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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

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Governor

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**GARY M. SCHMIDT**

**v.**

**Docket No. DOH-88-063**

**WEST VIRGINIA DEPARTMENT OF HIGHWAYS**

**DECISION**

On November 16, 1988, Grievant Gary M. Schmidt, employed by Respondent West Virginia Department of Highways (DOH) as a Highway Equipment Supervisor 3 at \$2199.35 per month, was notified that he was suspended for ten days without pay and demoted to Highway Equipment Supervisor 2 at a monthly pay of \$2100. The letter of notification provided,

The reason for your suspension is gross misconduct, more specifically,

On the evening of October 2, 1988 at the Southeastern Equipment Conference, Canaan Valley, you used foul, insulting and abusive language in the Department's hospitality room and otherwise exhibited conduct which did not project the professional image of the West Virginia Department of Highways required of a person in your position.

On November 25, 1988, Grievant filed his grievance<sup>1</sup>, which is being considered at Level IV pursuant to the expedited grievance procedures of W.Va. Code §29-6A-4(e). A hearing was held January 12, 1989. Proposed findings of fact and conclusions of law were received from the parties on and before February 22, 1989.

The conference referred to in the notification letter was attended by representatives of departments of transportation and/or highways from the southeastern states who were involved in transportation equipment. DOH was hosting the conference and Grievant was in charge of the hospitality room. While the testimony of the witnesses varied in some important respects, there was much agreement in the testimony. The testimony of Danny Gould, a DOH employee and at that time a supervisee of Grievant, who was an uninterested and credible witness, told the basic happenings of October 2nd here involved best since he was with Grievant throughout the afternoon and evening.

The facts of this case as constructed from Mr. Gould's testimony are as follows: He and Grievant arrived at Canaan Valley before noon to set up the hospitality room, where they laid out food they had brought and set up a bar, which the two of them tended. Some conferees and spouses came to

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<sup>1</sup> The grievance was sent to the Commissioner of DOH, who referred it to the West Virginia Education and State Employees Grievance Board on December 2, 1988.

the hospitality room from about 2 p.m. on. About 4:45<sup>3</sup> Mr. Whitley Perkins, Division Director of the Equipment Division of DOH, and his wife came into the room.<sup>4</sup> Although Mr. Perkins left, Mrs. Perkins came up to the bar. Mr. Gould witnessed her and Grievant talking, although he did not hear what Mrs. Perkins said to Grievant. Mr. Gould testified he heard Grievant tell Mrs. Perkins that he didn't take orders; that she was not his boss, and as far as he was concerned, she could "get the fuck out." Mr. Gould stated he did not want to hear any more, so he went into the other room. Mr. Gould testified that after Mrs. Perkins left, Grievant told Mr. Gould that she had criticized the food, saying the meatballs were cold, and that he had told her three times to "get the fuck out."

Thirty minutes later Don Post, Assistant Director of the Equipment Division, and Robert (Vic) Montgomery, Equipment Superintendent of Shop Operations, told Grievant that they had been told by Mr. Perkins for him to leave. Grievant told them he would only leave if the Commissioner told him to do so.<sup>5</sup> Mr. Gould also testified that Grievant

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<sup>3</sup> Most witnesses placed the incident at about 6 p.m.

<sup>4</sup> Mr. Gould testified that Mr. and Mrs. Perkins had been there earlier, when Mrs. Perkins had requested that soda and tonic water be obtained for the bar and two employees of Respondent had gone to fetch the soda and tonic water. No unpleasantness occurred at that time.

<sup>5</sup> Mr. Gould's testimony was not clear on when  
(Footnote Continued)

told him later that he had called Mr. Webb, Chief of Maintenance, and that Mr. Webb wanted Don Post or Vic Montgomery to give him a call. Grievant and Mr. Gould went to the dining room, where Mr. Post and Mr. Montgomery were eating, to relay the message.

Mr. Gould testified that Grievant began drinking after 12:30 p.m. At the time of Grievant's and Mrs. Perkins's confrontation Grievant used a loud, angry tone. Mr. Gould did not know how many drinks Grievant had had.

Mr. Post's testimony corroborated Mr. Gould's in most essential aspects. His testimony differed in that he stated that when Grievant told Mr. Montgomery and him about Grievant's conversation with Mr. Webb, Grievant said Mr. Webb wanted to talk to someone sober. He also testified that he was told that some attendees had been advised not to go to the hospitality room because it was hot and stuffy and someone was drunk there. He passed on the information to Mr. Perkins, who told him to go and tell Grievant to close the room down and to tell him to go home. Because Grievant was on the agenda for the next day, he and Mr. Montgomery asked Mr. Perkins to allow him to stay, but Mr. Perkins refused.

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(Footnote Continued)

Grievant told Mr. Post and Mr. Montgomery this, but those witnesses' testimony made clear that Grievant made the statement when they went to the hospitality room.

Mr. Montgomery's testimony was consistent with Mr. Post's, in particular corroborating Mr. Post's statement that Grievant had stated that Mr. Webb had asked to speak to someone who was sober.<sup>6</sup> Both Mr. Post and Mr. Montgomery testified that, from their observations, Grievant had been drinking in the afternoon.

Mrs. Pat Perkins testified that, in accordance with her husband's request, she was acting as a hostess for the women who were spouses of the attendees. Her testimony on what happened between herself and Grievant is crucial. She testified that when she came into the room about 6 p.m. several women were seated and men were standing. She stated that she struck up a conversation with a woman at the door, and asked her if she had eaten anything. When the woman replied "no," she suggested that the meatballs had been good earlier but may be cool by then. She stated she spoke only to the woman. Nevertheless, when she went to the bar to get a drink, Grievant started his "attack" on her. She stated she did not know what caused it, but it was her opinion that Grievant was inebriated. She stated that he stared at her and said, "Get the fucking hell out of here." She testified she said nothing but, "What did you say?" because she was

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<sup>6</sup> While Mr. Post did not testify about his own call to Mr. Webb made after dinner, Mr. Montgomery testified that immediately after the conversation between Mr. Post and Mr. Webb, made after dinner, Mr. Post told him that, if Grievant did not create any further disturbance, he could leave the next morning.

startled by his response, and he said, "You heard what I said." She said she told him to "cool it" before he said something he regretted, but he repeated his statement and she left. She finally testified that she did not repeat what happened to her husband, because she did not think he should be upset. On cross-examination she denied again that she had told Grievant that the snack bar was no good. She stated that in fact she had commented favorably on the snack bar in the afternoon, and the only negative statement she had made was to the woman. She concluded that Grievant must have overheard that comment.

Mr. Perkins testified he had told his supervisors he wanted everything done "with taste and class." On the incident, he stated that when he and his wife first went to the hospitality room he noticed Grievant talking abnormally and when later he and his wife returned prior to dinner Grievant was talking loudly. Further, Mr. Perkins testified that he was concerned since Grievant had cornered the delegate from Alabama, with whom Grievant was scheduled to make a presentation.<sup>7</sup> He stated that he knew something had to be done, so he told the delegates they should assemble upstairs. Having been told by Mr. Post that delegates were being warned not to go to the hospitality room, he told Mr.

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<sup>7</sup> Mr. Perkins stated that he had a feeling that Grievant would dominate the presentation and he was worried about embarrassment to the delegate.

Post to close down the hospitality room. Finally, he testified that he did not learn of the statements Grievant had made to his wife until the next day. On cross-examination Mr. Perkins stated that one such incident would justify both demotion and suspension.<sup>8</sup> He stated that he requested disciplinary action to the Personnel Department, but did not decide how much.<sup>9</sup>

When Grievant presented his case, several co-workers testified that he was very good at his job. Grievant himself testified that he had spent the evening prior to the convention doing the cooking. His testimony was also consistent with others', but differed notably from Mrs. Perkins's testimony. He stated that she told him that the

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<sup>8</sup> Mr. Perkins stated that October 2nd was not the first time Grievant had been inebriated at "company functions." When asked on cross-examination why, then, had he put Grievant in charge of the hospitality room, he answered that he had asked Grievant two or three times to have a dealer or distributor set up the room, as had been done the year previously, and Grievant had replied, "I'll take care of it."

<sup>9</sup> Mr. Perkins' memorandum of October 7, 1988, DOH Ex. 1, suggests that he supported dismissal, for there he stated,

I find Gary Schmidt's actions disgusting and would like to recommend the sternest disciplinary action that can be leveled. After his deplorable conduct at an Equipment Superintendent's meeting in Parkersburg, then followed by this incident the next time he is in public.

I do not feel this is the type of individual who should represent the Department of Highways or the State of West Virginia.

food was no good and that the bar was not set up properly. He said he told her he had had no problems or complaints and asked her to leave. He admitted that he did tell her to "get the fuck out" three times, as the others had testified. He further stated that he refused to go home because he had worked a month on three presentations he had planned to give. He stated that Mr. and Mrs. Perkins had had quite a few drinks, because they only were drinking Crown Royal, and the bottle had been approximately 2/3 full when they opened the bar and they were the only ones drinking it.<sup>10</sup> He admitted he had been drinking, but denied he was drunk.

It is clear from this record that Grievant did drink too much alcohol to the degree that his actions and judgment were affected and even his perceptions may have been affected. Grievant admitted he had been drinking and the record strongly indicates that he was a dependable worker when not affected by alcohol. A more difficult determination is to assess what actually occurred between Mrs. Perkins and Grievant. While Grievant was not a completely credible witness,<sup>11</sup> Grievant's testimony that Mrs. Perkins criticized his efforts is more credible than Mrs. Perkins's

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<sup>10</sup> Mr. Gould had testified that others were drinking the Crown Royal.

<sup>11</sup> Grievant's perceptions may have been tainted by alcohol and his truthfulness is questionable in some instances. For example, the evidence is clear, although Grievant denied it, that Mr. Webb had asked to speak to someone sober.



testimony that Grievant's outburst was unprovoked. Mrs. Perkins's testimony is inconsistent with Mr. Gould's testimony that he saw Grievant and Mrs. Perkins talking and heard Grievant say to her that he did not take orders from her. Secondly, what Grievant told Mr. Gould immediately after the incident, when it would be unlikely for Grievant to lie, especially if his cleverness was dulled by alcohol, dovetailed with his testimony. Accordingly, it is determined that Grievant's obscene and apparently drunken outburst was provoked to some degree.

Respondent did not submit into the record any disciplinary policy of DOH and no such policy was mentioned at hearing or in the parties' briefs. Further, Respondent's brief does not attempt to define "gross misconduct," the level of misconduct with which Grievant was charged. Rather, Respondent argues simply that an individual can be demoted for cause and further argues,

The Civil Service Commission in its rules and regulations makes no attempt to define cause. The Supreme Court has defined cause for dismissal in numerous cases but to our knowledge has never defined cause for a demotion or a suspension.

The cause for dismissal has been defined in Guine v. Civil Service Commission, 149 W.Va. 461, 141 S.E.2d 364 (1964); W.Va. Department of Corrections v. Lemasters, 313 S.E.2d 436 (W.Va. 1984); as being "misconduct of a substantial nature directly affecting the 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."...

In Blake v. Civil Service Commission, 310 S.E.2d 472 (W.Va. 1983), as well as other cases the Court has found that "Each case must be determined upon the facts and circumstances which are peculiar to that case."

In Blake the Court reduced a dismissal to a suspension. Therefore, in determining whether or not cause exists it appears that each case must stand on its merits.

Inasmuch as a demotion or suspension is a lesser form of disciplinary action, especially in this case where the salary loss is less than \$100 a month, it follows that cause for a demotion or suspension is somewhat less than that for a dismissal though it has not been formulated.

Respondent's Brief 5-6.

Grievant's brief does not dispute the standards relied on by Respondent. However, while Respondent quotes Syllabus Point 1 of Lemasters, Grievant relies on Syllabus Point 3 thereof, which provides,

If the employing authority dismisses or otherwise disciplines a Civil Service protected employee for gross misconduct occurring off the job and not involving State property, such misconduct must be substantial and not frivolous, trivial or inconsequential, and it must be shown that such misconduct reflects adversely upon the employee's ability to perform his job, impairs the efficient operation of the employing authority and bears a substantial relationship to duties directly affecting the rights and interest of the public.

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. See Ramey v. West Virginia Department of Health, Docket No. H-88-005 (Dec. 6, 1988). In order to prove the validity of the charges it is normally necessary for the employer to present its disciplinary policy. In this case, however, since the parties agree that the misconduct must be shown to be "substantial and not frivolous," the lack of a policy is not fatal to Respondent's case. Accordingly, the first issue for resolution is whether

Grievant's misconduct was of a substantial nature, which must be answered in the affirmative, for even Grievant's admitted statements to Mrs. Perkins fulfilled that standard. Secondly, while the language quoted by Respondent applies to dismissals, the requirement referred to therein that the misconduct must directly affect the rights and interests of the public would equally apply to demotions and suspensions, and that nexus is easily established in this case by the fact that the incident occurred at a working convention. In apparently arguing that the incident occurred off the job, Grievant's approach must be rejected, for the incident occurred at a working conference, albeit in the hospitality room.

The final issue is whether the demotion and suspension was an appropriate penalty for Grievant's misconduct. Without any policy showing how an employer sets its penalties, this Board will examine if the penalty is clearly excessive or reflects "an abuse of agency discretion or...an inherent disproportion between the offense and the personnel action." See Douglas v. Veterans Administration, 5 MSPR 280 (1981), where the federal Merit System Protection Board determined that it, like its predecessor the Civil Service Commission, had such authority to review agency penalties and to modify such arbitrary or excessive penalties. Firstly, while Grievant was clearly charged for conduct considered by Respondent to be unprovoked, the evidence showed otherwise. Furthermore, drinking too much alcohol

with disastrous results while fulfilling duties as host of a hospitality room for an entire afternoon is not as severe an offense as, for example, getting drunk and speaking abusively to other individuals during a normal working day.<sup>12</sup> Nevertheless, the heavy drinking, loud talking, and abusive language to Mrs. Perkins, even with provocation, did deserve a rather severe disciplinary action.<sup>13</sup> Either the ten-day suspension without pay or the demotion alone would be rather severe discipline; the two together are clearly excessive for Grievant's offense. The demotion is the less appropriate discipline since Grievant's offense did not reflect on his ability to do his usual day-to-day work. Accordingly, only the suspension without pay is sustained.

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<sup>12</sup> Although Mr. Perkins testified that Grievant need not have actually hosted the hospitality room, there was poor judgment on someone's part in either assigning or allowing Grievant to set up the bar, since Grievant had had a history of drinking too much at functions. See n. 8.

<sup>13</sup> Respondent's proposed findings of fact and conclusions of law suggest that Grievant's responding to Mr. Perkins' order to leave by refusing unless so ordered by Mr. Webb or the Commissioner was unprofessional and therefore should be considered partial support for the suspension and demotion. There was no indication in the evidentiary record that that incident was held against Grievant originally. In any case, Grievant's response was not utterly unreasonable under the circumstances and was not, as Respondent characterizes it, "abusive" to Mr. Post. Grievant's being forced to leave and not being allowed to return must have been very upsetting to Grievant since he was scheduled for several presentations on which he had done a lot of work and his ability to make those presentations the next day was not affected by his behavior on October 2nd.

In addition to the preceding narrative, the following findings of fact and conclusions of law are appropriate.

### Findings of Fact

1. On October 2nd, while serving as host at the hospitality room for a conference for transportation equipment representatives, Grievant drank too much alcohol so that his actions and judgment were affected and perhaps his perceptions also were affected.

2. Grievant exhibited drunken behavior, notably talking loudly, and abusively told Mrs. Perkins that she was not his boss and further told her to "get the fuck out" three times upon being told by her that the meatballs were cold.

### Conclusions of Law

1. Pursuant to the provisions of W.Va. Code §29-6A-6, 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. See Ramey v. West Virginia Department of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. It is Respondent's burdent to present its disciplinary policy, and in the absence thereof, the Board will consider the propriety of the disciplinary action under the principle that Respondent must establish good cause for the disciplinary action. See W.Va. Department of Corrections v. Lemasters, 313 S.E.2d 436 (W.Va. 1984). In order to establish good cause for suspensions or demotions the misconduct must directly affect the rights and interest of the public, and be of a less substantial nature than cause for dismissal. Id. "Each case must be determined upon the facts and circumstances which are peculiar to that case." Blake v. Civil Service Commission, 310 S.E.2d 472 (W.Va. 1983).

3. Respondent established that Grievant's misconduct on October 2nd did affect the rights and interests of the public, in that the misconduct was at a working conference.

4. When no disciplinary policy is presented by an employer, this Board will examine whether the penalty is clearly excessive or reflects "an abuse of agency discretion or an inherent disproportion between the offense and the personnel action." See Douglas v. Veterans Administration, 5 MSPR 280 (1981). See also W.Va. Code §29-6A-5(b).

5. Punishment of both a ten-day suspension without pay and demotion was clearly excessive, and demotion is the less appropriate discipline since Grievant's misconduct did not affect his ability to do his usual day-to-day work.

Accordingly, the grievance is **GRANTED IN PART**. Respondent is ordered to reinstate Grievant to Highway Equipment Supervisor 3 and to pay him all lost wages resulting from the demotion and any and all other benefits due him. In all other respects, the grievance is **DENIED**.

Either party or the West Virginia Civil Service System may appeal this decision to the Circuit Court of Upshur County and such appeal must be filed within thirty (30) days of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of your intent to appeal so that the record can be prepared and transmitted to the appropriate Court.



**SUNYA ANDERSON  
HEARING EXAMINER**

DATED: March 31, 1989