BOYD CUTRIGHT,

Grievant,

v. **Docket No. 98-DNR-270**

WEST VIRGINIA DIVISION OF

NATURAL RESOURCES,

Respondent.

D E C I S I O N

Boyd Cutright (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on May 4, 1998, alleging that Respondent West Virginia Division of Natural Resources (DNR) had improperly restricted him to administrative duties. Following denial of his grievance at Levels I and II, Grievant appealed to Level III on June 3, 1998. When a Level III hearing was not held within seven days of that appeal in accordance with W. Va. Code § 29-6A-4(c), Grievant by-passed Level III, as authorized by W. Va. Code § 29-6A- 3(a)(1), appealing to Level IV on July 27, 1998. Following a telephonic pre-hearing conference on August 17, 1998, a Level IV hearing was held in this Board's office in Charleston, West Virginia, on September 2 and October 14, 1998. (See footnote 1) The parties agreedto a briefing schedule at the close of the hearing, and this matter became mature for decision upon receipt of the parties' written submissions on November 16, 1998.

BACKGROUND

This grievance arose as a result of a reported incident which caused Colonel James Fields, Chief of DNR's Law Enforcement Section, to take the action described in the following letter, dated April 1, 1998:

> This letter is to confirm our meeting of Tuesday, March 31, 1998, in the Charleston Office.

On March 23, 1998, I was advised of a situation which occurred on February 8, 1998, wherein you were observed in your home in a drunken state handling your assigned state weapon in a brandishing and/or threatening manner and firing your gun in the presence of family members and friends.

As a Conservation Officer, you are charged with a great responsibility for the health, safety and welfare of the public. The behavior you are reported to have exhibited on Feb. 8 is not consistent with the high degree of trust placed in you as a law enforcement officer and cannot be condoned nor allowed to go without action on our part.

In displaying improper use of your assigned weapon, you are in violation of General Order No. VII, Use of Force, Section B(1):

Except for maintenance, during training, or when an officer destroys an injured animal, no officer shall draw or exhibit their firearm unless circumstances create a reasonable cause to believe that it may be necessary to use the weapon in conformance with this policy.

General Order VII, Section V, Paragraph D.1, requires completion of Form DNR-LE-12 whenever a firearm is discharged, except for training, dispatching injured wildlife, practice, or personal recreational activities, regardless of whether in an official capacity or not. This incident was not reported as required by this Order.

Therefore, effective Tuesday, March 31, 1998, you are relieved from your law enforcement duties. Your assigned state weapons and statevehicle will be removed from your residence immediately and secured by Sergeant Jim Vance.

Pursuant to our meeting of March 31, you have voluntarily agreed to seek treatment for your alcohol related problems. I have contacted Ms. Terry Cunningham, Substance Abuse Coordinator with United Summit Center in Clarksburg. She has agreed to discuss their treatment program with you. Please contact Ms. Cunningham at [phone number] to schedule an interview.

Also, during the March 31 meeting, you stated you wished to take your accumulated comp time and sick/annual leave during the period of evaluation and/or

> treatment. As I stated during our meeting, prior to returning to your position as a conservation officer, you will be required to undergo a psychological/psychiatric evaluation to determine your fitness to perform law enforcement duties. Upon release from your treatment, you are to contact Lt. Colonel Daniel for the scheduling of your evaluation.
>
> If you wish to further discuss the matters of this letter, either in writing or in person, please call my office to schedule an appointment.
>
> Individuals hired for permanent employment have appeal rights granted under the WV Code §29-6A-1 et seq., Grievance Procedure for State Employees. If you choose to exercise your appeal rights, you must submit your written appeal to your immediate supervisor within ten (10) work days of the effective date of this action.

R Ex 5.

Grievant seeks to have this letter rescinded, to be immediately reinstated to his regular field duties, (See footnote 2) to have the annual leave and compensatory time he took as a result of the letter reinstated, to be protected from reprisal or retaliatory action for filing andpursuing this grievance, and to be reimbursed for his attorney fees and mileage for attending the Level IV hearing. (See footnote 3)

DISCUSSION

In a grievance that does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. However, in disciplinary matters, W. Va. Code § 29-6A-6(e) places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The parties disagree as to whether the matter addressed in this grievance is a disciplinary action. Thus, the first issue to be determined in this grievance is what is the nature of the action being challenged, so that the burden of proof can be properly allocated.

Because the above-quoted letter specified that Grievant was being “relieved” from his law enforcement duties, and set forth his “appeal rights” under W. Va. Code §§ 29-6A- 1, et seq., the undersigned made an interlocutory ruling at the Level IV hearing that the action at issue was

disciplinary in nature. Thus, DNR was required to proceed with thepresentation of its evidence first, as though it had the burden of proof in accordance with W. Va. Code § 29-6A-6(e).

However, after hearing all the evidence surrounding the actions taken in this matter, and considering the post-hearing arguments of counsel, the undersigned is persuaded that the action in question is not a disciplinary matter where the employer has the burden of proof in accordance with W. Va. Code § 29-6A-6(e). Grievant's original statement of grievance includes the following statements in the first two paragraphs:

> On April 3, 1998, by letter dated April 1, 1998, Officer Cutright was placed on, and restricted to, administrative duty. Officer Cutright was required to take accumulated compensatory time, attend counseling and receive a psychiatric evaluation in order to be considered for return to routine work.
>
> This disciplinary action resulted from a misapplication of state statutes and Division of Natural Resources Law Enforcement Section (herein after (sic) LE) policy. Misapplication of state statute or policy is grievable under WV 29-6A-2(i).

Consistent with this claim, the evidence at hearing indicated Grievant had been administratively reassigned to Conservation Officer duties which do not involve the use of a firearm, pending an evaluation to determine if he is fit to return to normal duties. Although Grievant may have lost pay in the form of overtime he would likely have received had he continued to perform his previously-assigned duties, Grievant was not “suspended” from work, either with or without pay, nor was he formally admonished or reprimanded for any alleged misconduct. Accordingly, a temporary assignment to duties not involving use of a firearm does not constitute a disciplinary matter as contemplated by W. Va. Code § 29-6A-6(e). See generally Stoneking v. W. Va. Div. of Corrections, Docket No. 93- CORR-530 (Nov. 30, 1994); Titus v. W. Va. Div. of Corrections, Docket No. 93-CORR-528(Nov. 22, 1994). See also Childers v. Civil Serv. Comm'n, 155 W. Va. 68, 181 S.E.2d 22 (1971); Jarrett v. Dep't of Admin., Docket No. 98-ADMN-165 (Jan. 29, 1999).

Because Grievant's reassignment to duties not involving firearms was not a disciplinary action, he has the burden of establishing the allegations in his grievance by a preponderance of the evidence. See Payne, supra. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. (See footnote 4) Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry

v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

According to the credible evidence of record, this matter began when Grievant's son-in-law, Marvin McCourt, called Grievant's immediate supervisor, Sergeant James Vance, on the evening of February 8, 1998, to report an incident that allegedly occurred at Grievant's residence. Mr. McCourt advised Sergeant Vance Grievant had been drinking “all evening” and had become very upset and argumentative, reaching a point where he had taken his state-issued pistol, pointed it at his head and snapped the trigger. In addition, he fired the weapon out the front door of his home into the front yard. (See footnote 5) Mr. McCourt indicated to Sergeant Vance that he was calling from a cellular phone away from the house, because he did not want Grievant to know he was calling. As requested by Mr. McCourt, Sergeant Vance called Grievant's residence approximately one- half hour later, talked with Grievant's daughter, Angie McCourt, and was told that the situation had calmed down. Consequently, Sergeant Vance took no immediate action regarding Grievant, and did not fully report the incident until he attended a routine supervisors' meeting on March 19, 1998.

During that meeting, Grievant described the reported events of February 8 to his supervisors, Captain Kenneth Painter and Lieutenant Michael Pizzino. Captain Painter immediately tasked Lieutenant Pizzino with investigating the incident, assigning Sergeant Vance to assist. On March 24, 1998, Lieutenant Pizzino and Sergeant Vance conducted separate interviews with Grievant and his wife, Lana Cutright, concerning what had taken place on February 8. During his interview, Grievant admitted to Sergeant Vance and Lieutenant Pizzino he had been drinking beer and vodka that evening. It was established that in addition to Grievant, Marvin and Angie McCourt, and Mrs. Cutright, a daughter, Amanda Cutright, and a son, Matt Cutright, were also present in the residence during the incident. See R Ex 3.

According to Lieutenant Pizzino and Sergeant Vance, Grievant told them he was “drunk” when he came in from the garage, and he got mad when his family insisted he eat some birthday cake to celebrate his and his wife's birthdays. A little later, the subject of pistols came up in conversation, and he brought out his state-issued pistol. Grievant told his daughter to turn down the television, or he would “blow it out.” See R Ex 3. He indicated that he had demonstrated how the pistol would not fire without a clip ofammunition by putting the barrel against his hand and pulling the trigger. Shortly thereafter, he put the clip in the pistol and fired one round out the front door of his residence. According to the investigators, Mrs. Cutright told them Grievant held the pistol to his own head to

demonstrate that it would not fire without the ammunition clip. Lieutenant Pizzino noted that, during a subsequent telephone conversation, Grievant told him he really could not remember what happened in regard to demonstrating the weapon.

Lt. Pizzino duly reported his findings to Captain Painter. See R Exs 1 & 3. As a result of this investigation, and consistent with Captain Painter's recommendation, Colonel James Fields, Chief of DNR's Law Enforcement Section, met with Grievant and his supervisors in Charleston, West Virginia, on March 31, 1998. After discussing the incident with Grievant, Colonel Fields temporarily assigned Grievant to Conservation Officer duties that do not involve carrying a firearm. While performing these administrative duties, Grievant receives the same pay and benefits, although he is not eligible for overtime routinely available to Conservation Officers in the field.

The testimony of Sergeant Vance, Captain Painter, and Colonel Fields consistently indicated that their primary concern in reacting to this incident has been Grievant's conduct when under the influence of alcohol. Colonel Fields specifically noted his concern about getting Grievant into an appropriate alcohol treatment program that would assist in assuring that Grievant can be returned to his normal duties as a responsible and productive officer. The decision to assign Grievant to duties not requiring the use of firearms is wholly consistent with those concerns. Moreover, given the information available to Colonel Fields at the time he directed Grievant to turn in his weapons, thataction was not arbitrary and capricious, nor an abuse of the discretion a supervisor must exercise in monitoring employees who are authorized by law to use deadly force.

It is equally apparent that Grievant was not in violation of DNR's General Order No. VII by failing to report the discharge of his firearm on the evening of February 8, 1998, on Form DNR-LE-12. Grievant was not acting in an official capacity when he fired a shot out his front door. Further, Grievant was not engaged in the use of force as defined in DNR's policy because he was not engaged in conduct “designed or intended to assist the officer in controlling a situation.” Finally, the General Order specifically excludes “personal recreational activities” from the reporting requirement without further defining or explaining what activities are encompassed by that exception. Grievant's actions in demonstrating the operation of his pistol by firing it out the front door of his home did not involve a use of force situation requiring a written report in accordance with General Order No. VII.

However, General Order VII also provides, in Section IIIB(1), “Deadly Weapons Generally:”

> Except for maintenance, during training, or when an officer destroys an injured animal, no officer shall draw or exhibit their firearm unless circumstances create a

> reasonable cause to believe that it may be necessary to use the weapon in conformance with this policy.

R Ex 2.

Sergeant Vance testified credibly that all Conservation Officers under his supervision, including Grievant, had been provided copies of all established General Orders, including General Order VII. Accordingly, Respondent established that Grievant had constructive notice of DNR's policy governing use of force and firearms. Further, theundersigned finds that Grievant's conduct on February 8, 1998, was not in conformance with Section IIIB(1) of that policy.

In any event, Colonel Field's actions were not generated simply by Grievant's failure to follow the letter of a specific regulation or policy. Respondent's actions were substantially motivated by a concern that Grievant might have an alcohol abuse problem which is unacceptable for a law enforcement officer entrusted with using deadly force. (See footnote 6) Even without any specific language in General Order VII governing the situation which occurred on February 8, 1998, Grievant's supervisors have discretion to determine the circumstances under which a Conservation Officer may be authorized to carry a firearm. See generally Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995); Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997).

Despite this discretion, Respondent cannot transfer Grievant to duties that do not involve the use of a firearm for reasons that are arbitrary and capricious. In applying an arbitrary and capricious standard of review to such a determination, the scope of review is a narrow one, the issues being limited to whether the decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment. See generally, Bowman Transp., Inc., v. Arkansas-Best Freight System, Inc., 419 U.S. 285 (1974). Even though the arbitrary and capricious standard requires a searching and careful inquiry into the facts, the ultimate scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. See BedfordCounty Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Bradley, supra.

Colonel Fields testified that whether Grievant pointed a weapon at his head or his hand when demonstrating that the pistol would not fire without the ammunition clip in place, such action represented extremely poor judgment on Grievant's part. Likewise, firing a weapon out his front door

just to demonstrate how it works was not an appropriate use of his state-issued firearm. The fact that alcohol may have been a contributing factor to this situation only adds to Respondent's concern that Grievant might use his weapon even more inappropriately on some future occasion, unless proper action was taken to address the situation. In these circumstances, the undersigned is not persuaded that Colonel Fields' determination failed to consider relevant factors or represents a clear error in judgment.

Grievant further contends that in relieving him from his regular Conservation Officer duties pending a psychological/psychiatric determination that he is fit to return to duty, (See footnote 7) DNR engaged in discrimination prohibited by W. Va. Code § 29-6A-2(d). Discrimination is defined therein 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." W. Va. Code § 29-6A-2(d). This Grievance Board hasdetermined that a grievant seeking to establish a prima facie case (See footnote 8) of discrimination under Code § 29-6A-2(d), 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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

In support of this allegation Grievant presented limited evidence that, sometime prior to 1984, a Conservation Officer, Lieutenant accidentally discharged his firearm in the office and was suspended for three days. Another Conservation Officer accidentally discharged his weapon and shot himself in the leg. Grievant presented hearsay evidence that theemployee falsely reported he had been shot by a third party, later admitting that he had accidentally inflicted the wound on himself, but no disciplinary action was taken. Although each of these employees may have been in violation of some provision in General Order VII, (See footnote 9) there was no indication that alcohol was a contributing factor in any of these incidents. Accordingly, the facts and circumstances of those incidents are readily distinguishable from the situation presented by Grievant's actions on February 8, 1998, and Grievant failed to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d).

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are made in this matter.

FINDINGS OF FACT

1. Grievant is employed by Respondent DNR as a Conservation Officer assigned to the Eastern Region. Grievant has been employed by DNR for over twenty- seven (27) years.

2. Grievant's immediate supervisor is James Vance, a Conservation Officer, Sergeant who supervises officers in the counties of Upshur, Webster, and Barbour.

3. On February 8, 1998, Grievant's son-in-law, Marvin McCourt, called Sergeant Vance and told him Grievant was intoxicated at his residence, and had been in an argument with Mrs. Cutright and other family members. Further, Mr. McCourt described to Sergeant Vance how Grievant had taken out his state-issued pistol, pointed it at his head without the ammunition clip in it, and pulled the trigger, thereafter firing the weapon out his front door into the yard. 4. Mr. McCourt asked Sergeant Vance not to come to Grievant's residence but to call back later and make sure that the situation was under control. Sergeant Vance called the Cutright residence about one-half hour later, spoke with Grievant's daughter, Angie McCourt, and was advised that everything had calmed down.

5. Sergeant Vance did not report Grievant's use of a firearm on February 8 until he attended a meeting with his supervisors on March 19, 1998. After Sergeant Vance described the activities reported to him by Mr. McCourt to his supervisors, Captain Kenneth Painter and Lieutenant Michael Pizzino, Captain Painter assigned Lieutenant Pizzino to investigate the incident, with the assistance of Sergeant Vance.

6. On March 24, 1998, Lieutenant Pizzino and Sergeant Vance interviewed Grievant. Grievant admitted to them that he had been drinking beer and vodka on the evening of February 8, 1998. He also acknowledged that he got in an argument with his wife and family members regarding eating cake at an impromptu birthday celebration for him and his wife.

7. During the interview, Grievant described getting out his state-issued pistol after his daughter raised the question of purchasing a personal handgun. He admitted that he had “dry fired” the weapon, pointing the muzzle at his hand and pulling the trigger. The pistol had a round in the chamber, but did not have an ammunition clip inserted. When the weapon is in proper working order, it will not fire unless the ammunition clip is in place.

8. Grievant told the investigators he had further demonstrated the safety of the weapon by inserting the ammunition clip in the pistol and firing a single round out his front door into the yard. 9. Mrs. Cutright told the investigators much the same as Grievant, except she recalled he had pointed the pistol at his head before pulling the trigger.

10. Lieutenant Pizzino and Sergeant Vance made no effort to interview any other witnesses to the February 8 incident.

11. Lieutenant Pizzino provided a written report of the interviews, and a written memorandum from Sergeant Vance, to Captain Painter. See R Exs 1 & 3. Captain Painter forwarded these reports through his chain of command to Colonel James Fields, Chief of DNR's Law Enforcement Section. See R Ex 4.

12. On March 31, 1998, at Colonel Fields' direction, Grievant met with Colonel Fields, Sergeant Vance, Lieutenant Pizzino, and Lieutenant Colonel Daniel, Deputy Chief of the Law Enforcement Section, in Colonel Fields' office in Charleston, West Virginia.

13. Colonel Fields discussed the incident with Grievant who did not dispute the report he had fired his service pistol when he had been drinking.

14. Colonel Fields relieved Grievant of his regular law enforcement duties, assigning him to administrative duties as a Conservation Officer not requiring the use of a firearm, pending treatment for possible alcohol abuse and a psychological/psychiatric examination to confirm that he was fit to return to duty.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of

proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. 2. Pursuant to W. Va. Code § 29-6A-6(e), 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. Wellman v. W. Va. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

3. Under the facts and circumstances presented in this grievance, Grievant's assignment to duties not involving the use of firearms did not constitute a disciplinary matter within the meaning of W. Va. Code § 29-6A-6(e). See generally, Stoneking v. W. Va. Div. of Corrections, Docket No. 93-CORR-530 (Nov. 30, 1994); Titus v. W. Va. Div. of Corrections, Docket No. 93-CORR-528 (Nov. 22, 1994).

4. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-426 (May 7, 1998); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

5. DNR acted in compliance with its internal policy on the use of force contained in General Order VII when Grievant was reassigned to Conservation Officer duties which do not involve the use of a firearm.

6. DNR did not act in an arbitrary and capricious manner or abuse its discretion when Grievant was temporarily assigned to Conservation Officer duties which do not involve the use of a firearm. See Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan.28, 1997). See also Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995). See generally, Bowman Transp., Inc., v. Arkansas-Best Freight System, Inc., 419 U.S. 285 (1974); Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

7. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), a 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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

8. Grievant failed to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in regard to other Conservation Officers who carelessly or accidentally discharged their weapons in violation of DNR's General Order VII, in that there was no indication that alcohol was a significant factor in any of those reported incidents. See Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995); Runyon v. W. Va. Dept. of Transp., Docket No. 94-DOH-376 & 377 (Feb. 23, 1995); Parsons, supra).

Accordingly, this 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 24, 1999

Footnote: 1

Grievant was represented by counsel, Mark D. Hudnall, and Daniel Dotson. Respondent was represented by Senior Assistant Attorney General Daynus Jividen.

Footnote: 2

Grievant was provided with a regular state vehicle approximately one month after he was relieved of regular law enforcement duties, and DNR agreed to compensate him for the mileage on his personal vehicle which he had incurred while performing his new official duties.

Footnote: 3

Under W. Va. Code § 29-6A-10, an Administrative Law Judge of the West Virginia Education and State Employees Grievance Board is without authority to award attorney fees at Level IV. Chafin v. Boone County Health Dep't, Docket No. 95-BCHD-362 (June 21, 1996). See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1996); Barnhart v. Kanawha County Bd. of Educ., Docket No. 20-87-201-1 (Apr. 6, 1988). Further, under W. Va. Code § 29-6A-7, this Grievance Board may only allocate costs related to the hearing when a party acts in extreme bad faith. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Chafin, supra. There was no showing that DNR took the action challenged by this grievance in bad faith.

Footnote: 4

Because the preponderance standard involves a "more likely than not" analysis, it is less onerous than the "clear and convincing evidence" or "proof beyond a reasonable doubt" standards. All findings of fact in this matter are derived from the preponderant evidence of record. However, even if DNR had been required to establish by a preponderance of the evidence that it acted properly in relieving Grievant of his weapon and temporarily assigning him to duties that do not involve law enforcement, the outcome of this Grievance would be the same.

Footnote: 5

Grievant's front yard abuts West Virginia State Route 20 in a rural section of Webster County.

Footnote: 6

Sergeant Vance credibly testified that Grievant and his wife have had a number of domestic squabbles over the past eight years where Grievant's alcohol use was perceived to be a contributing factor.

Footnote: 7

This grievance involved the propriety of the conditions and limitations placed on Grievant by Colonel Fields' letter of April 1, 1998. Thus, the outcome of any subsequent psychological or psychiatric evaluation is not relevant to the issues properly raised by this grievance. See W. Va. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993). Accordingly, it is not necessary to address Grievant's assertion that these evaluations were either privileged or confidential.

Footnote: 8

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 9

It was not established that General Order VII, last revised in 1995, was in effect when the pre-1984 incident took place.