards, illegal sale of a prescription drug called Adderall, and hunting crimes involving spotlighting and illegally killing wildlife in 2003. The dismissal letter states that "[t]his agency cannot ignore your present admissions to multiple crimes, including potential felony offenses, and allow you to remain employed as a law enforcement officer", and that Grievant would not have been hired had he disclosed this information to DNR. "Further, discovery of the failure to disclose undetected crimes irreparably diminishes your credibility with this agency and, potentially, your ability to perform your required duties as a witness in both the state and federal courts." The letter goes on to state that Grievant's conduct "indicates a long pattern of disregard for the very laws you are sworn to enforce", and that "police officers are held to an even higher standard of conduct."

9. Prior to being hired by DNR, Grievant completed an employment application, was administered and passed a polygraph examination, and was subject to a background check. Grievant was not a law enforcement officer at this time, nor had he previously been a law enforcement officer except as a seasonal employee during the summer in Delaware. The polygraph examiner stated that the pertinent areas covered by the examination were "use of alias or incorrect name; automobile collision and traffic violation record; debts; subversive activities; illegal use of drugs; gambling; consumption of alcoholic beverages; employment record; arrests and confinements to jail or other institutions; serious crimes

and illegal sex acts." The polygraph examiner stated that he had met with Grievant and "no information regarding any past criminal activity was disclosed other than what the applicant had previously disclosed in the applicant booklet. . . .no reactions indicative of deception were observed during the [polygraph] examination."

10. On Grievant's employment application with DNR, he was asked to state whether he had "ever been detained, arrested, convicted by police or summoned into court." Grievant answered this question in the affirmative, and listed a charge of underage possession of alcohol, which was dropped. There are no questions on the application related to violations of any law for which he was not detained, arrested, or charged.

11. Part of the polygraph examination by DNR involves the applicant answering a series of questions in writing before the polygraph examination is administered. Grievant admitted in the questionnaire to shoplifting various items of minimal value from 2002 to 2007. Grievant was asked a number of questions regarding illicit sexual activity, arson, kidnapping, burglary, forgery, bribery, and gambling. Grievant was not asked any question regarding whether he had violated any games laws, except for one question which asked him to state whether he had committed "[a]ny act, *as an adult*, of cruelty to any creature or animal which resulted in harm, injury, or death other than legally licensed sport hunting or fishing?" (Emphasis added.) Grievant responded that he had "shot a non-game species (black bird) on several accounts (2000)."

12. Prior to his employment by DNR, in 2003, when Grievant was 18 years old, Grievant and some friends went out in a vehicle after dark to set up deer stands for hunting. Grievant was driving. One of the passengers took a flashlight and a gun, and that person was using the flashlight to spotlight deer, but no deer were killed. Grievant did not

realize that this was a violation of the law until he began his employment with DNR, and Grievant did not use the flashlight to look for deer. On another occasion when Grievant was 18 years old, he and some friends engaged in spotlighting deer in Delaware.

13. None of the questions on the employment application or pre-polygraph questionnaire asked whether the applicant had ever engaged in any activity which would constitute a violation of any law, or specifically, any game law. Grievant did not voluntarily disclose either of these spotlighting incidents when he applied for employment with DNR.

14. Sometime around 2003, while he was in college, on two occasions, Grievant did not check in a deer he had killed. Grievant did not voluntarily disclose this information when he applied for employment with DNR.

15. Prior to his employment by DNR, while Grievant was a freshman in college, he had a prescription for a drug called Adderall.[3] He would sell his pills to other students for a minimal amount per pill.

16. Grievant was asked questions in the pre-polygraph questionnaire to illicit whether he had been involved in the sale of illegal drugs. After being asked to list all illegal drugs he had sold, Grievant then checked the box indicating he had "NEVER sold or delivered any drug at any time." The next sentence following this states, "BEFORE CONTINUING, BE SURE THAT YOU HAVE LISTED ALL ILLEGAL DRUG SALES IN WHICH YOU RECALL BEING INVOLVED." (Emphasis in original.) Grievant did not

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[3] Adderall is a combination of dextroamphetamine and amphetamine and is used as part of a treatment program to control symptoms of attention deficit hyperactivity disorder. It can also be used to treat narcolepsy.

believe that the prescription drug Adderall was an illegal drug, and he did not believe that this line of inquiry related to the sale of a prescription drug. None of the other questions in the application or pre-polygraph questionnaire inquired about the sale of any drug.

17. Grievant was asked on the pre-polygraph questionnaire whether he had ever engaged in "[a]ny act, involving forgery of any writing, document, signature, money, any legal document, license, contract, credit card, check, security agreement, will, deed, or any deed of trust with the intention to defraud or harm any person or business." Grievant answered "no" to this question.

18. Prior to his employment by DNR, in 2002 when Grievant was 17 or 18 years old and in college, he produced and sold fraudulent identification cards on less than 20 occasions to other students for the purpose of using the identification cards to purchase beer for underage consumption. Grievant did not disclose this to DNR during the hiring process. At the time he answered the questions on the pre-polygraph questionnaire, Grievant did not believe that a fake identification card was a forged legal document.

19. One of the questions on the pre-polygraph questionnaire asked Grievant to list "everything you have ever taken which you did not have permission to take." Grievant listed that he had shoplifted various items ranging in value from $1.00 to $6.00 on six occasions.

20. Immediately after he was hired by DNR, Grievant received a written reprimand for a criminal hunting violation. Since that time, Grievant has received good evaluations, and was considered by his supervisors to be a very good, dependable, trustworthy, self-motivated officer. Grievant was the only officer stationed in a county which has two officer positions assigned to it, and capably handled all the issues which

arose in that county, with minimal complaints from the residents. Grievant's supervisor nominated him for the National Turkey Federation Officer of the Year award.

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.' 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).

Grievant was dismissed from his employment when Respondent became aware of various incidents, all but one of which occurred prior to his employment. Grievant argued, among other things, that Respondent had not established a sufficient nexus between Grievant's off-duty activities and his duties. Grievant also pointed out that since Respondent did not make specific inquiries during the hiring process of any officer regarding all but one of the allegations, that there may well be any number of DNR officers currently employed who had engaged in similarly inappropriate conduct before they were hired, but have not suffered any consequence for it. Grievant did not present any evidence, however, that any officer had, in fact, engaged in such conduct. Respondent argued that Grievant had withheld information during the hiring process, and that once it learned of Grievant's prior acts, it could not ignore them or trust him to carry out his duties. Respondent argued that had it known of these various acts, Grievant would never have been hired. Respondent also seemed to suggest that since Grievant had wanted to be a Natural Resources Officer since he was young, that he should have taken care to make sure he complied with all game laws as a child. This argument is irrelevant to the issues at hand, as well as unrealistic.[4]

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[4] Grievant also argued that the Ohio equivalent of DNR violated Grievant's right to privacy and the Federal Polygraph Protection Act when it disclosed the results of Grievant's polygraph examination to Respondent, and that the information used by Respondent to support Grievant's dismissal was therefore obtained illegally. Respondent argued that the Federal Polygraph Protection Act is not applicable to this situation, because government agencies are specifically excluded from its realm. The undersigned is hesitant to delve into the interpretation of this federal law, and given the conclusions reached on the other issues, finds no reason to do so.

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). Simply stated, "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285 S.E.2d 665 (1981).

The Supreme Court reviewed the basis for the *Golden* "rational nexus" rule in the recent decision of *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007). In *Powell* the Court decided that a coach should not have his license to teach suspended for four years because he was convicted of battering his son at home even though the son was a student in the teacher's school system. The court noted that:

> We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards. *Id.* at 68-69, 285 S.E.2d at 669.

Powell, supra, 655 S.E.2d 204, at 209.

As noted in *Golden* and *Powell,* the interest of the employer must be significant enough to overcome an employee's constitutional privacy interest.

Grievant was an excellent employee for over four years, and has been dismissed from his employment primarily because of activities he engaged in before he was an adult, and for which he was never charged or convicted. Some of these activities occurred nine years or more before Grievant's dismissal, and five years or more before he was employed by DNR. Certainly Grievant's pre-adult behavior was not exemplary, but he has put his childhood behind him and become an excellent officer. Respondent had the opportunity to question Grievant's past behavior prior to his employment, and did so. Grievant voluntarily submitted to a polygraph examination, and he passed the polygraph examination administered before he was employed by Respondent. Respondent conducted a background investigation on Grievant which did not uncover any information that was found to be objectionable. Grievant answered the questions asked of him at that time, apparently truthfully. Respondent apparently believes that Grievant should have disclosed every questionable activity in which he was ever engaged in his life, whether Respondent inquired about it or not, and the failure to do so makes him untrustworthy. Colonel David Murphy, Chief of DNR's Law Enforcement Section, opined that Grievant had withheld information. Respondent's asserted expectations are unrealistic. The undersigned would be surprised to find many people who would disclose their inappropriate adolescent conduct unless they were specifically asked. This does not make someone untrustworthy, nor does it amount to withholding information. It is putting your childhood recklessness and stupidity behind you and not letting it completely ruin your future plans as you grow up.

With regard to the specific allegations, Respondent argued that Grievant lied on the pre-polygraph questionnaire when he checked the box stating he had never sold or delivered a drug, when he had, in fact, sold Adderall, which is a drug. Grievant pointed out that this entire section of the questionnaire talks about illegal drugs, and that since he had a prescription for Adderall, it would not be an illegal drug. Respondent's argument is specious. Grievant is quite correct that the questionnaire is clearly focusing on illegal drugs, such as those listed on page 13, including marijuana, hashish, PCP, angel dust, heroin, cocaine, quaaludes, and amphetamines. Grievant was not asked whether he had ever sold any drug for which he had a legal prescription. While Grievant's conduct in college cannot be condoned, Respondent obviously did not think this line of inquiry was important when it hired Grievant, and Grievant was not dishonest in his answer. Respondent is now, in hindsight, changing the rules four years after Grievant was hired, arguing that it "is not willing to sponsor such enormous power in a person willing to profit from illegal, felonious activity." This activity occurred eight to nine years before Grievant's dismissal, when Grievant was 17 or 18 years old. This is too remote in time to meet the rational nexus test, particularly given that the facts demonstrate that this has not, in fact, affected Grievant's ability to perform his duties. There is no indication whatsoever that Grievant has continued to engage in this type of activity, or that he has in any way abused his power as an officer.

The same is true of the spotlighting incidents, and the failure to check deer. There was no reason for Grievant to admit to these indiscretions when he was not asked to disclose them. If Respondent thought it was important to know this information prior to making the hiring decision, which certainly would seem to be a relevant line of inquiry, then

it should have asked questions which would have elicited this information.[5] Now, many years later, Respondent is attempting to change the rules in order to save face after Ohio's more thorough application process uncovered questionable behavior. Respondent produced no evidence that Grievant's failure to observe game laws when he was younger has affected his ability to carry out his assigned duties during the four years of his employment. It will further be noted that retired DNR Officer Sam Brick testified that it had been his experience that anyone who hunts or fishes will at some point violate a game law.

Finally, Grievant did not disclose on his pre-polygraph questionnaire that he had manufactured and sold fake identification cards to fellow students while in college, so that they could purchase alcohol. Mr. DeBord testified that this was a misdemeanor. While Grievant did not believe that this action fit within the question relating to forgery, and therefore did not disclose it, it is clear to the undersigned that Grievant should have disclosed this information. Nonetheless, the undersigned can see how a college student would not view the manufacture and sale of false identification cards as a serious matter, or consider it forgery of a document with intent to defraud or harm. It is not uncommon for individuals who are considered adults for most purposes at age 18 to use a fake identification or someone else's identification because they are not allowed to buy alcohol until they are 21 years old. Grievant's role, of course, was more serious, in that he was actually manufacturing the identification and selling it. However, it is not a foregone

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[5] Respondent asserted that the record reflects that the polygraph examiner would have advised Grievant to err on the side of full disclosure. The undersigned has not found any evidence in the record to support this assertion. The polygraph examiner was not called to testify as to his instructions to Grievant. Grievant, however, testified that the polygraph examiner went over the questions on the pre-polygraph questionnaire with him, and he provided the answers to the questions being asked.

conclusion that he would not have been hired had he disclosed this information since DNR did not find his multiple acts of shoplifting, which he did disclose, to be a problem. Further, this occurred many years ago, and Grievant has moved past this type of college mentality and become a good officer. The undersigned cannot find that Grievant was dishonest in his failure to disclose this information prior to his employment. Further, this incident is now too remote in time to constitute a rational nexus. Grievant has demonstrated through his four years as an excellent employee that his teenage misconduct has not affected his ability to become a good officer.

Notwithstanding all of the above, Colonel Murphy testified that another reason supporting Grievant's dismissal was that Grievant's admissions would have to be disclosed to federal authorities should Grievant ever be needed as a witness in federal court, and, in his opinion, would preclude Grievant from testifying. Respondent further argued that Grievant's actions before his employment and his failure to disclose them during the hiring process rendered him a non-credible witness, and that the Grievance Board has recognized that it is part of an officer's job to testify, and that "'[c]redibility is critical for [natural resources police] officers.'" *Young v. Div. of Natural Resources*, Docket No. 2009-0540-DOC (Nov. 13, 2009). As noted above, the failure to disclose these incidents has nothing to do with credibility. As to the actions themselves, Respondent did not explain how the admissions for which Grievant was fired were different in this regard from the six separate incidents of shoplifting which Grievant disclosed on his application, and which did not affect DNR's decision to hire him. All of these are uncharged violations of the law. The undersigned has been left to discern the distinction without any evidence with which to do so.

The only charge against Grievant which resulted from actions taken during his employment with DNR occurred three years prior to his dismissal, in another state. Respondent argues that Grievant clearly violated Delaware law and that as a law enforcement officer, he had a duty to research and understand the hunting laws in Delaware, including all the rules applicable to reciprocal licenses. Respondent has gone so far as to accuse Grievant of a federal offense for transporting an illegally killed deer across state lines (testimony of Investigator DeBord). However, the fact is that Grievant was never charged with a violation of any law. According to Grievant's testimony, which is the only evidence in the record related to this incident, the Director of the agency charged with enforcing hunting laws in Delaware was well aware of what had occurred, and did not charge him with a violation of the law, and in fact, directed him to go purchase a license and then check the deer in that he had already killed.[6] While Grievant may be guilty of poor judgement, he was not charged with a violation of the game laws of Delaware. Respondent does not have any authority to interpret or enforce the laws of the state of Delaware, nor does the undersigned. The undersigned cannot conclude that this incident rises to the level of good cause for dismissal, despite Colonel Murphy's opinion to the contrary.

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[6] Respondent asserted that Grievant refused to take responsibility and blamed the Director in this instance, as well as his friends in regard to one of the spotlighting incidents. While this assertion is irrelevant to the issues, the undersigned did not observe that Grievant was attempting to blame others for his actions; rather, as Grievant pointed out, he was simply stating the facts. Respondent presented no evidence to dispute Grievant's version of events.

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 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. 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). Simply stated, "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285 S.E.2d 665 (1981).

4. Respondent did not demonstrate that Grievant should have disclosed on his employment application or pre-polygraph questionnaire any of the incidents cited in the dismissal letter, with the exception of the manufacture and sale of false identification cards.

5. Respondent did not demonstrate that had Grievant disclosed that he had engaged in the manufacture and sale of false identification cards to college students for the purpose of purchasing alcohol that he would not have been hired. Further, this activity is so remote in time that there is no rational nexus between it and Grievant's dismissal.

6. Respondent did not demonstrate that Grievant violated the game laws in Delaware in 2008.

7. Respondent did not demonstrate good cause for the dismissal of an excellent employee.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to his position as a Natural Resources Police Officer in Hardy County, and to pay him back pay from the date of his dismissal, plus benefits to which he was entitled during

his dismissal, including retirement contributions and reimbursement for the employer's share of any health insurance payments made by Grievant during this time.

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).

BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: July 27, 2012