THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WAYNE A. KELLER,

Grievant,

v. **Docket No. 2009-1440-DOT**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS**,

Respondent.

DECISION

Grievant Wayne A. Keller was suspended from his employment with the Division of Highways ("DOH") after his involvement in an after-work fight with a co-worker on March 31, 2009. The suspension letter was issued on April 8, 2009, and the action was taken pursuant to Division of Personnel Administrative Rule 143 C.S.R. 1 § 12.3, to allow the DOH the opportunity to complete an investigation into the after-work incident. Wayne Keller filed a level one grievance dated April 10, 2009, contesting the suspension and requesting among other things that his "pay of 15 days and 21 days of tenure be given back to [him]" and that he "remain employed with the Department of Transportation, Division of Highways Bragg location." Grievant requested a level one conference. Subsequent to the filing of the grievance, Grievant Keller was dismissed from his job. The dismissal letter, dated April 29, 2009, cited as reasons for the action, matters that were the subject of the investigation that was the reason for Grievant's suspension.

On May 15, 2009, the DOH Level One Grievance evaluator waived the grievance to level 3 noting that the grievance involved a suspension without pay. Pursuant to W. VA. CODE § 6C-2-4 (a) (4) a Grievant may elect to file such a grievance directly to level 3. The

Grievance evaluator felt "it [would] be in the Grievant's best interest to proceed directly to level 3 to expedite the resolution of [the] grievance." An Order was entered by the undersigned Administrative Law Judge ("ALJ") transferring the grievance back to level one for a conference because Grievant had not indicated that he wanted to waive levels one and two. On June 22, 2009, Grievant and Respondent signed an agreement waiving levels one and two and requesting that this grievance be heard at level three. A copy of that agreement was subsequently transmitted to the West Virginia Public Employees Grievance Board and the grievance was set for a level three hearing.

The first day of the level three hearing was conducted on November 30, 2009, in Beckley, West Virginia, with ALJ Mark A. Barney, Esquire presiding. Grievant was present at the hearing and was represented by Kyle G. Lusk, Esquire. Respondent was represented by Jennifer F. Alkire, Esquire, DOH Legal Division. During this hearing, Grievant's counsel noted that he was contesting the dismissal as well as the suspension. Counsel for Respondent objected noting that Grievant filed his grievance prior to being dismissed and has not filed a subsequent grievance after the dismissal letter was issued. ALJ Barney ruled that the suspension was made so that an investigation could be conducted and the dismissal was a direct result of the investigation. Additionally, as relief Grievant sought to "remain employed with the DOH." Since the dismissal was directly related to the suspension, ALJ Barney held that Grievant had substantially complied with the grievance statute in contesting both his suspension and his dismissal. ALJ Barney further held that the matter would be set for another day of hearing since the DOH had the

burden of proof in the disciplinary grievance and had not been prepared to go forward on the issue of the dismissal as well as the suspension.[1]

On January 12, 2010, counsel for Respondent filed a Motion to Reconsider ALJ Barney's decision and limit the grievance to the issue of the suspension only. Counsel for Grievant filed a Response to the Motion to Reconsider dated January 28, 2010. An Order was entered on February 16, 2010, which denied Respondent's Motion to Reconsider and allowed Respondent to reopen its case in chief to provide testimony in support of the decision to terminate Grievant's employment.[2]

A second day of hearing was held on March 22, 2010, in Beckley, West Virginia. Once again, Grievant was present at the hearing and was represented by Kyle G. Lusk, Esquire. Respondent was represented by Jason C. Workman[3], Esquire, DOH Legal Division. Subsequent to the hearing the parties agreed to submit Proposed Findings of Fact and Conclusions of Law to be postmarked on or before April 30, 2010.

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[1] On December 31, 2009, ALJ Barney left employment with the Grievance Board . This case was assigned to the undersigned ALJ for hearing and resolution.

[2] This issue has been previously addressed in the case of *Lough v. Dept. of Health & Human Res.*, Docket No. 99-HHR-323 (Aug. 29, 2000), in which the ALJ wrote:

> Grievant did not file another grievance contesting the dismissal, and HHR contended at the Level IV hearing that the dismissal therefore could not be considered in this grievance. After taking evidence on the reasons for the suspension and the dismissal, the undersigned determined that the facts giving rise to the suspension were the same as those which HHR relied upon to justify the dismissal, and the dismissal was merely the final discipline imposed; thus, it was not necessary for a second grievance to be filed.

Id.

[3] Prior to this hearing, Jennifer Alkire, Esquire, had left employment with the DOH for employment with a federal agency.

Respondent submitted its fact/law proposal on April 30, 2010, and it was received by the West Virginia Public Employees Grievance Board on May 3, 2010. Grievant's counsel submitted his proposal on June 4, 2010, and it was received by the West Virginia Public Employees Grievance Board on June 7, 2010. On June 9, 2010, Respondent's counsel filed a Motion to Strike Grievant's Proposed Findings of Fact and Conclusions of Law because the proposal had been filed more than a month after the submission was due. Respondent argues that Grievant's counsel gained an unfair advantage by possessing Respondent's proposal while he was drafting his own. While Respondent raises a valid concern, after a close reading of the proposals by both parties it does not appear that Grievant gained an unfair advantage by filing his proposal late and the Motion is denied. This grievance became mature for consideration on June 7, 2010, upon receipt of Grievant's fact/law proposal.

Synopsis

Respondent initiated an investigation into a charge of racism lodged against Grievant by another employee. That investigation was cut short when Grievant became involved in an after-work physical altercation with the same co-worker. Respondent suspended Grievant while the altercation was investigated and ultimately terminated Grievant's employment. The main reason for the dismissal was the fight; however, the incidents at work were also listed in the dismissal letter. Respondent failed to prove a sufficient rational nexus between the off duty fight and Grievant's job duties to support terminating his employment for off-duty conduct. Respondent proved Grievant was guilty of workplace misconduct that warranted a suspension.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Wayne Keller was initially employed by the DOH in March 2008. Grievant's position was classified as a Transportation Worker 2 Equipment Operator and he worked out of the DOH Bragg facility in Raleigh County, West Virginia.

2. As an Equipment Operator, Grievant drives various pieces of Heavy Equipment of the DOH including snow removal trucks.

3. Andre Thomas is also a Transportation Worker 2 Equipment Operator employed by the DOH and assigned to the DOH Bragg facility. He performs similar duties as Grievant. Mr. Thomas is black.

4. On March 20, 2009, Andre Thomas complained to his supervisor that he was being subjected to racial slurs and acts of intimidation in the workplace.

5. Tracy Hamer was assigned to investigate the complaint of Mr. Thomas. Ms. Hamer is employed in the DOH Princeton headquarters where she has been an Engineering Technician for 20 years. Additionally, Ms. Hamer has voluntarily served as an EEO[4] Counselor since 2006. In that capacity she takes statements of individuals to investigate complaints of discrimination and harassment in the workplace. A co-worker, Bob Hudson, assisted her in taking statements in this investigation.

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[4] Equal Employment Opportunity.

6. Ms. Hamer and Mr. Hudson took statements from a number of employees assigned to the Bragg facility, including Grievant, Andre Thomas, Ricky Williams, Joe Adkins, Marty Walker, Steve Barker, and Donnie Meadows.

7. Andre Thomas complained that Grievant had engaged in the following activities:

- Made inappropriate and derogatory racial remarks at work,
- Tampered with equipment rendering it unsafe to operate,
- Made offensive hand gestures, and,
- He believed that Grievant slit his tires while it was parked in the parking lot.

8. Ms. Hamer and Mr. Hudson finished their interviews and Ms. Hamer typed her notes that she took during those interviews. Respondent Exhibits 1 & 2. However, before they completed their final report, their investigation was stopped due to an altercation that took place involving Grievant, Ricky Williams and Andre Thomas on March 31, 2009.

9. The physical altercation between Grievant and Andre Thomas took place at in the parking lot of the Bible Baptist Church near Mabscott West Virginia, which is several miles away from the DOH facility where Grievant and Andre Thomas work.

10. After the altercation, Grievant was suspended and a separate investigation was initiated to include the allegations Mr. Thomas had previously made and the fight that took place away from work. This investigation was conducted by Dawn Jordan, DOH EEO Manager, and Doug Berkel, an investigator for the DOH Legal Division. Mr. Jordan has been the DOH EEO Manager since 2006 and Mr. Berkel has been a DOH investigator for two years. Prior to coming to work for the DOH, Mr. Berkel had been a Trooper with the West Virginia State Police for several years.

11. Dawn Jordan and Doug Berkel conducted an investigation beginning on April 1, 2009, and conducted interviews on April 2nd and 3rd. The investigators interviewed Grievant, Andre Thomas, Ricky Williams, Frank Mancari, Marty Walker, Steve Barker, Joe Adkins and Dana Wood.

12. Mr. Berkel obtained a copy of a surveillance footage from a security camera that was focused on the parking lot where the fight involving Grievant and Andre Tomas took place.[5] He spoke to the Police Chief for Mabscott, West Virginia and provided a copy of the surveillance video to him as well.

13. In August of 2008, Grievant, Andre Thomas and Frank Mancari were working together. Mr. Mancari asked Mr. Thomas to find him a black girl to date. Grievant told Mancari, "I can call you salt and pepper then." When Thomas went around the truck and was out of Grievant's sight Grievant told Mancari, "you don't want to be hooked up with no n - - - - r." Respondent Exhibit 3 and Level Three Testimony.

14. Later that summer, Mr. Thomas was talking to Marty Walker about going to the beach and Walker's need to take his sunscreen. Thomas stated to Walker, "I already have a tan." Grievant overheard the conversation and stated, "They just kept him in the oven too long." Respondent Exhibit 3 and Level Three Testimony.

15. That winter, while referring to Andre Thomas, Grievant told a co-worker, "If I ever catch that boot-lipped n - - - -r in my neighborhood, I will take care of it." Respondent Exhibit 3.

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[5] A compact disc containing a copy of the surveillance video was admitted into the record as Respondent Exhibit 8.

16. Andre Thomas overheard Grievant tell Frank Mancari that they could take the pins out of the snow plow on Marty Walker's truck to get back at him for some reason. Mr. Thomas warned Mancari not to do that. Two weeks prior to the investigation that was conducted in this matter, Marty Walker checked the pins in his snow blade before going on the road and found that the pins were missing. Respondent Exhibit 3.

17. Andre Thomas complained about Grievant's comments to their supervisor who assured Thomas that he would talk to Grievant. After making that complaint the tires on Mr. Thomas' car were slashed. Subsequently, Andre Thomas filed a formal EEO complaint which led to the investigation conducted by Ms. Hamer and Mr. Hudson.[6] There was tension in the shop between Grievant, Andre Thomas, and Ricky Williams as the investigation continued.

18. On March 31, 2009, Grievant left work at the Bragg facility in his car. Ricky Williams was riding with Grievant. Andre Thomas saw Grievant leave and waited five or six minutes for Grievant to get down the road before he left. The previous day Thomas had passed Grievant's car on the way home and Grievant had made an obscene hand gesture at him. Respondent Exhibit 3. Thomas waited to leave work in an effort to avoid a similar incident.

19. Grievant and Thomas were both traveling on Interstate 64 in Raleigh County.

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[6] It was never determined who took the pins from the snow blade on Marty Walker's truck or who slashed the tires on Andre Thomas' car.

After about three or four miles Thomas caught up with Grievant's vehicle.[7] Thomas attempted to pass Grievant's truck and Grievant swerved to the left in front of him. Thomas then tried to pass Grievant on the right and Grievant swerved toward him but Thomas was able to pass.

20. Andre Thomas then pulled off the interstate at Exit 42 for Mabscott, West Virginia, which is the exit before he normally got off the highway. He pulled off the road into the parking lot of the Bible Baptist Church.[8]

21. Andre Thomas was familiar with the location of the church parking lot because at one time Ricky Williams rode to work with Mr. Thomas and he would park his vehicle in that lot before riding with Mr. Thomas the rest of the way to work. On this evening, Mr. Williams was riding with Grievant and had left his vehicle in this lot that morning before continuing with Grievant.

22. The surveillance camera at the church lot captured the following events:[9]

- 3:53:58 Thomas arrived at the parking lot and parks his vehicle.
- 3:54:12 Grievant Keller drove into the parking lot directly at Thomas' vehicle. He drove around Thomas' vehicle and parked a few spaces over, next to Williams' vehicle.
- 3:54:18 Thomas got out of his Jeep and walked toward the front of Grievant's vehicle. He passes the passenger side of the vehicle and near the driver side front bumper.

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[7] Thomas testified that he was driving within the speed limit and it seemed to him that Grievant had driven slowly to wait for him to catch up.

[8] Mr. Thomas testified that he pulled off the road at this exit to calm down and let Grievant get down the road before he proceeded home.

[9] The time noted by each event came from the video. It is not known whether it reflects the actual time of day or an accurate time span. It is included only to give a reference as to the approximate time of each event.

- 3:54:32 Grievant and Williams got out of Grievant's vehicle as Thomas neared the front bumper of the truck. Grievant had a club and a can of pepper spray in his hand and rushed toward Thomas.[10] Thomas immediately retreated and Grievant pursued him spraying a substance in Thomas' face and attempting to hit him with the club.
- 3:54:42 Thomas continued to retreat backward toward his vehicle then in a circle for about 50 feet with Grievant pursuing him. Williams approached the two but does not participate.
- 3:54:53 Grievant got close enough to Thomas to swing the club at him. Thomas grabbed Grievant and wrestled him to the ground. The two struggled on the ground and Thomas ended up on top of Grievant and knocked the club and the spray away from him. Thomas hit Grievant in the head three or four times and then let him up.
- 3:55:14 Grievant retrieved the spray can and continued to spray the substance at Thomas' face.
- 3:56:12 Thomas walked around his Jeep, opened the door, wiped his face and drove away.
- 3:56:15 Grievant and Williams picked up the club, called the Mabscott police and waited until the police arrived.

23. Grievant and Williams told the Mabscott police officer that Thomas had attacked Grievant with a club and beat him. Thomas was arrested and charged with malicious wounding based upon those statements.

24. After obtaining and viewing the surveillance video, Inspector Berkel showed it to the Mabscott Chief of Police. Since the statements given to the police were opposite to what was represented on the video, the charges were dropped against Mr. Thomas and Grievant Keller was arrested. Grievant Keller retained counsel and a magistrate dismissed the charges against Grievant at the conclusion of a probable cause hearing.

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[10] The spray was determined to be pepper spray and the club was a cylinder of wood that appeared to be just over a foot long.

25. Both Mr. Williams and Grievant Keller gave false statements about the fight in the church parking lot to the DOH investigator before they were made aware of the video that recorded the incident.

26. The physical altercation occurred after Grievant and Mr. Thomas were off work. Neither Mr. Thomas nor Grievant were engaged in any activity for the DOH. The fight took place in a church parking lot several miles away from their workplace and did not occur on DOH or State property.

27. By letter dated April 8, 2009, Grievant was suspended without pay for a period of fifteen working days. The stated reason for the suspension was "to continue and conclude an investigation into behavior [by Grievant] that may violate the West Virginia Division of Personnel's Workplace Security Policy and/or that agencies Prohibited Workplace Harassment Bulletin." Respondent Exhibit 6. This letter was signed by Jeff Black, Director of the DOH Human Resources Division.

28. By letter dated April 29, 2009, Jeff Black notified Grievant Keller that he was dismissed from employment with the DOH effective that day. Mr. Black stated that Grievant was dismissed for violating "federal, state and agency standards designed to ensure a safe and harassment free workplace." Director Black listed the following specific charges:

- "[Regular] use of the term "n - - - - r" when referring to African American persons, including Andre Thomas, a fellow employee;"
- "Suggesting" to at least one other fellow employee that he remove pins from the snow plow blade on another employee's truck;" [and] "that employee later found the pins had, in fact, been removed from his snow plow blade;"

- Assaulting Andre Thomas with a length of pipe and mace on March 31, 2009.[11]

Respondent Exhibit 13.

Discussion

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent argues the Grievant's behavior at the workplace and his assault on Mr. Thomas at the Bible Baptist Church parking lot violate the Division of Personnel ("DOP") Workplace Security Policy ("WPSP"). Respondent notes that Grievant's activities meet the definition of "Threatening and Assaultive Behavior" which the policy describes as follows:

> C. Threatening or Assaultive Behavior: Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. Any person (e.g.,

[11] During his testimony Director Black agreed that the main reason for the discipline of Grievant was the assault on Mr. Thomas.

> client, customer, vendor, visitor, etc.) who exhibits threatening, hostile, or abusive behavior, either physically or verbally, or who otherwise willfully interrupts or molests the orderly and peaceful process of any department, division, or agency of State government, may be denied services and may be subject to arrest and criminal prosecution. In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following:
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> - the perception that a threat is real;
> - the nature and severity of potential harm;
> - the likelihood that harm will occur;
> - the imminence of the potential harm;
> - the duration of risk, and/or
> - the past behavior of an individual.

Respondent Exhibit 4.

Respondent avers that Grievant's assault on Thomas easily meets this definition and that the policy provides that employees engaging in such behavior may be dismissed.

Grievant points to another section of the WPSP and argues that the Policy has no application to the fight in the church parking lot, because the incident occurred miles away from the workplace and after work hours for all of the participants. Grievant focuses on the WPSP policy statement which provides:

> **III. POLICY:** It is the policy of the State of West Virginia to take reasonable measures to ensure the health, safety, and welfare of State employees and the general public they serve, *while in the buildings or on the grounds of the State Capitol Complex and all other State government workplaces* by screening mail and monitoring and limiting the access of all individuals to State government workplaces. In addition, this policy prohibits the possession, by an unauthorized individual, of any firearm or dangerous/deadly weapon or the exhibition of threatening behavior *in any public-owned or leased building or work site.*

(Emphasis added) Respondent Exhibit 4.

Grievant opines that he cannot be punished by his employer for the physical attack on Mr. Thomas as it was not related to his employment and is therefore not covered by the WPSP or any other policy adopted by the Respondent.

On a number of occasions the West Virginia Supreme Court of Appeals has addressed the issue of when a public employer may discipline an employee for conduct away from work. Generally, what a State employee does away from work is beyond the employer's realm of influence. However, "if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond V. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976). Simply stated, "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285 S.E.2d 665 (1981).

The Supreme Court reviewed the basis for the *Golden* "rational nexus" rule in the recent decision of *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007). In *Powell* the Court decided that a coach should not have his license to teach suspended for four years because he was convicted of battering his son at home even though the son was a student in the teacher's school system. The court noted that:

> We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in

> a statute which would be void for vagueness under substantive due process constitutional standards. *Id.* at 68-69, 285 S.E.2d at 669

Powell, supra, 655 S.E.2d 204, at 209.

Respondent points to the recent Grievance Board decision in *Williams v. Alcohol Beverage Control Admin.,* Docket No. 2009-1684-DOR (Nov. 25, 2009), for support that a rational nexus existed between Grievant's assault on Mr. Thomas and his job duties. In *Williams* a rational nexus was found between an employee's job and his employment that justified his employer in disciplining Mr. Williams for his off duty conduct. However, there were significant differences in that case and this one.

In *Williams* the combatants engaged in a heated argument at work and the attack took place in direct retaliation for the duty related argument. Additionally, Mr. Williams called his wife during work hours and told her that he planned to fight with his co-worker as soon as they were off state property. Williams left work early without authorization so that he could confront the co-worker as he was leaving work and the assault took place within a block of the warehouse gate.

In the present case, the only connection to work is that is where the co-workers met and formed their animosity for each other. Grievant and Mr. Thomas were three or four miles down the road before Grievant swerved his truck in front of Mr. Thomas' Jeep. They both had finished their work day and neither had left early in violation of a work rule to engage in the fight. While the friction between the two combatants may have originated at work there was no specific work related incident that led to the actual assault as there

was in *Williams.* Finally, the actual assault took place miles away from the work site and unlike in *Williams,* it was not witnessed by employees from the facility.[12]

There is some indication that Grievant and Mr. Thomas do not have to work together at the Bragg facility. After completing her initial investigation into Andre Thomas' EEO complaint, Tracy Hamer indicated that she and Bob Hudson were going to recommend that Grievant and Mr. Thomas not work together. That solution was not available in *Williams* since there was only one warehouse and one shift to which Williams and his co-worker could be assigned.

As noted in *Golden* and *Powell,* the interest of the employer must be significant enough to overcome the constitutional privacy interest. In the present situation, there is some connection between Grievant's off work conduct and his employment. However, there is no indication that the activity directly effects Grievant's ability to perform his job. Grievant and Andre Thomas do not have to work together and the fight does not effect Grievant's ability to operate Heavy Equipment. The slight possibility of some impact on the efficiency of the agency's operation is too speculative to overcome the employee's privacy interest. Consequently, there is not a sufficient rational nexus between Grievant's assault on Mr. Thomas in the Bible Baptist Church parking lot for that conduct to be the basis for discipline by the DOH.

Next, Grievant attempts to characterize Andre Thomas as the person who initiated the violence, but that is not the case. The surveillance camera at the church parking lot

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[12] The incident in the *Williams* case was witnessed by a number of employees of the facility because it occurred right outside the ABCA warehouse parking lot at quitting time as employees were leaving work.

gave a very clear view of the events that took place on March 31, 2009. Mr. Thomas approached Grievant's vehicle with empty hands and was not making threatening gestures. Grievant exited his vehicle with pepper spray and a club and immediately advanced toward Mr. Thomas. As soon as Grievant exited his truck, Mr. Thomas began to retreat. That would have been the end of the confrontation had Grievant not chased Mr. Thomas and sprayed him with the pepper spray. Grievant was undoubtedly the aggressor in this altercation. Had there been a sufficient nexus between Grievant's assault on Mr. Thomas and his employment, dismissal would have been justified.

Director Black testified that the main reason for the suspension and dismissal of Grievant was the physical assault on Andre Thomas, but that was not the only reason. In the dismissal letter, Director Black also noted the following reasons for the disciplinary action:

> "[Regular] use of the term "n_ _ _ _r" when referring to African American persons, including Andre Thomas, a fellow employee and "Suggesting" to at least one other fellow employee that he remove pins from the snow plow blade on another employee's truck;" [and] "that employee later found the pins had, in fact, been removed from his snow plow blade."

Grievant also admitted to other pranks related to the trucks of co-workers including waxing of windshields and filling Mr. Thomas' glove with grease. Director Black noted in his testimony that Grievant's racial comments were in violation of the DOP interpretative bulletin entitled "Prohibited Workplace Harassment" which states that:

> A. Employees have the right to be free from illegal and non-discriminatory hostile workplace harassment on the job, and the State has the moral and legal obligation to ensure that such harassment does not occur and that effective means of redress are available to employees. . .

> C. Illegal and non-discriminatory hostile workplace harassment will not be tolerated within the workplace and will result in appropriate disciplinary action, up to and including dismissal.

Respondent Exhibit 5.

Grievant denies that he made the racist comments at the workplace and that he suggested that a co-worker should pull the pins from the snow plow of another employee's truck. However, other employees indicated that they witnessed Grievant participating in these activities. Because of the differences in the testimony, a credibility assessment is necessary to the resolution of this matter. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge 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' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588- DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

Grievant has the obvious bias and motive to be untruthful in this matter because he wishes to escape punishment. His co-worker did not have that motive and was reluctant to come forward for fear of potential retaliation. More telling though is the Grievant's reputation for honesty, or lack thereof. Grievant lied to the Mabscott police and told them that Andre Thomas had attacked him with a club and pepper spray when the opposite was

true. This led to the arrest of Mr. Thomas for charges that were later dropped. Grievant and Ricky Williams admitted that they told the same lie to the DOH investigator and only recanted when they were confronted with the video recording of the incident. Under these circumstances it is very easy to determine that the accounts of Grievant's conduct given by his co-workers are more likely to be true than Grievant's version. Respondent proved the allegations that Grievant participated in workplace racial slurs in violation of DOP rules and that he participated in conduct that jeopardized the safety of his co-workers and efficiency of the Respondent's operation. Therefore, some discipline is appropriate.

Director Black stated that the main reason for the termination of Grievant's employment was the assault on Mr. Thomas. Consequently, dismissal is too great a punishment for the remaining offenses. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). If there had been a rational nexus, dismissal would have been appropriate for an assault on another employee with weapons but it is a disproportionate punishment for the remaining offenses.

The remaining charges are serious. Racial slurs have no place in the workplace and the pranks that Grievant engaged in could have caused extensive harm to the DOH vehicles and endangered the safety of his co-workers. Additionally, Grievant lied to DOH investigators who were looking into grave charges. Given the gravity of the potential harm

that could have resulted from Grievant's actions, a thirty working day suspension is reasonable. Consequently, the Grievance is Granted to the limited extent that the termination of Grievant's employment is reversed, but in place of the dismissal, a thirty working day suspension without pay is imposed.

The remaining issue involves the Grievant's obligation to mitigate any damages he might incur as a result of a wrongful termination of his employment. The West Virginia Supreme Court of Appeals addressed this obligation in the case of *Mason County Bd. of Educ. v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982). In syllabus points two and three Justice Neely wrote:

> 2. Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.
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> 3. Wages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee's performance of the job would have been incompatible with his or her performance of the contract.

Id.

Prior to the taking of testimony at the March 2010 hearing, counsel for Respondent raised the issue of mitigation of damages. Counsel noted that Grievant had been working since his suspension and dismissal and, that in the event that Grievant was ultimately reinstated, Respondent believed any backpay award should be offset by those earnings. Counsel for Respondent requested that Grievant's counsel provide to Respondent a record of any wages Grievant earned while he was suspended and dismissed from employment

and Grievant's counsel agreed to make such documents available. Accordingly, the issue of mitigation of damages was raised by the Respondent and must be considered.

Respondent's dismissal of Grievant was not malicious. It was based upon an assault of one employee by another with weapons. Had there been a sufficient rational nexus between the assault and the Grievant's job duties, the dismissal would have been upheld. Under these circumstances, Grievant is obligated to mitigate his damages and any wages Grievant earned between the time he was suspended and the time he is reinstated must be deducted from any back pay Grievant may receive. The grievance is Granted in part and Denied in part.

Conclusions of Law

1. 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus"

between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285 S.E.2d 665 (1981). *See also*, *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007); *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986); *Thurmond V. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976); *Cottrill v. Gilmer County Bd. of Educ.,* Docket No. 2010-0898-GilED (April 14, 2010); *Williams v. Alcohol Beverage Control Admin.,* Docket No. 2009-1684-DOR (Nov. 25, 2009); *Boehm v. Dep't of Health & Human Res*. Docket No. 05-HHR-441 (May 18, 2006); and *Hensley v. Dep't of Health & Human Res.* Docket No. 04-HHR-375 (Jan. 28, 2004).

3. There is not a sufficient rational nexus between Grievant's assault on Mr. Thomas in the Bible Baptist Church parking lot for that conduct to be the basis for discipline by the DOH.

4. Respondent proved the allegations by a preponderance of the evidence that Grievant participated in workplace racial slurs in violation of DOP rules and that he participated in conduct that jeopardized the safety of his co-workers and efficiency of the Respondent's operation. Therefore, some discipline is appropriate.

5. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

6. Since Grievant may not be disciplined for his conduct away from work, dismissal from employment is disproportionate to the remaining charges. Given the totality of the circumstances and the gravity of the potential harm that could have resulted from Grievant's actions at work, a thirty working day suspension without pay is reasonable.

7. "Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Wages from any job taken by a wrongfully discharged employee will be deducted from his or her back pay award whether the work taken is comparable to the work contracted for or not, if the employee's performance of the job would have been incompatible with his or her performance of the contract." *Syl. pts.* 2 & 3, *Mason County Bd. of Educ. v. State Superintendent of Schools*, 170 W.Va. 632, 295 S.E.2d 719 (1982).

Accordingly the Grievance is GRANTED in part and DENIED in part. Respondent is ORDERED to reinstate Grievant to employment with back pay and benefits, minus pay for the thirty working day suspension. Any wages Grievant earned between the time he was initially suspended and the time he is reinstated shall be deducted from the back pay award.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of

its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008). Additionally, the prevailing party on appeal is required by 156 C.S.R. 1 § 6.20 to furnish the Grievance Board with a copy of the final decision of the circuit court and any accompanying order within twenty days of its receipt.

DATE: SEPTEMBER 8, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE