

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**FRANK GEORGE HUTTON,  
Grievant,**

**v.**

**Docket No. 2018-0017-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

## **DECISION**

Frank George Hutton, Grievant, was employed by Respondent, Division of Highways (“DOH”), as a Transportation Engineering Technician-Project Inspector. Mr. Hutton filed a level three form for an expedited grievance dated July 7, 2017.<sup>1</sup> Grievant alleges that his employment was terminated based upon false accusations following an improper investigation. He also asserts that he was not given due process prior to his dismissal.<sup>2</sup> As relief, Grievant seeks reinstatement at the same pay with restoration of all benefits. Grievant also noted that he “Will not oppose a 30 day Suspension from the day of Termination.”<sup>3</sup>

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on October 17, 2017. Grievant appeared *pro se*, and Respondent was represented by Xueyan Palmer, Esquire, DOH Legal Division. This

---

<sup>1</sup> Pursuant to WEST VIRGINIA CODE § 6C-2-4(a)(4), employees may file a grievance directly at level three for specific causes including dismissal from employment.

<sup>2</sup> This is a summary of Grievant’s statement of grievance which included a one-page typed attachment. The full grievance statement is in the record and incorporated herein by reference.

<sup>3</sup> This quote is set out herein as it appeared on the grievance form.

matter became mature for decision on November 16, 2017, upon receipt of the last post-hearing submission.

### **Synopsis**

Grievant was dismissed from employment for operating an agency-owned vehicle for personal pursuits, transporting a person who was not a state employee in the vehicle without business necessity, removing the license plate from the vehicle to elude discovery of its personal use, and having controlled substances in the agency owned vehicle. Grievant had been previously suspended for unauthorized use of an agency-owned vehicle to transport a person who was not an agency employee.

Grievant admitted to all the allegations except possession of a controlled substance. He alleged that he knew nothing of the drugs and syringes found in the car and that they could have belonged to the person to whom the vehicle is normally assigned. He also argued that he was denied due process.

Respondent proved the allegations which were the basis for terminating Grievant's employment except the possession of drugs and paraphernalia. Respondent complied with the Division of Personal *Administrative Rule* when terminating Grievant's employment. Given Grievant's prior offence, dismissal was justified.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Frank George Hutton, Grievant, was employed by Respondent, Division of Highways ("DOH"), as a Transportation Engineering Technician-Project Inspector. He has been employed by the DOH since September 1, 2010.

2. Prior to joining the DOH Grievant spent twenty years in military service. He retired from the military service in 2010.

3. Early on June 19, 2017, Grievant drove a DOH-owned vehicle to a house in Mann West Virginia. There he picked up a bag of clothes and other items that belonged to his girlfriend.<sup>4</sup>

4. Later that day, Grievant got into the vehicle owned by the DOH and went to his girlfriend's home to pick her up. With his girlfriend in the vehicle, Grievant drove to Monitor, West Virginia, ostensibly to see a woman about rings which had been stolen from his residence.<sup>5</sup>

5. Grievant was unable to find the woman at her usual residence and returned to the DOH vehicle. The girlfriend then left the vehicle and went to enquire with the neighbors concerning the woman's whereabouts. Grievant remained in the vehicle which was parked just off the road.

6. While his girlfriend was out of the vehicle, Grievant got out and removed the license plate from the DOH vehicle because he was afraid someone would take a picture of the DOH-owned vehicle which was being used for private purposes, and post it on Facebook.<sup>6</sup>

7. Shortly thereafter, a State Police Officer pulled off the road behind the vehicle Grievant was sitting in and asked him a number of questions, including why he had no license plate on the vehicle. The officer went back to his vehicle. When he

---

<sup>4</sup> The girlfriend previously lived at the Mann residence and the occupant had put her belongings out on the porch to be picked up.

<sup>5</sup> Grievant's written statement and level three testimony.

<sup>6</sup> *Id.*

returned, he asked Grievant again about the lack of a license plate on the vehicle. Grievant replied that it was a State Vehicle that he was not permitted to have at that location so he removed the tags.<sup>7</sup>

8. The officer asked Grievant to step out of the car and searched him for weapons. The girlfriend had returned and the officer checked her as well. He then asked Grievant if there were any drugs or weapons in the vehicle. After Grievant responded “no” and consented to a search, the officer searched the vehicle and found five pills concealed in a flashlight which the officer identified as Clonazepam. He also found several unused syringes in a black plastic bag.

9. Grievant denied knowledge of the drugs and syringes. The vehicle was usually assigned to another DOH employee. Grievant noted that the usual driver of the vehicle was diabetic so the needles probably belonged to him.<sup>8</sup>

10. The State Police Officer arrested Grievant and his girlfriend for possession of a controlled substance as set out in WEST VIRGINIA CODE § 60A-4-401(c).<sup>9</sup>

11. A Criminal Judgement Order dated September 11, 2017, was signed by Magistrate Joseph Mendez dismissing the charge of possessing a controlled substance which had been brought against Grievant. The notation, “co-defendant accepted responsibility” was typed on the Order form.<sup>10</sup>

---

<sup>7</sup> *Id.*

<sup>8</sup> No one disputed that the usual driver of the State-owned vehicle was diabetic but there was no evidence that he had to inject insulin as part of his treatment.

<sup>9</sup> Respondent Exhibit 4, a Criminal Complaint signed by the officer on June 19, 2017, and the Magistrate on June 20, 2017.

<sup>10</sup> Grievant Exhibit 2.

12. Grievant was previously suspended without pay for five working days for driving a State-owned vehicle for personal business. The letter issuing this suspension was dated April 19, 2016. Grievant used the vehicle on the weekend of January 22, 23, and 24, 2016, and accumulated between 125 and 150 personal use miles. During this time, Grievant was transporting a different girlfriend who was not employed by the DOH.

13. A private citizen posted a picture of the DOH vehicle assigned to Grievant on Facebook while it was parked at a private residence in what was described as “an area known or drugs.”<sup>11</sup> (Respondent Exhibit 5).

14. In the suspension letter, Grievant was warned that future violations would result in “further disciplinary action up to and including termination.” *Id.* Grievant did not contest this suspension.

15. By letter dated June 21, 2017, Grievant was suspended pending an investigation into the allegations that he had been arrested while using a State-owned vehicle to conduct personal business.

16. Grievant received a letter dated June 30, advising him that his employment was terminated for gross misconduct. Specifically, it was noted that Grievant had driven a State vehicle for personal reasons to the area of Monitor Hill which was described by the State Police officer as a known area for drug trafficking. It was also noted that Grievant removed the license plate from the vehicle to intentionally conceal his personal use of a State vehicle and he was subsequently arrested at that time for possession of a controlled substance.

---

<sup>11</sup> Grievant took the license plate off the State car eighteen months later to avoid a repeat appearance on social media.

17. The letter also stated that Grievant would not be given a predetermination conference because he was dismissed for gross misconduct.

18. On July 3, 2017, Grievant called Kathleen Dempsey, DOH Director of Human Resources. He explained his version of the events and asked that the dismissal be rescinded. Director Dempsey denied that request.

### **Discussion**

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

*W. Va. Dep't of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent State employee when his employment was terminated. Permanent State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights

and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Grievant was dismissed for alleged gross misconduct. He is accused of: 1) using a State vehicle for personal use; 2) allowing a person not employed by the agency to ride in the State vehicle without a business-related purpose; 3) taking the license plate off the State vehicle to conceal the fact that he was using it for personal reasons; 4) parking the State vehicle in an area allegedly known for drug trafficking; 5) and, being arrested for possession of a controlled substance while occupying a State vehicle. Grievant was previously issued a five-day suspension for committing the first two actions listed above.

Grievant does not deny that he was transporting a person not employed by the DOH in a DOH vehicle while pursuing personal business. Nor does he deny removing the license plate from the vehicle to prevent it being recognized as a DOH vehicle in an area where no DOH business was being conducted.

Grievant argues that there is not proof the area where he was parked was known for drug trafficking and the possession charge was dismissed. If these allegations are removed, Grievant opines, the charges fall short of gross misconduct and the penalty imposed is out of proportion to his misconduct. Grievant also asserts that he was denied due process because he was not given a predetermination conference prior to the implementation of any discipline.

The only evidence regarding the area where Grievant was parked came from the Criminal Complaint completed by the State Police officer who described it as “a known area for drug trafficking.” The evidence is hearsay and the State Police officer was not called to testify. Additionally, being parked in that area is not sufficient to infer that Grievant was participating in such activity. Its only value is to help confirm that Grievant had driven the DOH vehicle to a residential area where he was not conducting activity related to his employment.

Similarly, Grievant’s arrest without conviction or a finding of probable cause is not helpful evidence that he committed the act with which he was charged. Accordingly, the issue is whether Grievant’s remaining misconduct amounts to “gross misconduct.”

Gross misconduct “implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.” *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010); *Poke v. Human Rights Commission*, Docket No. 2014-1196-HRC (Mar. 18, 2015); *Wilson v. W. Va. Tax Dep't*, Docket No. 2017-2172-DOR (Oct. 17, 2017).

Grievant had been trained on the appropriate use of vehicles owned by the DOH. (Respondent Exhibit 7). The DOH *Administrative Operating Procedures*, Section *Equipment*, states the Equipment Operator:

. . . Must not allow non-employees to ride in the equipment unless the purpose of riding is based on a legitimate business reason. . .

*Id.*

Grievant was fully aware of the expectation that he only uses a DOH vehicle for job-related activities and that he could not allow non-employees to ride in the vehicle for reasons not related to business. He had been suspended for doing this very activity approximately eighteen months earlier. Yet, he willfully and intentionally committed the same policy violation. The willfulness of this act is accentuated by the fact that he removed the license plate to avoid detection.<sup>12</sup> This activity demonstrates a willful and wanton disregard of the employer's standards and meets the definition of gross misconduct.

Given the deliberate nature of Grievant's disregard of Respondent's policy, Respondent cannot reasonably trust him to follow this or other mandatory policies in the future. Respondent proved that Grievant's dismissal for gross misconduct was appropriate.

Grievant next argues that he was denied due process when Respondent decided to dismiss him prior to holding a predetermination conference. The Division of Personnel *Administrative Procedures* related to dismissing State employees states the following:

12.2.a. An appointing authority may dismiss any employee for cause. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:

12.2.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal, **provided that a conference is not required** when the public interests are best served by withholding the notice or **when the cause of the dismissal is gross misconduct.** (Emphasis added).

---

<sup>12</sup> Grievant alleged that he removed the license plate to protect the agency from embarrassment of once again having a DOH vehicle on Facebook when it was being used for personal reasons. The better way to protect the agency from such embarrassment would have been for Grievant to simply follow the policy.

W. VA. CODE ST. R. § 143-1-12.2.a.

Respondent complied with the administrative rule when notifying Grievant of his dismissal for gross misconduct. Grievant was afforded the right to contact Director Dempsey by telephone “for the purpose of communicating any reasons why” he felt the dismissal was unwarranted. (Respondent Exhibit 2). Grievant called Director Dempsey shortly after receiving the dismissal letter and was given an opportunity to fully discuss his actions.

Finally, Grievant asserts that termination of his contract was disproportionate to his misconduct. He believes a thirty-day suspension would have been more reasonable. “The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent disproportion between the offense and the personnel action.” *Hudson v. Dep’t of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). “Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis.” *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep’t of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Respondent could have given Grievant an extended suspension rather than terminating his employment but that was not required. This is Grievant’s second violation of the same policy in an eighteen-month period. More importantly, he was fully aware that

he was violating the policy and took deliberate steps to avoid detection of his misconduct. Given the willful nature of Grievant's conduct, Respondent's decision was not clearly excessive. Accordingly, the Grievance is DENIED.

### **Conclusions of Law**

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Permanent State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. Gross misconduct "implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108

(Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010); *Poke v. Human Rights Commission*, Docket No. 2014-1196-HRC (Mar. 18, 2015); *Wilson v. W. Va. Tax Dep't*, Docket No. 2017-2172-DOR (Oct. 17, 2017).

4. Respondent proved by a preponderance of the evidence that Grievant's misconduct constituted to gross misconduct and terminating Grievant's employment was justified.

5. The Division of Personnel *Administrative Procedures* related to dismissing State employees states the following:

12.2.a. An appointing authority may dismiss any employee for cause. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:

12.2.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal, **provided that a conference is not required** when the public interests are best served by withholding the notice or **when the cause of the dismissal is gross misconduct**. (Emphasis added).

W. VA. CODE ST. R. § 143-1-12.2.a.

6. Respondent complied with the administrative rule when they notified Grievant of his dismissal for gross misconduct.

7. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

8. Grievant did not prove that mitigation of the penalty imposed was required or appropriate given the totality of the circumstance.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: January 22, 2018.**

---

**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**