

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DAVID BOSSERMAN,  
Grievant,**

**v.**

**Docket No. 2021-2237-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

**DECISION**

Grievant, David “Dudley” Bosserman, was dismissed from his employment with Respondent, Division of Highways, effective January 27, 2021. On February 25, 2021, Grievant grieved his dismissal directly to level three, pursuant to West Virginia Code § 6C-2-4(a)(4). As relief, Grievant requests reinstatement.

A level three hearing was held before the undersigned on February 7, 2022, via an online platform. Grievant was self-represented. Respondent appeared by Kathryn Hill, Human Resources Manager, and was represented by Keith Cox, Esq. This matter became mature for decision on March 18, 2022. Each party submitted Proposed Findings of Fact and Conclusions of Law (PFFCL).<sup>1</sup>

**Synopsis**

Grievant was dismissed for timekeeping and work conduct violations. Respondent proved that Grievant regularly spent worktime at a shoe store, once went hunting with a coworker during work, processed timesheets for that occasion as an eight-hour workday, and took a firearm to work after being reprimanded against it. This constitutes misconduct and good cause for dismissal. Accordingly, this grievance is DENIED.

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<sup>1</sup>Grievant’s PFFCL was titled, *Grievant; David Bosserman Employee Status Exempt vs Non-Exempt*.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant was employed as a Transportation Engineer Technologist by Respondent, West Virginia Division of Highways (DOH), in District Eight.

2. As the District Eight survey crew chief, Grievant was the immediate supervisor of the four employees on that crew. (Respondent's Exhibits O and V)

3. As part of his supervisory duties, Grievant regularly signed timesheets for crew members. (Grievant's testimony at recording position 4:24:30)

4. Grievant's duties did not include overseeing use of State vehicles by crew members. (Respondent's Exhibits V and O, page 5)

5. Andrew Thomas was employed as a Transportation Engineer Associate and was a member of the District Eight survey crew.

6. At 8:00 a.m. on February 11, 2020, Grievant met Mr. Thomas and Mr. Thomas' father in the District Eight facility parking lot. A hunting dog and a covered long gun were transferred through the parking lot from Grievant's personal vehicle to the father's vehicle. (Testimony of Douglas Thompson and Daniel Mallow & Respondent's Exhibit F)

7. Previously, on June 3, 2019, a firearm belonging to Grievant was discovered in the State vehicle assigned him. On July 12, 2019, Grievant was issued a three-day suspension for violating the Workplace Security Policy. (Respondent's Exhibit N)

8. Due to this prior reprimand, Grievant knew on February 11, 2020, that having a gun in the work parking lot was a violation of the Workplace Security Policy. (Respondent's Exhibit O, page 29)

9. Grievant went rabbit hunting for the rest of the morning on February 11, 2020, with Mr. Thomas and Mr. Thomas' father. (Mr. Thomas' testimony at recording position 2:03:33)

10. Thereafter, Grievant signed his own timesheet and approved one completed by Mr. Thomas showing they had worked an eight-hour shift on February 11, 2020.

11. Work hours in District Eight are normally from 7:30 a.m. to 4:00 p.m. The start time is anywhere between 6:30 a.m. and 8:30 a.m. An employee is expected to adhere to a given schedule but can obtain permission to deviate from this schedule. (Testimony of Steven Schumacher, Grievant's supervisor)

12. There was no evidence that either Grievant or Mr. Thomas were authorized to deviate or did in fact deviate from this schedule on February 11, 2020.

13. For a period during the summer of 2020, Grievant regularly hung out during work at a shoe store for about an hour a day. (Testimony of Investigator Zirk and Mr. Thomas & Respondent's Exhibit A)

14. Mr. Thomas frequently engaged in private lawn mowing jobs while on State work time.

15. Mr. Thomas regularly reported this as work time on timesheets submitted to Grievant for approval.

16. Grievant signed Mr. Thomas' timesheets on these and many other occasions. There is no evidence that Grievant had personal knowledge as to how Mr. Thomas spent his work time since they went long stretches of not working together or seeing each other. Also, Mr. Thomas would submit many weeks of timesheets at once to Grievant. (Mr. Thomas' testimony)

17. There were many personal items in the garage and shared office space used by the District Eight survey crew. (Testimony of Mr. Thomas and District Eight Safety Officer, Melinda Foster, now known as Melinda Mastrogiuseppe)

18. The evidence was insufficient to support Respondent's allegations that these items belonged to Grievant or that Grievant lived in the office during his divorce.

19. Jeffrey Zirk is an Investigator with Respondent's Office of Investigations.

20. On May 19, 2020, Investigator Zirk was assigned to investigate allegations that Grievant and Mr. Thomas engaged in personal activity during work, fraudulently reported work time, and improperly used State vehicles. (Respondent's Exhibit A)

21. Dirk Stemple is a Chief Investigator and assisted in the investigation.

22. The investigators conducted interviews and obtained signed statements from witnesses.

23. Doug Thompson was employed as an investigator at the same facility as Grievant. On May 22, 2020, Mr. Thompson provided a signed statement attesting that he saw Grievant and Mr. Thomas transfer a hunting dog and a long covered object between personal vehicles in the facility parking lot on February 11, 2020. (Respondent's Exhibit F)

24. David Shaffer and Daniel Mallow were also employed at the same facility as Grievant. On June 11, 2020, they provided signed statements attesting that they saw Grievant and Mr. Thomas transfer a hunting dog and what appeared to be a covered long firearm between personal vehicles in the facility parking lot on February 11, 2020. (Respondent's Exhibit F)

25. On June 11, 2020, a GPS tracking device was attached to Grievant's State vehicle and tracked Grievant's whereabouts for just one workday, as Grievant was off work injured for the rest of the tracking period. The tracker showed that Grievant spent 21 minutes at a shoe store. (Investigator Zirk's testimony & Respondent's Exhibit A)

26. On July 1, 2020, Ms. Foster provided a signed statement attesting that she inspected the survey crew building with a Brick Street Insurance representative on September 17, 2018, and found personal items including sleeping bags, clothing, a refrigerator, food, truck wheels and tires, golf clubs, bicycles, etc. Her statement asserts that Mr. Shaffer said Grievant and Mr. Thomas were staying in the office occasionally during their divorces. Ms. Foster wrote that she conducted another safety inspection on December 10, 2019, and found many personal items stored in the office, along with a cat, cat food, and a State road sign covering a window. Ms. Foster took pictures of the items. She also attested that Mr. Thompson, Mr. Mallow, and Mr. Shaffer told her that Grievant carried a long gun through the parking lot on February 11, 2020. (Respondent's Exhibit F)

27. Mr. Thomas was interviewed on August 6, 2020. In response to questions about Grievant residing in the office, Mr. Thomas told investigators that he "[n]ever physically saw him [Grievant] sleep there, stay there, but I mean, he was there late. I

mean, I'd go in ... and he'd still be working on something. But to ever see him physically sleep there, no." (Respondent's Exhibit M, page 8)

28. On the issue of whether Grievant owned the personal property in the facility, Mr. Thomas had the following exchange with investigators:

**Investigator Zirk (JZ):** Uh, you think some of that other personal stuff that I talked about it, was that his?

**Mr. Thomas:** Could have been. Yeah, I mean, I mean.

**Investigator Stemple (DS):** We know it's his. We know it's his.

**Investigator JZ:** You—

**Mr. Thomas:** Correct.

**Investigator JZ:** You're fairly certain it's his. Okay.

**Investigator DS:** We need you to say yes or no. You know the stuff was his, correct?

**Mr. Thomas:** Well, it wasn't mine. So, yeah.

(Respondent's Exhibit M, page 8)

29. On the issue of whether Grievant had a firearm in his vehicle, Mr. Thomas had the following exchange with investigators:

**Investigator JZ:** Okay. Dudley [Grievant] has some sort of firearm in his vehicle.

**Mr. Thomas:** Okay.

**Investigator JZ:** Am, am I correct so far? I mean—

**Mr. Thomas:** I would assume, yes, because when we arrived to go hunt, he has a gun. I assume he brought it from Point A because it wasn't my dad's gun.

**Investigator JZ:** Okay.

**Mr. Thomas:** I don't rabbit hunt with a gun.

**Investigator JZ:** Your, your father pulls in.

**Mr. Thomas:** Okay.

**Investigator JZ:** No, am I on track so far?

**Mr. Thomas:** I mean, I'm not sure on the exact date, but—

**Investigator JZ:** Yeah. But I mean this incident happened. Okay. Your father pulls in the pickup truck, uh, you, Dudley gets his dog out of his personal vehicle, puts it into your father's truck.

**Mr. Thomas:** I would say so, yes.

**Investigator JZ:** Okay. Dudley gets a firearm out of his vehicle and puts it in your father's truck.

**Mr. Thomas:** I would assume so. I mean, I didn't witness that happening. The dog, yes. Gun?

**Investigator JZ:** How, how are you going to see him put a dog in there, then--

**Mr. Thomas:** Cause I was already in the vehicle.

**Investigator JZ:** Well, does not the gun have to come in while you're in the vehicle?

**Mr. Thomas:** No, I think he put it in the back of the truck.

**Investigator JZ:** So he did put it in the back—the, you're talking about the bed of the truck.

**Mr. Thomas:** I assume—Yes. So I assume the bed of the truck.

**Investigator DS:** The gun wasn't in the back of the truck when your dad showed up.

**Mr. Thomas:** No.

**Investigator DS:** And then when you left, it was there.

**Mr. Thomas:** It was there.

**Investigator DS:** And you didn't put it there.

**Mr. Thomas:** No, sir.

**Investigator DS:** And it was you, your father, and Dudley.

**Mr. Thomas:** Yes.

**Investigator DS:** So that means the only other person was Dudley.

**Mr. Thomas:** Correct.

(Respondent's Exhibit M, pages 10 and 11)

30. Grievant was interviewed by investigators on September 9, 2020, over various allegations including that he lived in the office during his divorce, stored personal items there, hung out in a shoe store during work, and had a firearm in his vehicle in the facility parking lot before he went hunting on February 11, 2020.

31. Grievant told investigators that, while he never resided at the office, he slept there at times when he worked late, kept his bicycle at the office when he rode to work, at times brought his hunting dog so he could go on hunting trips from the office, and regularly hung out in a shoe store for about an hour a day. (Respondent's Exhibit O, pages 8 and 29, & Investigator Zirk's testimony)

32. Investigators extensively questioned Grievant on the firearm allegation from February 11, 2020. They repeated witness statements about the firearm and gave Grievant an opportunity to provide an explanation. Grievant told investigators that he did not have a firearm in the parking lot on February 11, 2020. (Grievant's Exhibit O)

33. On October 5, 2020, Mr. Zirk completed an Investigative Report which substantiated the allegations that Grievant and Mr. Thomas engaged in timekeeping fraud and improper use of State equipment. The Report did not reach a conclusion on some of the specific alleged violations, such as residing at the facility and having a firearm. (Respondent's Exhibit A)

34. The Investigative Report referenced the West Virginia Division of Highways Administrative Operating Procedures Section III, Chapter 6, which states in relevant part:

III. DISCIPLINARY ACTION ...

B. TYPES OF DISCIPLINARY ACTION ...

1. Oral Reprimand: Examples of poor performance or misconduct that my warrant oral reprimand in response to a single performance issue or instance of misconduct include but are not limited to the following: ...
  - c. Failure to notify of absence prior to start of workday;
  - d. Unauthorized leave;
  - e. Wasting time; ...
  - l. Failure to keep equipment/work area clean; ...
2. Written Reprimand: ...
  - b. Failure to report for regular or overtime duty as required;
  - ...
  - e. Safety violations;
  - f. Leaving assigned work area without permission; ...
5. Dismissal: An employee may be dismissed for cause, which requires that it be based on something of a substantial nature directly affective (sic) the rights and interests of the public rather than trivial violations of statute or official duty without wrongful intention.



Examples of poor performance or misconduct that may warrant dismissal in response to a single performance issue or instance of misconduct include but are not limited to those for which the imposition of a lesser penalty would be warranted and the following: ...

c. Theft or dishonesty; ...

i. Unauthorized use of state vehicles, property, or equipment; ...

(Respondent's Exhibit S)

35. The Investigative Report did not mention the policy on firearms.

36. After reviewing the Investigative Report, District Eight administrators James Rossi, Steve Schumacher, and Angela Brochart recommended that Grievant be dismissed. Central Human Resources reviewed the recommendation and relevant records and agreed that Grievant should be dismissed.

37. On November 16, 2020, Grievant was provided a Form RL-544 detailing factual allegations and policy violations and recommending his dismissal. Grievant was given an opportunity to respond. (Respondent's Exhibit Q)

38. The Form RL-544 did not mention the alleged firearm infraction.

39. On November 19, 2020, Grievant provided a written response.

40. By letter dated January 13, 2021, Respondent notified Grievant of his dismissal for gross misconduct, effective January 27, 2021. (Respondent's Exhibit P)

41. The letter provides the following as the basis for dismissal:

The reason for termination is your failure to meet DOH standards of work performance and conduct and Fraudulent reporting of time. More specifically, but not limited to:

An internal investigation, conducted in September 2020 revealed that you have conducted personal activities during work hours, submitted intentional and fraudulent statements of work hours, and improper use of state equipment for

personal gain and willfully and intentionally allowed one or more employees under your supervision to continuously violate policies. These consist of hunting, visits to friends and use of state equipment for personal gain during normal work hours was documented.

As an example, on February 11, 2020, in which you did not deny, you and your employee left the facility on this morning and went rabbit hunting on the Brushy Fork Road in Buckhannon, WV. You intentionally and fraudulently reported 8 work hours for this day. You also admitting (sic) to spending excessive time visiting a friend during normal work hours by use of your state issued vehicle.

42. While the dismissal letter does not allege that Grievant had a firearm at work or that he violated the firearm policy, it does allude to unspecified allegations “not limited to” the examples given therein.

43. Grievant does not claim he was denied due process for lack of notice on any allegation or policy infraction.

44. While Respondent did not submit a copy of the Workplace Security Policy into evidence, it presented testimony on the firearm policy and covered the prior firearm incident that notified Grievant of the policy. It also provided detailed evidence on the firearm incident from February 11, 2020.

45. The Workplace Security Policy prohibits employees from having firearms on State property, including State vehicles, but allows for firearms in personal vehicles on State property if the firearms are locked up out of view. (Kathryn Hill’s testimony)

46. Mr. Thomas testified that Grievant did not transfer a firearm in the work parking lot and that his father supplied the firearms for hunting on February 11, 2020.

47. Mr. Thompson and Mr. Mallow testified that they saw a long, covered object being transferred from Grievant’s vehicle and that the object could have been a firearm.

48. While Grievant testified at the level three hearing, he did not admit or deny that he had a gun in the parking lot on February 11, 2020. He evaded the issue by testifying that the long, covered object seen in the parking lot that day could have been any number of things other than a firearm, including survey equipment and a walking stick.

49. Mr. Shaffer was available but did not testify.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "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 & 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.*

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or

the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

The dismissal letter claimed Grievant engaged in fraudulent timekeeping and failed to meet its standards of work conduct, “more specifically, but not limited to,” personal activities during work, fraudulent timekeeping, personal use of state equipment, and intentionally allowing subordinates to continuously violate policies. It also alleged that on February 11, 2020, Grievant went hunting with Mr. Thomas during work, fraudulently submitted their timekeeping for eight hours of work that day, regularly hung out at a shoe store during work, and used State equipment for personal gain. At the hearing, Respondent further asserted that Grievant resided in his office during his divorce, stored personal property at the work facility, allowed subordinates to violate the State vehicle use policy, and brought a firearm to the facility parking lot despite prior discipline alerting him this was improper.

Respondent points to its Administrative Operating Procedure to highlight the impropriety of the alleged misconduct and provide applicable examples. These examples include theft or dishonesty; unauthorized use of state vehicles, property, or equipment; failure to notify of absence prior to start of workday; unauthorized leave; wasting time; failure to keep equipment/work area clean; failure to report for regular or overtime duty as required; safety violations; and leaving assigned work area without permission. The policy reflects caselaw in stating that “[a]n employee may be dismissed for cause, which requires that it be based on something of a substantial nature directly affective (sic) the rights and interests of the public rather than trivial violations of statute or official duty without wrongful intention.”

Respondent also claims that Grievant violated the Workplace Safety Policy in possessing a firearm. Respondent did not submit this policy into evidence. Nevertheless, the July 12, 2019, suspension letter for the first firearm infraction put Grievant on notice that the Workplace Security Policy prohibits employees from having a firearm at work, including the work parking lot. Grievant revealed his ongoing awareness of this prohibition in his evasiveness on the issue during the hearing and investigative interview.

Addressing the uncontested allegations, Grievant admits that he hung out at a shoe store for about an hour a day while working near Beverly. While Grievant never indicated how long this lasted, Mr. Thomas testified that the survey crew worked near Beverly for a few months during the summer of 2020. Thus, Respondent proved that Grievant regularly wasted time that summer. While one incident of wasting time would normally warrant an oral reprimand under Respondent's disciplinary policy, a summer's worth of reoccurring incidents combined with other infractions could warrant more severe discipline.

Grievant also admits that he went rabbit hunting with Mr. Thomas and Mr. Thomas' father the morning of February 11, 2020. Grievant does not contest that he signed Mr. Thomas' timesheet for February 11, 2020, or that he submitted one for himself showing each worked eight hours that day. Rather, Grievant argues that he was an exempt employee and therefore not eligible to supervise more than one employee, implying that this negates any alleged impropriety for his supervisory miscues. Grievant implies that this absolves him of any impropriety in approving Mr. Thomas' timesheet to reflect an eight-hour workday on February 11, 2020, after they went hunting. Grievant also argues that when they finished hunting, they still had sufficient time to put in an eight-hour

workday. Grievant testified at the level three hearing but avoided affirming or denying that he worked eight hours after he finished hunting, perhaps deeming it to be Respondent's burden.

Respondent met its burden by showing that the typical eight-hour workday starts between 6:30 a.m. and 8:30 a.m. and that to vary from this schedule an employee must get prior approval. It also proved that Grievant signed timesheets covering an eight-hour workday for himself and Mr. Thomas for February 11, 2020. Thus, Grievant's defenses to these charges must be treated as affirmative defenses.<sup>2</sup>

"Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). Grievant did not offer any authority for his assertion that a lack of authority to sign coworkers' timesheets should excuse him from knowingly or negligently signing a fraudulent timesheet. Further, Grievant did not refute evidence that work hours in District Eight are from 7:30 a.m. to 4:00 p.m. Grievant did not present evidence that he had permission to work or that he did in fact work a different shift. Thus, Grievant failed to prove his affirmative defenses.

Grievant contests the remaining allegations. These are that he allowed Mr. Thomas to use a State vehicle for personal activities, willingly or negligently submitted fraudulent timesheets for Mr. Thomas on occasions other than February 11, 2020, resided at work during his divorce, stored personal property at work, and brought a firearm to work after a prior reprimand for the same. As for the two allegations covering Grievant's

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<sup>2</sup>An affirmative defense assumes the truth of the underlying allegation in raising a defense to it. BLACK'S LAW DICTIONARY, 60 (6th ed. 1990).

supervisory role over Mr. Thomas, Mr. Thomas admitted that he used State vehicles for personal activities and submitted fraudulent timesheets to Grievant. He testified, however, that Grievant did not see him for weeks on end and that he submitted timekeeping in bunches, making it difficult for Grievant to review timesheets for accuracy. For his part, Grievant testified that he did not oversee the use of State vehicles by survey crew members. Respondent did not provide evidence showing Grievant was responsible for overseeing vehicle use for crew members or that he would have known that timekeeping submitted by Mr. Thomas was incorrect (other than that submitted for February 11, 2020). Thus, Respondent failed to prove that Grievant should have monitored Mr. Thomas' use of State vehicles or that he willingly or negligently submitted fraudulent timesheets for Mr. Thomas (other than for February 11, 2020).

As for the allegation that Grievant resided in his office during his divorce and stored personal property at the work facility, Respondent highlights the example of "[u]nauthorized use of state vehicles, property, or equipment" from DOH's Operating Procedure. Grievant does not dispute that many personal items were found at the facility in 2018 and 2019, but denies that the personal items belonged to him or that he resided at the facility. Respondent points out that Grievant made some related admissions to investigators. These related admissions were that he slept in the office on occasion when he worked late, kept his bicycle there during the workday if he rode it to work, and brought his hunting dog at times so it could go on hunting trips. However, these admissions do not establish that Grievant resided or stored property at the work facility in an improper manner. Respondent presented other evidence to bolster these charges and points to apparent admissions Mr. Thomas made to investigators. A closer analysis exposes these

apparent admissions as a mischaracterization. Mr. Thomas' interview provided little clarity on the matter due to conflicting answers.

Ms. Foster's testimony is more germane. Ms. Foster testified that someone told her that Grievant and Mr. Thomas stayed in the office occasionally during their divorces. Ms. Foster also attributed the personal items to Grievant but could not justify this attribution given the shared nature of the workspace. Regardless, the crux of Ms. Foster's testimony is hearsay. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

"Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their



statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

While Ms. Foster's testimony did not identify the declarant, her statement to investigators revealed him to be Dave Shaffer. Mr. Shaffer was available to testify but did not do so. Nor did Mr. Shaffer give a written statement attesting that Grievant lived at the facility. Respondent did not provide a reason for failing to obtain a written statement from Mr. Shaffer. Mr. Shaffer is likely a disinterested witness, but his account is not corroborated by any firsthand evidence. The hearsay rendition of his account is also inconsistent with Mr. Thomas' testimony on the issue. Thus, Ms. Foster's hearsay testimony cannot be attributed any weight. Respondent failed to prove that Grievant lived or stored personal property at the facility.

As for the charge that Grievant had a firearm in the facility parking lot on February 11, 2020, Mr. Thompson and Mr. Mallow testified that they saw a long, covered object being transferred from Grievant's vehicle and that the object could have been a firearm. While testifying, Grievant speculated that the covered object could have been any number of things other than a firearm, including survey equipment and a walking stick. Even though he was not coerced to testify, Grievant avoided admitting or denying that he had a gun in the parking lot that day.

The evidence that provides the most clarity on the issue is Mr. Thomas' interview with investigators, rendering it critical to a factual determination. Mr. Thomas testified that Grievant did not transfer a firearm in the parking lot and that his father supplied the firearms for hunting. Yet, he stated to investigators that Grievant most likely transferred

a firearm from his vehicle and that the firearm did not belong to his father. This statement to investigators qualifies as hearsay under a generic definition thereof, as the rules of evidence, including the parameters for hearsay therein, does not apply to grievance proceedings. A hearsay analysis shows that despite the discrepancy between Mr. Thomas' statement and testimony, some weight must be attributed to his statement to investigators. It is significant that this statement is supported by the firsthand testimony of Mr. Thompson and Mr. Mallow and is against Mr. Thomas' own interest. The only evidence that contradicts it was testimony given by Mr. Thomas more than a year later, after he had time to reflect on the ramifications of his statement to investigators. Mr. Thomas' testimony on the issue is not replete with the well-reasoned details seen in his exchange with investigators. This detail is reflected in the following exchange between Mr. Thomas and investigators:

**Investigator JZ:** Okay. Dudley [Grievant] has some sort of firearm in his vehicle.

**Mr. Thomas:** Okay.

**Investigator JZ:** Am, am I correct so far? I mean—

**Mr. Thomas:** I would assume, yes, because when we arrived to go hunt, he has a gun. I assume he brought it from Point A because it wasn't my dad's gun.

**Investigator JZ:** Okay.

**Mr. Thomas:** I don't rabbit hunt with a gun.

**Investigator JZ:** Your, your father pulls in.

**Mr. Thomas:** Okay.

**Investigator JZ:** No, am I on track so far?

**Mr. Thomas:** I mean, I'm not sure on the exact date, but—

**Investigator JZ:** Yeah. But I mean this incident happened. Okay. Your father pulls in the pickup truck, uh, you, Dudley gets his dog out of his personal vehicle, puts it into your father's truck.

**Mr. Thomas:** I would say so, yes.

**Investigator JZ:** Okay. Dudley gets a firearm out of his vehicle and puts it in your father's truck.

**Mr. Thomas:** I would assume so. I mean, I didn't witness that happening. The dog, yes. Gun?

**Investigator JZ:** How, how are you going to see him put a dog in there, then--

**Mr. Thomas:** Cause I was already in the vehicle.

**Investigator JZ:** Well, does not the gun have to come in while you're in the vehicle?

**Mr. Thomas:** No, I think he put it in the back of the truck.

**Investigator JZ:** So he did put it in the back—the, you're talking about the bed of the truck.

**Mr. Thomas:** I assume—Yes. So I assume the bed of the truck.

**Investigator DS:** The gun wasn't in the back of the truck when your dad showed up.

**Mr. Thomas:** No.

**Investigator DS:** And then when you left, it was there.

**Mr. Thomas:** It was there.

**Investigator DS:** And you didn't put it there.

**Mr. Thomas:** No, sir.

**Investigator DS:** And it was you, your father, and Dudley.

**Mr. Thomas:** Yes.

**Investigator DS:** So that means the only other person was Dudley.

**Mr. Thomas:** Correct.

The sort of detail that gives this exchange credence is that, despite saying he did not see Grievant carrying the gun, Mr. Thomas assumes the gun in his father's pickup was brought by Grievant because it only appeared in the truck after Grievant got into the truck and did not belong to either he or his father. Mr. Thomas later testified that this affirming exchange should be disregarded due to the pressure applied by investigators. There is no indication in the transcript that investigators coerced Mr. Thomas to provide this affirmation. Mr. Thomas agreed that the transcript of the exchange was an accurate representation of the exchange. Thus, the issue to be decided is whether Mr. Thomas

was more credible<sup>3</sup> during the investigative interview or during his testimony. Mr. Thomas' demeanor in both instances was evasive and guarded at times. However, Mr. Thomas' interview seemed to provide the most honest moments with breakthroughs of spontaneity.

As stated, unlike Mr. Thomas' testimony, his interview was well-reasoned and most consistent with the eyewitness testimony provided by Mr. Thompson and Mr. Mallow. It was also more plausible given the totality of the evidence on the issue. Even though it was in Grievant's interest to give testimony denying the incident, Grievant did not do so. Neither did he admit it. In failing to commit himself on the issue while under oath, Grievant seemed intent on avoiding self-incrimination. Ironically, he thereby inadvertently bolstered the incomplete evidence provided by Respondent in support of the narrative that he had a firearm in the facility parking lot.

Even though the evidence fell short on some of the allegations against Grievant, Respondent proved by a preponderance of the evidence that Grievant regularly spent worktime at a shoe store, went hunting with a coworker during work on February 11, 2020,

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<sup>3</sup>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); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATE MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

processed the timesheets for that occasion as an eight-hour workday, and took a firearm to work even after being reprimanded against doing so. This constitutes misconduct of a substantial nature directly affecting the rights and interest of the public.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "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 & 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.*

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct of a substantial nature directly affecting the rights and interest of the public and that his conduct was a gross disregard for professional responsibilities or the public safety.

4. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2018).

5. Grievant did not prove by a preponderance of the evidence any of his affirmative defenses.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: April 27, 2022**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**