MARK OAKES,

Grievant,

v. **Docket No. 00-PEDTA-337**

PARKWAYS ECONOMIC DEVELOPMENT

AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

This grievance was submitted directly to Level IV by Grievant Mark Oakes, pursuant to W. Va. Code § 29-6A-4(e), on October 18, 2000, when he was dismissed from his employment with Respondent, Parkways Economic Development and Tourism Authority ("Parkways"). The statement of grievance reads:

> On Oct. 11 I received a termination notice from W.V. Parkways Authority effective immediately. I believe I have been discriminated against and treated unfairly. Due to the fact that other Parkway employees have committed as serious or worse infractions than I and yet received much less of a severe penalty than I.

Grievant sought as relief to be returned to his position with back pay, "and to be made whole in every way."

The following Findings of Fact are made based upon a preponderance of the evidence presented at Level IV. (See footnote 1)

Findings of Fact

1. Grievant was employed by Parkways in the Utility Shop as a Utility Technician. He was hired in 1997.

2. By letter dated October 10, 2000, Grievant was advised that Parkways was terminating his employment effective October 11, 2000, for his "involvement in the misappropriation of a Scotsman Model AC125 ice machine."

3. In October 1998, Tammy Darnell, the manager of the Host Marriott TCBY facility at the Morton Travel Plaza, asked Roger Johnson, Supervisor of Parkways' Utility Shop, to move an ice machine out of the facility because she needed the space.

4. On October 13, 1998, Mr. Johnson prepared a work order for Gary Boyd to see Ms. Darnell about the ice machine, and a work order for Grievant to assist Mr. Boyd. Mr. Johnson told Mr. Boyd to put the ice machine in the electrical room at the Morton Travel Plaza.

5. Grievant and Mr. Boyd moved the ice machine out of the facility used by Host Marriott on October 13, 1998, and placed it in the generator room at the Morton Travel Plaza, because they did not believe there was room to store the ice machine in the electrical room.

6. Sometime in 2000, Mr. Johnson was told by an employee that an ice machine was missing from storage at the Morton Travel Plaza, and that it had been taken by Grievant and sold to the person who owned a store at Standard. Mr. Johnson told his supervisor, Rick Deeds, Facilities Manager, and sent the evening shift workers to the Morton Travel Plaza to see if the ice machine could be located. When the workers reported that the machine could not be located, Mr. Johnson went to the Travel Plaza to verify that the machine was not there. He then went to the store at Standard and did not see the ice machine. He looked around the store owner's property, and thought he sawthe ice machine in a storage area under the owner's house. He reported this to Mr. Deeds. (See footnote 2)

7. Mr. Deeds told Lawrence Cousins, Parkways' General Manager, that an ice machine, identified by Parkways as inventory number 0340, was missing from the Morton Service Plaza. Mr. Cousins followed the normal procedure at Parkways when criminal activity is suspected, and instructed personnel to report the matter to the West Virginia State Police.

8. Trooper Deanna Miller conducted an investigation. She was told by Parkways' personnel that the ice machine was in the possession of Charles Dwayne Coiner. She interviewed Mr. Coiner, who showed her the ice machine. She checked themachine and found 0340 inscribed on the machine. The machine was not in good shape. Mr. Coiner told her Grievant had given him the ice machine, that Grievant was to return and help him install the machine in his store, and that they were going to settle up later; however, Grievant had never returned. Trooper Miller recovered the ice machine, and turned it over to Parkways. She interviewed Grievant, who admitted to her that he had taken the ice machine.

9. Grievant admitted at the Level IV hearing that he took the ice machine from a secured storage area, and gave it to Mr. Coiner.

10. Grievant used a Parkways' vehicle to transport the ice machine to Mr. Coiner, during work hours.

11. Grievant did not ask anyone at Parkways for permission to take the ice machine.

12. As a Utility Shop employee, Grievant had access to the keys to secured Parkways' locations. He often was required to work with little to no supervision.

13. Mr. Cousins considered Grievant's access to locked facilities, the fact that he was often required to work alone, and his evaluations, which were above satisfactory, but not outstanding. Mr. Cousins felt he could no longer trust Grievant, and decided dismissal was the appropriate punishment.

14. After the ice machine was returned to Parkways, it was stored for a year in Mr. Johnson's office pending Grievant's criminal trial. It was missing a leg, and had some rust on it. The leg was repaired, which took about 15 minutes, and the ice machine is being used by Parkways in a break room.

15. In January 1992, Ernest Dunford, a supervisor, was suspended for two days without pay for directing a Parkways employee to dump waste asphalt belonging to Parkways on his personal property for his own use. In 1991, Mr. Dunford also received a written reprimand for declaring some scrap lumber and usable lumber to be of no furthervalue, and taking the lumber for his personal use, using a Parkways' vehicle. Mr. Dunford was suspended for two days without pay, and reimbursed Parkways $69.50 for the lumber and use of equipment. Mr. Cousins was not Parkways' General Manager at that time.

16. In 1994, Kenneth Kirk, a Parkways employee, stole 500 pounds of sand, valued at $5.60, from Parkways. He was suspended for 14 days without pay, relieved as Crew Leader, and required to pay Parkways $5.60. Mr. Cousins was not Parkways' General Manager at that time.

17. In 1994, Dick Roache had a Parkways employee put some dirt in bags for him for Mr. Roache's personal use, during work hours, which amounted to about an hour of the employee's work time, and he used a Parkways' vehicle to go fishing. Mr. Cousins was Parkways' Deputy General Manager at that time. Parkways' Board decided to suspend Mr. Roache for six months without pay, and to require him to reimburse Parkways for the labor, use of equipment, and materials.

18. Many years ago a Parkways employee was discharged for stealing a culvert.

Discussion

"Employees of [Parkways] are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. Va. Code § 29-6-10. See Simmons v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 96-PEDTA-019 (July 31, 1996); Graley v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991)." Boyd v. Parkways Economic Development and Tourism Auth., Docket No. 00- PEDTA-243 (Feb. 28, 2001). This Grievance Board has determined that Parkways employees are at-will employees who may be dismissed from their employment at any time, with or without cause, even though Parkways has adopted a personnel handbook with a progressive disciplinary policy. Stelling v. W. Va. Parkways, Economic Development and Tourism Auth., Docket No. 01-PEDTA-507 (Mar. 21, 2002); Graley, supra.

> Employees of Parkways are considered statutorily classified-exempt, that is, they are not covered by the civil service protections afforded employees of the State of West Virginia. There are only two ways positions in State government can be added to the classified service. First, the legislature can place positions in the classified service or remove positions from such service. Second, W. Va. Code § 29-6-4(b) provides a procedure by which the Governor, by Executive Order, can add (but not remove) positions to the classified service. Logan v. W. Va. Regional Jail and Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).
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> Here, neither the Governor nor the legislature has afforded classified service job protection to employees of Parkways. The general powers and duties of the Authority are set forth in W. Va. Code § 17-16A-6. Subsection (a)(1) authorizes the Authority to make by-laws for the regulation of its affairs and the conduct of its business. Subsection (a)(13) provides that the Authority has the power "to employ consulting engineers, attorneys, accountants, architects, construction and financial experts . . . and such other employees and agents, as may be necessary in its judgment. . .". These statutory provisions do not show any type of legislative intent to include the employees of Parkways in the classified service.
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> There can be no doubt that the language of Personnel Policy II-7 appears to abolish "at-will" employment at Parkways. The undersigned is at a loss to see how it could be made any clearer than it is in Section A, where it says, "[t]he previous policy of 'at-will' employment is Canceled." However, as noted above, there are only two ways positions in State government can be added to the classified service, and neither

> of those actions took place here. Parkways does not have the authority itself to place positions designated by statute as at-will into the classified service. See Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). Nevertheless, there is nothing which would prevent Parkways from establishing internal procedures or guidelines to follow when disciplining employees, and once instituting those procedures, it would be bound to follow them.

Stelling, supra.

As at-will employees, Parkways employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. Wilhelm v. Dep't of Tax and Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd per curiam, Wilhelm v. W. Va. Lottery, 198 W. Va. 93, 479 S.E.2d 602 (1996). See Harless v. First National Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978).

Parkways did not rely upon its ability to discharge Grievant as an at-will employee for any reason, but rather, accepted the burden of proving the charge of stealing an icemachine, which it readily accomplished. Even were Parkways required to demonstrate good cause for the dismissal of Grievant, theft of state property has been found by this Grievance Board to constitute gross misconduct, for which even a classified employee may be dismissed. Symns v. W. Va. Dep't of Transp., Docket No. 94-DOH-091 (July 7, 1994); Brown v. W. Va. Dep't of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

Grievant did not argue he was discharged in contravention of any substantial public policy. Grievant admitted he took the ice machine and gave it to Mr. Coiner, but he argued he should not have been fired for this because he thought the ice machine did not work and was junk. He further argued his appropriation of the ice machine for his own purposes was not gross misconduct, as he endangered no one. He pointed to other instances where Parkways employees who had stolen Parkways property had not been fired in support of his claim that dismissal was too severe a penalty. Finally, he argued that after a trial in magistrate court he was found not guilty, and that the undersigned must give deference to this verdict.

As to this latter argument, the document placed into evidence states simply that Grievant was found “not guilty” of the criminal charge of petit larceny. Although it was argued that the reason for the “not guilty” verdict was that the value of the ice machine had not been proven, the document admitted into evidence does not state this. Grievant admitted to taking the ice machine without approval, and with no intent to return it. Regardless of the actual value of the ice machine, it was

state property and it was not Grievant's to take.

Grievant admitted it was wrong to take the ice machine, and felt a suspension was in order. He denied he had stolen the ice machine. Grievant testified he thought the ice machine was worthless, because he had heard someone say it was junk, he was doing Parkways a favor by removing it, and he thought Mr. Coiner could use it for parts. Hetestified he did not know if Mr. Coiner had another ice machine. He testified on cross- examination, however, that Mr. Coiner had mentioned to him about a month earlier that he needed an ice machine, and he was “just helping somebody out.” He stated he called Mr. Coiner and asked him if he had gotten an ice machine, and when he said no, he told him, “I think I got one up here.” He testified he did not ask permission to take the machine because he was not thinking straight at the time due to his divorce, he took it on the spur of the moment, and he thought he was helping out by getting rid of a piece of junk.

The undersigned finds Grievant's testimony regarding why he took the ice machine to Mr. Coiner to be clearly inconsistent, and his testimony is therefore not credible. Grievant obviously took the ice machine to Mr. Coiner for him to use to make ice, not for parts. Grievant knew the ice machine worked, or could easily be placed in working order. He took property of the State of West Virginia without permission. He stole it.

Grievant argued he was discriminated against as other employees have not been dismissed by Parkways for theft. 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." To establish a prima facie case of discrimination a grievant must show:

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

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. 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, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks, supra.; Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH 376 & 377 (Feb. 23, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Parkways argued the other incidents pointed to by Grievant were minor compared to his act. Certainly opinions could differ on that. The undersigned finds it significant that, while Mr. Kirk, Mr. Dunford, and Mr. Roache were Parkways employees like Grievant who stole Parkways' property, these other incidents occurred a long time ago, under a different Parkways administration. Mr. Cousins was not the person who made the decision that Mr. Kirk, Mr. Dunford, and Mr. Roache should not be fired for their actions, nor did he compare Grievant to these other employees when making his decision. Mr. Cousins looked at Grievant's access to locked facilities, the fact that he was often required to work alone, and his evaluations, which were above satisfactory, but which did not indicate to him that Grievant was an exceptional employee. Mr. Cousins no longer trusted Grievant to work unsupervised. The undersigned finds no discrimination in the punishment imposed.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. “Employees of [Parkways] are classified exempt, that is, their positions are not included in the classification and compensation plan adopted by the West Virginia Division of Personnel pursuant to W. Va. Code § 29-6-10. See Simmons v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 96-PEDTA-019 (July 31, 1996); Graley v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).” Boyd v. Parkways Economic Development and Tourism Auth., DocketNo. 00-PEDTA-243 (Feb. 28, 2001). As such, Parkways employees are at-will employees, even though Parkways has adopted a personnel handbook with a

progressive disciplinary policy. Stelling v. W. Va. Parkways, Economic Development and Tourism Auth., Docket No. 01-PEDTA-507 (Mar. 21, 2002); Graley, supra.

2. At-will employees may be discharged for good cause, bad cause, or no cause, unless the termination contravenes some substantial public policy. Wilhelm v. Dep't of Tax and Revenue, Docket No. 94-L-038 (Sept. 30, 1994), aff'd per curiam, Wilhelm v. W. Va. Lottery, 198 W. Va. 93, 479 S.E.2d 602 (1996). See Harless v. First National Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978).

3. Grievant was terminated for theft of an ice machine. Grievant's termination did not contravene any substantial public policy.

4. 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." To establish a prima facie case of discrimination a 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.

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

5. Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. 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, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks, supra.; Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH 376 & 377 (Feb. 23, 1995); Steele v. Wayne County Bd. of Educ.,

Docket No. 89-50-260 (Oct. 19, 1989).

6. While Mr. Kirk, Mr. Dunford, and Mr. Roache were Parkways employees like Grievant who stole Parkways' property, these other incidents occurred a long time ago, under a different Parkways administration. Mr. Cousins was not the person who made the decision that Mr. Kirk, Mr. Dunford, and Mr. Roache should not be fired for their actions, nor did he compare Grievant to these other employees when making his decision. Mr. Cousins looked at Grievant's access to locked facilities, the fact that he was often required to work alone, and his evaluations, which were above satisfactory, but which did not indicate to him that Grievant was an exceptional employee. Mr. Cousins no longer trusted Grievant to work unsupervised. The undersigned finds no discrimination in the punishment imposed.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: September 25, 2002

Footnote: 1

After several continuances for good cause, two days of hearing were held at Level IV on March 6 and May 21, 2002. Grievant was represented by Michael C. Allen, Esquire, and Kevin Church, and Respondent was represented by A. David Abrams, Esquire. This grievance became mature for decision upon receipt of the last of the parties' written arguments on

August 26, 2002.

Footnote: 2

Tommy Keller, Foreman of the Utility Shop, testified the ice machine had been moved while he was on vacation in October 1998, and when he returned on the following Monday, he told Mr. Johnson the ice machine had probably already been taken by someone. He testified he went to the Morton Travel Plaza, and the ice machine was gone. He testified he asked Ms. Darnell what happened to the ice machine, and she told him Mr. Boyd and Grievant had taken it out of the generator room sometime after they had stored it. He stated he had told Mr. Johnson and Mr. Deeds the ice machine was gone, and that Ms. Darnell said Mr. Boyd and Grievant had taken it. He also stated the ice machine was a good machine which had not been used much. Mr. Deeds denied Mr. Keller had told him in 1998 that the ice machine was gone, although he recalled Mr. Keller opining that it would disappear if they placed it in storage. Mr. Johnson was not specifically asked whether Mr. Keller had relayed this information to him in 1998, but he stated he was made aware of the missing ice machine in late 1999 or 2000, indicating he had no prior knowledge of this. Grievant testified he loaded the ice machine on a Parkways truck by himself when he was working alone on a holiday. There were no holidays between October 13, 1998, and the following Monday. The next holiday would have been in November. Mr. Keller's testimony obviously is at odds with that of several other witnesses. Ms. Darnell was not called to testify. Grievant was not concerned that Mr. Keller's testimony was at odds with his own. He suggested that the failure of Mr. Deeds and Mr. Johnson to act on this information in 1998, demonstrated this theft was not important to Parkways in 1998, and supported his argument that dismissal was not appropriate. He suggested the theft only became important in 2000, after a legislative investigative team began investigating other allegations of theft of Parkways property. He also noted he had had words with Mr. Keller, and Mr. Keller had told him he would pay for it. Regardless of whether Mr. Keller made such a discovery in 1998, and reported it to Mr. Johnson and Mr. Deeds at that time, there was no evidence that General Manager Lawrence Cousins was ever made aware of such information in 1998, and considered it unimportant. It was Mr. Cousins who decided to dismiss Grievant when he became aware of the theft. Accordingly, whether Mr. Keller discovered the ice machine was missing in 1998, and reported it to Mr. Johnson and/or Mr. Deeds at that time, is not relevant to the issues at hand, and the credibility of Mr. Keller, Mr. Johnson, and Mr. Deeds need not be explored.