VAN PARKS,

Grievant,

v. **Docket No. 97-ABCC-567**

DEPARTMENT OF TAX AND REVENUE/

ALCOHOL BEVERAGE CONTROL ADMINISTRATION,

Respondent.

D E C I S I O N

Grievant, Van Parks, employed by the Department of Tax and Revenue/Alcohol Beverage Control Administration (ABCA), Respondent, filed an expedited grievance directly to level four on December 17, 1997, pursuant to W. Va. Code §29-6A-4(e), following the termination of his employment as an Inspector on December 11, 1997. Grievant stated he had not been given a reason for the action, and alleged that it was motivated by racial discrimination. An evidentiary hearing was conducted on February 23, April 29, and June 29, 1998, in the Grievance Board's Wheeling office. This matter became mature for decision with the submission of proposed findings of fact and conclusions of law on September 30, 1998. (See footnote 1)

___Grievant was first employed by the ABCA as an Inspector on April 16, 1992, and served in that capacity until his discharge by Commissioner Donald Stemple on December 11, 1997. In his letter of that date, Commissioner Stemple reminded Grievant that he served at the will and pleasure of the appointing authority, but continued, “I wish to share with you that the reason for this action is my loss of confidence in your ability to effectively discharge the duties and responsibilities of your position as an inspector for this agency.” The burden of proof in a disciplinary matter is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6. Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). In cases involving the termination of classified-exempt, at-will employees, state agencies do not have to meet this legal standard. Patterson v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-572 (May 28, 1996); Logan v. W. Va. Regional Jail and Correctional Authority, Docket No. 94-RJA- 225 (Nov. 29, 1994). An at-will employee may be discharged from employment for good cause, bad cause, or no cause unless the termination contravenes some substantial public policy. Williams v. Precision Coal Co., 194 W. Va.

52, 459 S.E.2d 329 (1995); Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993); John C. v. Dept. of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996).

While this Board has permitted at-will employees to utilize the grievance procedure set forth in W. Va. Code §§29-6A-1, et seq., to protest their dismissal, those employee's rights have been limited to asserting and proving by a preponderance of the evidence that the dismissal was in contravention of some substantial public policy. Wilhelm v. Dept. of Tax and Revenue/Lottery Commission, Docket No. 94-L-038 (Sept. 30, 1994). If proven,Grievant's assertion that his dismissal was motivated by racial discrimination would unquestionably be in contravention of public policy.

Grievant stipulates that he is a classified-exempt employee, thereby serving at the will and pleasure of Respondent. As an at-will employee seeking to establish that his termination was motivated by unlawful discrimination, Grievant must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d), which defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” To establish a prima facie case of discrimination Grievant must demonstrate the following:

(a)that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Although Grievant bears the burden of proof in this matter, Respondent's case,including the alleged acts of misconduct which led to the Commissioner's loss of confidence, will be addressed first to facilitate the reader's understanding of this matter. Respondent argues that the termination of Grievant's employment was appropriate, based upon the following incidents:

First, Grievant failed to fulfill his duty to insure the dumping and destruction of out- of-date beer at the Wetzel County landfill in April and May 1997. Respondent asserts that Grievant was instructed to observe the destruction of out-of-date beer at the landfill on April 18 and 30, and May 8, 1997. Grievant went to the landfill on each of these dates; however, he did not insure that all of the beer was destroyed. Steven Goudy, the bulldozer operator at the landfill, testified that he, Goudy, took some of the beer home for his personal consumption.

Second, Grievant incurred repeated damage to the state car assigned to him. It is undisputed that Grievant was involved in five motor vehicle accidents in the state-owned vehicle assigned to him during the five years and eight months he was employed by ABCA. Respondent asserts that Grievant was involved in more accidents than any other employee at ABCA during the same period of time.

Third, Grievant failed to disclose damage to his state-owned vehicle following the most recent accident. ABCA Inspector Donna Clutter testified that she observed damage to the left side of Grievant's car on June 16, 1997. On July 22, 1997, then-Enforcement Director Bill Adkins met with Grievant at the Parkersburg State Police Detachment. Mr. Adkins stated that he observed damage to the car consistent with that reported by Ms. Clutter. He later confronted Grievant regarding the damage, and Grievant replied that theaccident had occurred the previous day, July 21, 1997.

Fourth, Grievant failed to complete the training academy for ABCA Inspectors in August 1997, and failed to request permission for his early departure. ABCA Inspectors, including Grievant, were to attend a training academy at Charleston, West Virginia, from August 11-20, 1997. Grievant departed the academy after only three days. Mr. Adkins testified that Grievant left without notifying, or seeking permission from, his supervisors.

Fifth, Grievant engaged in misconduct at the ABCA-licensed Triangle Club on September 25, 1996. Respondent claims that Grievant entered the Club on the night in question, consumed alcohol, and questioned patrons regarding their membership status. Licensee Dottie Walden testified that she requested Grievant provide her with copies of state laws relating to private clubs, but he refused. She recalled that as he was leaving the bar, he “brushed up against” her and commented to the effect that he had thought they could work something out.

Sixth, Grievant engaged in misconduct at the Guest House Inn on October 3, 1994. Respondent charges that under the influence of alcohol, Grievant pursued a then-sixteen year old female. Now twenty years old, Trudi Peters testified that Grievant was loud and aggressively pursued her to

dance. After learning her age, Grievant allegedly acted as if in an official capacity, and threatened to close the establishment. He later told her that she did not have to leave and he was not going to do anything. Grievant then followed Ms. Peters to her home while driving his state car.

Seventh, Grievant engaged in misconduct at the ABCA-licensed Sundown Club in 1993 and 1994. Club licensee Gerald Beasley testified that on December 25, 1993, andJanuary 8, 1994, Grievant accepted two, fifty dollar payments. Mr. Beasley also stated that Grievant patronized his bar, and accepted free drinks, food, and candy bars.

Respondent argues that the termination of Grievant's employment could not be discrimination since there have been no comparable incidents of employee misconduct. Because Grievant failed to establish that he was similarly situated to at least one other employee who engaged in the same or similar misconduct and received different treatment, Respondent argues that he failed to make a prima facie case of discrimination. Even if it should be determined that Grievant established a prima facie case of discrimination, Respondent asserts that it has provided legitimate, non-discriminatory reasons for the dismissal.

Grievant bases his claim that he was wrongfully discharged from his position as the sole African-American Investigator with the ABCA because of a racially discriminatory motive on the following:

First, Grievant had never received an unsatisfactory performance evaluation, and had been rated as “very good” or “good” for the years of 1992 through 1995. Grievant had even been awarded a certificate of achievement in connection with his service to the ABCA in May 1997. (See footnote 2)

Second, Grievant admits that he was involved in five automobile accidents, but asserts that none involved damage in excess of $1,639.65. He also notes that ten of the Investigators employed by the ABCA had been involved in automobile accidents, with fourof the Inspectors being involved in three accidents each. One Investigator had been involved in two accidents within a twelve day period. Grievant notes that none of these Investigators were fired or otherwise disciplined as a consequence of their accidents.

Third, Grievant claims that his final accident was reported to his supervisor on July 22, 1997, the same day he received an evaluation, yet his rating was not unsatisfactory. Grievant further asserts that Commissioner Stemple was not aware of the number of accidents in which Grievant had been involved at the time of the dismissal. This claim was supported by the testimony of Mr. Adkins, who stated that he prepared a compilation of the accident records for the first time in preparation for

Grievant's level four hearing.

Fourth, Grievant notes that in 1994 he observed an adolescent girl, unaccompanied, in the Guest House Club. Grievant denies that he was intoxicated, belligerent, attempted to dance with the girl, or followed her home. Then-Commissioner Rick Atkinson restricted Grievant from future investigations of the Guest House Club, but no other action was taken regarding this matter.

Fifth, Grievant testified that the incident regarding the Sundown Club, also in 1994, arose from his investigation of Mr. Beasley. Although Mr. Beasley had paid the owner of the club $2,000.00 for the business, he continued to operate under the former owner's licence, and claimed that he was only managing the club for the owner during an illness. Grievant stated that he assumed he was cleared of all wrongdoing alleged by Mr. Beasley regarding the two bribes totaling $100.00, when no disciplinary action had been taken following an investigation.

Sixth, Grievant alleges that the Triangle Club complaint arose from his report to theABCA that the owners engaged in racial discrimination. Grievant testified that he had witnessed what he concluded to be discriminatory conduct when non-member, African- Americans were barred from the club, and no membership cards were available for those individuals to complete. In support of this observation, Karen Auber, a patron of the club, testified that she has no membership card, and has observed the owner turn black customers away.

Grievant concludes that his complaint relating to the Triangle Club was dismissed based upon an oral report from Jeff Weller, a white police officer, who indicated that he dates a black woman and frequents the club. The police officer is a friend of the club owner. Grievant further asserts that ABCA did not investigate the Triangle Club through the use of testers, and did not investigate his allegations that the owner had called him derogatory racist names and threatened his life. Grievant notes that the Triangle Club is currently under investigation by the NAACP, and a complaint has been filed with the West Virginia Human Rights Commission, for apparent racist practices, as a result of a separate complaint from an African-American barred from the club.

Seventh, Grievant claims that he left the training academy prior to its conclusion in August 1997, because his father was ill. Grievant asserts that he told Mr. Adkins he was leaving, and the reason for his early departure. Grievant notes that some white ABCA inspectors were excused from the training because they did not care to attend.

Eighth, on the three occasions he was assigned to observe the destruction of out of date beer,

Grievant claims that he remained until most of it was destroyed. In April 1997, a malfunctioning truck made it necessary to unload the beer manually. Because thiswas considerably time consuming, Grievant concedes that he left the landfill before the truck was completely unloaded. Nevertheless, Grievant estimates that the total tonnage of beer delivered to the landfill that day amounted to 50.19 tons, and that he observed the destruction of 98.05 total tons of beer on all three days. Grievant argues that there was no testimony of record that the beer was taken as a result of any malfeasance on his part. (See footnote 3) Grievant asserts that even if his action in this matter is classified as misconduct, i.e., some minimal form of dereliction of duty, its severity is not comparable to the level of discipline imposed upon another Inspector for driving while under the influence of alcohol.

Grievant concedes that as an at-will employee, he has limited job security, but asserts that disparate treatment between a member of a protected class and others evidences discriminatory motive which is in contravention of a public policy. In support of his claim, Grievant compares himself to his co-workers, noting that of the ten inspectors involved in automobile accidents, only he suffered an adverse employment action as a consequence. Grievant notes that his accident record was not even known at the time of his dismissal, and was compiled only in preparation for the grievance hearing.

Grievant also concedes that he departed from the training academy prior to its conclusion, but disputes that he left without advising Mr. Adkins. Grievant also notes that none of the white inspectors were disciplined for nonattendance, and that Mr. Adkins had signed his time sheets, indicating that he was aware that Grievant had continued to workin the field after he returned home.

Grievant particularly wishes to compare himself to Inspector Robert Adkins who was given a mere fifteen day suspension after he was arrested for driving under the influence of alcohol. Grievant asserts that the misconduct exhibited by Mr. Adkins was far more serious than any wrongdoing for which he has been accused.

Grievant concludes that Respondent's allegation that he had “an accumulation of problems” does not justify his discharge when each individual act of conduct would not have resulted in dismissal, particularly in consideration of the lesser penalty imposed on another Inspector.

Discussion

Grievant did not meet his burden of proving that he was the victim of racial discrimination. Grievant notes that discriminatory motive can be established by direct or circumstantial evidence, and

the Respondent's action may be a result of mixed motive, in which the discriminatory motive combines with some legitimate motive. Although Grievant is a member of a protected class, and was discharged from employment, he has failed to prove that a nonmember of a protected class received less discipline for similar conduct.

Grievant's comparison of his situation to that of Inspector Adkins is not persuasive. While Mr. Adkins did engage in a serious act of misconduct and received only a fifteen day suspension, the misconduct occurred on his own time, and in his personal vehicle. Further, Mr. Adkins is a classified, rather than an at-will employee, and his priordisciplinary record is not known. (See footnote 4) As a classified employee, Mr. Adkins could only be terminated for just cause, and may be entitled to progressive discipline prior to termination, in most instances. Because of the foregoing, it is concluded that Grievant and Mr. Adkins are not similarly situated.

Grievant's claim regarding the number of accidents Involving other Inspectors is interesting; certainly other Inspectors were involved in more than the usual number of accidents. Nevertheless, Grievant led all Inspectors in car accidents, and this is in no way attributable to racial discrimination. However, the number of accidents Grievant had been involved in was not known to Commissioner Stemple at the time of the dismissal, and could not have contributed to his loss of confidence in Grievant.

More persuasive than the number of accidents, is the fact that Grievant apparently did not report his final accident, and misrepresented the facts surrounding it upon inquiry by Mr. Adkins. Inspector Clutter testified at hearing that she saw Grievant in New Martinsville, West Virginia, on June 16, 1997, while taking her boyfriend's son to the doctor. Because traffic was heavy she had slowed down, and was traveling fifteen to twenty miles per hour when she observed Grievant pulling into a GoMart station, and that “the side of his car . . . looked like a wave, or the side of his car had been hit.” Ms. Clutter recalled that she stopped and spoke with Grievant, but did not ask about his car. When presented with photographs of Grievant's car, Ms. Clutter confirmed that the pictures were consistent with the damage she had observed on June 16, 1997. Ms. Clutter was alsocertain of the date, noting that she was involved in Magistrate Court the following day, and did not report the results of the hearing to Mr. Adkins until the next day, June 18, 1997. It was during this conversation that she mentioned seeing Grievant, and asking Mr. Adkins what had happened to his car.

Ms. Clutter's demeanor was direct and forthright. She appears to have no motive to distort the

truth, and no personal or professional vendetta against Grievant, and he alleges none. Under the circumstances, her recollection of the damaged car on June 16, 1997, is found credible. On the contrary, Grievant failed to offer an accident report, or any other evidence that the accident had occurred on July 21, 1997.

Grievant's comparison of himself to other Inspectors who did not attend the training academy in August 1997, is also not persuasive evidence of discrimination. It appears from Mr. Adkins' testimony, that their absence had been excused by the Commissioner or the Deputy, who, he explained, would have granted the exceptions for reasons such as family problems. Grievant testified that advised Mr. Adkins he was leaving the Academy, and the reason for his departure. This statement directly contradicts the testimony of Mr. Adkins, making it is necessary to assess the credibility of the witnesses.

The Grievance Board has held that some factors which are to be considered in evaluating credibility are demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, admission of untruthfulness, the presence or absence of bias, interest, or motive, consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. Alaeddini v. Div. of Environmental Protection/Office of Air Quality,Docket No. 95-DEP-450/580 (Jan. 28, 1998). Applying these factors, it can only be determined that based upon Grievant's failure to report the June 1997 car accident, and his failure to ensure complete destruction of the beer, indicates that he does not always engage in optimal performance relating to his job. As such, Mr. Adkins is determined to be the credible witness on this matter.

Because Grievant concedes that he did not remain to insure all of the beer was destroyed at the landfill, no further discussion of that incident is warranted.

Other than disparate treatment, the only other racially-motivated claims made by Grievant are that: (1) Respondent did not investigate his claim that the owner of the Triangle Club had called him a racially-derogatory name and had barred African-American patrons from the Club, and, (2) Mr. Adkins stated that his dismissal was based in part on the fact that he had not recruited African-American children to work undercover. It became apparent to the undersigned during the level four hearing that Grievant and Mr. Miller have some serious personal differences. Accepting Grievant's claim, it must be noted that no employee at ABCA had called Grievant the offensive name, it simply

was not investigated. Grievant did not establish that Respondent bears any responsibility to investigate such claims. Grievant could have filed the complaint with another agency with specific authority in this area, such as the Human Rights Commission. While it is understandable that Grievant was upset by the comments, the failure to investigate the incident does not prove that the dismissal was motivated by discriminatory factors. Mr. Adkins did testify that Grievant did not recruit African-American children for sting operations; however, it does not appear that this was a required duty of Inspectors, and ABCA counsel notes in hispost-hearing submission that Commissioner Stemple did not rely on this matter as a basis for Grievant's dismissal. Therefore, that issue will not be considered as a basis for Grievant's dismissal.

Having examined each of the allegations made against Grievant, it is determined while the bar-related complaints are too far removed in time to consider, his failure to insure the beer was entirely destroyed, his failure to report the 1997 automobile accident, and later misrepresenting the date of the accident, and his failure to complete the eight day training session, constitute legitimate, non-discriminatory reasons for the employment decision.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

Findings of Fact

1. Grievant was employed by the ABCA as an Inspector on April 16, 1992. Grievant was unclassified and served as an at-will employee.

2. On December 11, 1997, ABCA Commissioner Donald Stemple advised Grievant that his employment was terminated. The reason given for the action was that the Commissioner had lost confidence in Grievant's ability to discharge the duties of his position.

3. During the period of Grievant's employment, several bar owners filed complaints to ABCA relating to his professional behavior. Respondent took no disciplinary action against Grievant as a result of any of these complaints.

4. Grievant was involved in five car accidents during his five years at ABCA,more than any other Inspector during that period of time; however, this fact was unknown to the Commissioner at the time of Grievant's dismissal.

5. Inspector Donna Clutter advised Mr. Adkins on June 18, 1997, that she had observed damage on Grievant's state-owned car on June 16, 1997.

6. When Mr. Adkins inquired about the accident on July 22, 1997, Grievant represented that the accident had occurred on July 21, 1997.

7. In April and May 1997, Grievant failed to insure that the entire contents of three truck loads of out-of-date beer were destroyed at the Wetzel County landfill.

8. In August 1997, Grievant left, without permission, an eight day training academy for Inspectors in Charleston, West Virginia, after only three days.

Conclusions of Law

1. The burden of proof in a disciplinary matter is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6. Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). In cases involving the termination of classified-exempt, at-will employees, state agencies do not have to meet this legal standard. Patterson v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-572 (May 28, 1996); Logan v. W. Va. Regional Jail and Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. An at-will employee may be discharged from employment for good cause, bad cause, or no cause unless the termination contravenes some substantial public policy. Williams v. Precision Coal Co., 194 W. Va. 52, 459 S.E.2d 329 (1995); Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993); Wilhelm v. Dept. of Tax and Revenue/LotteryCommission, Docket No. 94-L-038 (Sept. 30, 1994); John C. v. Dept. of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996).

3. W. Va. Code §29-6A-2 (d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

4. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

5. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

6. Grievant failed to make a prima facie case of discrimination. 7. Respondent offered legitimate, non-discriminatory reasons for the dismissal.

8. Grievant has failed to prove by a preponderance of the evidence that he has been discriminated against on the basis of race by Respondent.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: _____ _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant was represented by Ron Tucker, Esq., and ABCA was represented by Jeffrey G. Blaydes, Assistant Attorney General.

Footnote: 2

The Certificate of Achievement stated that it was awarded to Grievant "for your many years of service WV ABCA".

Footnote: 3

In addition to the case of beer taken by Mr. Goudy, Respondent had also alleged that the truck driver had taken one or more cases of the drink. The truck driver did not testify at hearing, and Respondent's counsel did not address this claim in his proposed findings of fact and conclusions of law. Therefore, any beer taken by the truck driver will not be considered by the undersigned in reaching a decision.

Footnote: 4

Commissioner Stemple testified that eleven of the Inspector positions are classified-exempt, and those employees serve at the will and pleasure of the appointing authority.