# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOSEPH HEATH,**
**Grievant,**

**v.** **DOCKET NO. 2013-1661-DOT**

**DIVISION OF HIGHWAYS,**
**Respondent.**

## DECISION

Joseph Heath ("Grievant") filed this grievance directly at Level Three of the grievance procedure on March 29, 2013, challenging his dismissal by his employer, the Division of Highways ("DOH" or "Respondent"). Grievant is seeking reinstatement to his former position as a Transportation Crew Supervisor 1 and recovery of all lost pay. A Level Three hearing was held before the undersigned Administrative Law Judge on October 21, 2013, at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Mark C. Dean, Esquire, with the Legal Division of the DOH. This matter became mature for decision on November 18, 2013, upon receipt of the last of the parties' post-hearing arguments.[1]

[1] To the extent Grievant's post-hearing argument included statements which were testimonial in nature, such representations were disregarded because the Grievance Board's procedures do not permit additional evidence to be introduced after the Level Three hearing is closed. *See L.A. v. Marshall Univ*., Docket No. 2013-1720-MU (Nov. 21, 2013); *Redd v. McDowell County Bd. of Educ*., Docket No. 2012-1419-McDED (July 18, 2012); *Hedinger v. Wyoming County Bd. of Educ*., Docket No. 2010-0589-WyoED (Mar. 4, 2011).

## Synopsis

Grievant was dismissed from his employment by DOH for physically and violently assaulting the same co-worker in May and August of 2011, and using racially offensive language toward this African-American co-worker in the course of these assaults. DOH also alleged that Grievant's behavior represented a pattern of threatening and racially offensive behavior which also occurred while Grievant was employed with the Greenbrier County Maintenance Organization. DOH presented no evidence to support this latter claim. Based upon credibility determinations where several controlling facts were in dispute, the employer proved the assault and racially offensive language charges in 2011 by a preponderance of the evidence. Nonetheless, the employer's choice of termination as a penalty in the circumstances presented was determined to be an abuse of discretion, and a lesser penalty of a 30-day suspension and demotion to a non-supervisory position was substituted as the most appropriate sustainable penalty for the charges proven.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

## Findings of Fact

1. At the time of the events which led to this disciplinary action, Grievant was employed by DOH in Marion County, West Virginia as a Transportation Worker 2 Equipment Operator. He began working for DOH on December 26, 2007. *See* G Ex 4.

2. Raymond Jackson is currently employed by DOH as a Transportation Crew Supervisor 1 in Marion County. At the time of the events which led to this

disciplinary action, Mr. Jackson was employed as a Transportation Worker 2. Mr. Jackson began working for DOH in District III in the vicinity of Parkersburg and St. Marys before transferring to Marion County in 2010.

3. Mr. Jackson is African-American. He weighs somewhere in the neighborhood of 210 to 215 pounds.

4. John McCale is currently employed by DOH as a Transportation Worker 2 Craft Worker in Marion County. Mr. McCale suffers from a medical condition which affects his speech, and his short-term memory, in certain situations. This medical condition does not impact his long-term memory.

5. Jeff Black was the Director of Human Resources for DOH at the time of the events which led to this disciplinary action. Subsequent to Grievant's termination, Mr. Black retired from state employment, after 32 years with DOH.

6. At all times pertinent to this grievance, Michael Roncone was employed by DOH as the Highway Administrator for Marion County, which is part of DOH District IV.

7. Anthony Paletta is the Administrative Services Manager for DOH District IV, headquartered in Clarksburg, West Virginia.

8. Ralph Sumlin is employed by DOH as a Transportation Worker 2 Truck Driver in Marion County. Mr. Sumlin is also African-American.

9. Drema Smith is employed by DOH as Director of the Equal Employment Opportunity Division. Ms. Smith agreed that the EEO investigators made certain unprofessional or inappropriate comments in the course of conducting an investigation concerning Grievant's alleged misconduct while employed in Marion County.

10. On an unspecified date in May 2011, Grievant, Mr. Jackson and Mr. McCale were on a crew performing blacktopping work on a public road near Four States, in Marion County, West Virginia.

11. While spreading asphalt on the highway near Four States, Grievant and Mr. Jackson got in an argument over the use of a rake. A struggle to take control of the rake ensued. Grievant was the principal aggressor in this incident. When Grievant charged Mr. Jackson, in an apparent effort to shove him down a descending hill toward an adjacent creek, Mr. Jackson ducked aside, and Grievant's momentum caused him to fall down the hill.

12. When Grievant climbed back up the hill to the highway, he was angry and approached Mr. Jackson, pushing him with his hands and bumping Mr. Jackson chest-to-chest in an apparent effort to provoke a fight. Grievant also made various negative and provocative statements to Mr. Jackson, including calling him a "N _ _ _ _ r."

13. A co-worker, Ralph Sumlin, got between Grievant and Mr. Jackson, and Mr. Sumlin and another co-worker, John McCale, were able to separate them without any further violence. Bill Lane, their Foreman, then appeared, and took Grievant and Mr. Jackson away from the work site in his state vehicle.

14. Mr. Jackson did not complain to anyone about this incident at Four States, and no disciplinary action was taken against Grievant at that time.

15. On August 29, 2011, Grievant, Mr. McCale and Mr. Jackson were preparing to spread asphalt on Ice's Run Road off U.S. Route 250 between Fairmont and Farmington, West Virginia.

16. Mr. Jackson was driving a dump truck, hauling asphalt from the plant to the work site. Grievant had some words with Mr. Jackson and stepped onto the truck's running board on the driver's side, grabbing Mr. Jackson by the neck.

17. Later that same morning, when the three crew members met to discuss this incident, Grievant attempted to provoke a fight with Mr. Jackson and called him a "N _ _ _ _ r."

18. On the day of the Ice's Run incident, Grievant was acting in the capacity of a Crew Leader, which DOH considers to involve serving in a supervisory capacity.

19. According to DOH records, Grievant's crew spread over 78 tons of blacktop on Monday, August 29, 2011. *See* G Ex 7. These same DOH records indicate that Mr. Jackson drove his assigned dump truck a distance of 177 miles that day. *Id*.

20. On two occasions Grievant made verbal complaints on unspecified dates to Gregory Phillips, District Manager for DOH District IV, alleging that he was being harassed by various DOH employees in Marion County. Mr. Phillips referred these investigations to his staff to follow up. There was no evidence that Grievant's complaints were either investigated or substantiated, and there was no evidence that any remedial action was ever taken as a result of any of Grievant's complaints.

21. On April 16, 2012 Grievant was promoted from Transportation Worker 2 Equipment Operator to Transportation Crew Supervisor 1. *See* G Ex 4.

22. Vicki Wiseman filed a grievance at Level One of the grievance procedure on or about April 24, 2012, challenging her non-selection for promotion to the Transportation Crew Supervisor I position awarded to Grievant. Grievant was granted

Intervenor status in that grievance  In describing her grievance, Ms. Wiseman alleged, *inter alia*:

> The employee, Joe Heath, that was chosen for this position has displayed unprofessionalism, anger issues, such as profanity, physical contact and unsafe situations which have been directed toward fellow co-workers numerous times. With his behavior being a safety risk, it has caused hostility throughout the garage, and has effected (*sic*.) the morral (*sic*.) and team work to accomplish work to be completed for this County. My opinion, (*sic*.) the selection for this position was not in the best interest for the public, employees, (*sic*.) of this County. His lack of concern for the safety of his fellow employees, and his reliability and dependability are below the standards for this position.

G Ex 4.

23. There was no evidence presented to indicate how Ms. Wiseman became aware of these alleged incidents involving Grievant, as she was not present during any of the incidents which led to Grievant's termination.

24. DOH denied Ms. Wiseman's grievance on its merits in a decision issued on June 7, 2012. *See* G Ex 4. There was no evidence to indicate that the grievance was pursued any further.

25. As a result of some of the allegations in Ms. Wiseman's grievance, DOH initiated an investigation by its EEO Division sometime in early 2013 to determine whether Grievant had participated in prohibited racial harassment.

26. By the time the DOH investigation got underway, Mr. Jackson was working for Mr. McCale's private construction contracting business on a part-time basis, and continued working in that capacity up to the time of the Level Three hearing.

27. There was no documentation to support the allegation that Grievant had anger management issues and used racial slurs while working for DOH in Greenbrier

County, West Virginia. No witnesses with knowledge of such incidents appeared at the Level Three hearing.

28. Following completion of the EEO investigation, Mr. Roncone and Mr. Paletta recommended that Grievant be demoted to a Transportation Worker 2 Equipment Operator and suspended for 10 days. *See* G Ex 1.

29. On March 6, 2013, Grievant participated in a pre-termination meeting with Mr. Black and Ernie Larzo, Executive Assistant to the Commissioner. *See* G Ex 2.

30. On March 8, 2013, Jeff Black, Director of the Human Resources Division for DOH, notified Grievant of his decision to terminate Grievant's employment as follows:

> Pursuant to Section 12.2 of the State Division of Personnel Administrative Rule and Section II, Chapter 6 of the Division of Highways Administrative Operating Procedures, your employment with the Department of Transportation, Division of Highways, as a Transportation Crew Supervisor 1 is hereby terminated effective March 22, 2013 at the close of business. Although the effective date of your termination is March 22, 2013, your separation from the work place is effective immediately. You will be paid 80 hours of severance pay for the period of March 11 through March 22, 2013. Prior to this action being taken, you were given the opportunity to respond to the charges made against you.
>
> The reason for your termination is inappropriate workplace behavior involving physical violence and violation of equal employment opportunity standards. More specifically, in approximately May of 2011 you physically and violently assaulted a fellow employee, Raymond Jackson, while using racially offensive language toward him. Again, in approximately August of 2011, you physically and violently assaulted Mr. Jackson, while using racially offensive language toward him. This behavior is unacceptable in the workplace and represents a pattern of threatening and racially offensive behavior on your part, which also occurred while you were employed with the Greenbrier County Maintenance Organization.
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> * * *

G Ex 2.

31. Prior to reaching his decision to terminate Grievant, Mr. Black personally interviewed Grievant and some of the Marion County employees Grievant indicated would have personal knowledge of the events at issue. Mr. Black sometimes, but not often, followed this extra step before taking a disciplinary action.

## **Discussion**

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332

S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

There were four witnesses who testified regarding one or both of the incidents for which Grievant was disciplined: Grievant, Raymond Jackson, John McCale, and Ralph Sumlin. Grievant and Mr. Jackson are the principle protagonists in this dispute, and thus have a greater stake in the outcome, a factor which may slant their testimony in

one direction or the other. Mr. McCale and Mr. Sumlin were more likely to be disinterested witnesses. Grievant established that Mr. Jackson is presently employed by Mr. McCale's private construction business on a part-time basis. However, having observed Mr. McCale's demeanor during his testimony, there was no appearance of any animosity toward Grievant, or any suggestion that his testimony was biased toward either participant. As for Mr. Sumlin, there was no suggestion that he had any reason to favor one participant over the other. Moreover, his testimony was very candid and credible, although his observation of the Four States incident was rather limited.

Because a considerable amount of time elapsed between these events (May and August 2011) and the point in time where DOH initiated this disciplinary action (March 2013), memories were necessarily a little fuzzy on some matters such as dates and times. Grievant contends that it would be unlikely that the crew could spread over 78 tons of asphalt on the day of the Ice's Run incident, if they were tied up for one to two hours as related by Mr. Jackson and Mr. McCale. Grievant's evidence does indicate that the events did not take as long as the witnesses remembered. However, the events described and the distances covered could have taken place substantially as alleged without taking the two hours which Mr. McCale recalled. This circumstantial evidence does not refute the eyewitness testimony of the assault related by Mr. Jackson and Mr. McCale, nor does it impeach their testimony generally.

In any event, DOH presented evidence relating to three separate physical altercations involving Grievant and Mr. Jackson. Two of these incidents occurred on the same day while Grievant and Mr. Jackson were part of a road crew involved in a

blacktopping operation on Four States Road in Marion County, West Virginia, in or about May 2011. The third incident occurred on Ice's Run Road in Marion County, when Grievant and Mr. Jackson were part of a different crew performing a blacktopping operation on the highway, on August 29, 2011. (For simplicity, the first two incidents in May 2011 will be referred to as "Four States incident No. 1" and "Four States incident No. 2," respectively. The third incident will be referred to as the "Ice's Run incident.")

Mr. Jackson described the first of these two incidents, noting that he had been "joking" with the members of the crew about his service as a Navy SEAL. Mr. Jackson noted that his SEAL experience was limited to role play in a video game, and that he has never actually served in such capacity. Grievant asked Mr. Jackson several questions about Navy SEAL activities and Mr. Jackson responded as part of the joke. Grievant asked Mr. Jackson if there was enough water in the creek adjacent to the road to drown someone and Mr. Jackson answered affirmatively. According to Mr. Jackson, Grievant got out of the truck and wanted to engage in horseplay.

Mr. Jackson told Grievant that he (Jackson) did not want to engage in horseplay because he was "too old." Grievant persisted and proceeded to "manhandle" Mr. Jackson, picking him up off the ground, and over his shoulder. Mr. Jackson grabbed hold of a roller with one arm in an effort to extricate himself from Grievant's grasp. Ultimately, Grievant dropped Mr. Jackson on his head and walked away. Mr. Jackson suffered no significant injuries beyond a strained arm which he never reported to anyone. There was nothing else said during this incident, and no racial epithets were uttered.

Later that same day in May 2011, while the crew was actively engaged in laying asphalt on the highway, Grievant was leaning on his rake and Mr. Jackson's rake was broken. Mr. Jackson said to Grievant, "If you're not going to rake, let me use your rake." Mr. Jackson recalled that Grievant simply laughed in response. Shortly thereafter, Grievant walked up to Mr. Jackson, grabbed the broken rake from his hand and threw it over the hill. Mr. Jackson said, "I'm not getting that rake now," or words to that effect, and attempted to take the good rake from Grievant. The two workers then pushed each other around, with both of them holding onto the rake between them. When Mr. Jackson was pushed back toward the edge of a hill along the road, he told Grievant, "I am not going over this hill."

According to Mr. Jackson, at that point Grievant made an aggressive move to push him over the hill, which Mr. Jackson sidestepped, resulting in Grievant's momentum taking him over the hill. When Grievant climbed back up onto the road, Mr. Jackson observed that Grievant's face was "beet red" and he was "really mad." Grievant pushed Mr. Jackson and called him names, in what Mr. Jackson perceived as an effort to provoke a fight. Mr. Jackson backed up and Grievant followed. Mr. Jackson recalled Grievant calling him a "N _ _ _ _ _ r," "worthless," "ball-less," as well as making insulting comments regarding Mr. Jackson's mother and children that Mr. Jackson could not specifically remember. At that point, another co-worker, Ralph Sumlin, got out of his truck, pushed each of them back, and stood between Mr. Jackson and Grievant. He had to tell them three times, "you guys are gonna lose your jobs," before the confrontation ended. Mr. Sumlin recalled that their foreman, Bill Lane, who had been

watching from a distance while sitting in his vehicle, then appeared and took Grievant and Mr. Jackson away from the work site in his truck. When they returned, both Mr. Jackson and Grievant thanked Mr. Sumlin for intervening, and everyone went back to work.

Mr. McCale was also working at the Four States location when these events took place. Like Mr. Sumlin, Mr. McCale did not witness the incident involving Grievant picking Mr. Jackson up over his shoulder and dropping him. Initially, Mr. McCale's focus was on guiding Mr. Sumlin's truck to the proper location to offload asphalt. The first thing Mr. McCale noticed was Grievant and Mr. Jackson apparently struggling over a rake, and Grievant was trying to take the rake from Mr. Jackson. Mr. McCale thought they were just joking around, but then they began pushing each other back and forth from one side of the road to the other. Grievant charged toward Mr. Jackson who stepped aside and Grievant went tumbling over the hill. Mr. McCale observed Mr. Jackson laughing after Grievant fell down the hill. When Grievant came back up the hill onto the road, he was angry and yelling at Mr. Jackson, shoving him, and calling him a "N _ _ _ _ r," as well as making some comments about Mr. Jackson's mother. At that point, Mr. Sumlin got out of his truck and got between them, and Mr. Sumlin and Mr. McCale tried to get them separated. Shortly thereafter, Foreman Lane appeared, had Grievant and Mr. Jackson get in his truck, and drove away from the work site. The three of them were gone for a while, returning several minutes later, and everyone went back to work.

Mr. Jackson described another incident that occurred in August 2011 on Ice's Run Road, a secondary road off U.S. Route 250 near Fairmont in Marion County.[2] Mr. Jackson testified that this incident took place on a Monday in August. Again, Grievant and Mr. Jackson were assigned to a crew that was spreading asphalt. Mr. Jackson was driving a dump truck, delivering asphalt to be spread on the road. Also present was John McCale.

Mr. Jackson had a discussion with Grievant on the previous Friday regarding a work-related dispute between himself and Mr. McCale. Mr. McCale was not at work that day. Mr. Jackson spoke with Mr. McCale over the weekend and Mr. Jackson considered the matter resolved between them. Mr. Jackson could not recall the specifics of the dispute, relating that is was "something stupid," essentially a "he said, she said" kind of issue. When Mr. Jackson arrived at the work site on Ice's Run that Monday morning, he recalled that Grievant and Mr. McCale got out of another truck and approached the dump truck in which he was sitting. At that point, Grievant brought up the conversation about Mr. McCale and Mr. Jackson said, "Joe, me and John's already talked about it. It's no big deal. Let's just get to work." Grievant made a statement that Mr. Jackson said something to him about Mr. McCale's daughter, which Mr. Jackson denied ever saying. Grievant kept saying, "Go ahead and say it. Tell him what you told me." Mr. Jackson, responded by stating, "Joe, I've already talked with John. Let's just get to work man."

[2] As disclosed at the Level Three hearing, the undersigned Administrative Law Judge was employed by the Division of Highways (then the "Department of Highways") in the summer of 1965 as a Traffic Survey Interviewer in Marion County. Having resided in Marion County from 1956 to 1968, the locations described in the witnesses' testimony are not unfamiliar. However, the Administrative Law Judge does not have any personal knowledge of the witnesses, most of whom were not yet employed by DOH in 1965.

Grievant kept insisting that Mr. Jackson repeat their earlier conversation about Mr. McCale and it appeared to Mr. Jackson that Grievant was becoming more and more angry. Finally, Mr. Jackson said, “Your old lady is right. You really do have anger issues.” As soon as Mr. Jackson made that remark, Grievant stepped up on the running board on the driver’s side of the dump truck and forcefully grabbed Mr. Jackson around the neck, causing him to strike his head somewhere on the window frame on the driver’s door. Mr. Jackson suffered a cut near the top of his head which began bleeding. Mr. Jackson yelled, “Let go of my f _ _ _ _ _ _ g neck.” Grievant then held the door to keep Mr. Jackson from getting out of the truck. At that point, Mr. Jackson began laughing.

Mr. Jackson then turned his truck around and drove away, heading toward the county garage in Fairmont, stating that he intended to report the incident to Mr. Roncone, the County Highway Administrator. Grievant and Mr. McCale got in their vehicle and also proceeded toward the county garage in Fairmont. While nearing the DOH facility, Mr. McCale called Mr. Jackson on his cell phone and convinced him to discuss the matter with Grievant and himself, rather than involve their superiors. The three of them then met in a parking lot on College Hill between the work site and the county garage, which is located on Country Club Road. When Mr. Jackson got out of his truck to speak to Mr. McCale, Grievant came up and tried to provoke a fight, bumping his chest against Mr. Jackson and calling him names, including “N _ _ _ _ r” at least twice.

Mr. McCale's testimony regarding the incident on Ice's Run Road supported Mr. Jackson's version of the events. Mr. McCale and Grievant were sitting in a crew cab truck when Mr. Jackson arrived in a dump truck with a load of asphalt. The two trucks were facing each other. Grievant walked over to talk to Mr. Jackson while Mr. McCale went to get the rakes and other needed tools out of the back of their truck. Mr. McCale did not hear what they were saying until they got loud and Grievant said something to Mr. Jackson that sounded like "tell John the truth." As Mr. McCale was walking toward the dump truck, Grievant jumped up on the truck and grabbed Mr. Jackson by the neck. Mr. McCale observed a red mark near the top of his forehead immediately thereafter. Mr. McCale believed that Mr. Jackson struck the top of his head on something but he was unable to say if it was the truck steering wheel or some portion of the driver's side window frame.

Mr. Jackson took off in his truck, and headed toward the county garage, stating that he was going to report the incident to Mr. Roncone. Mr. McCale and Grievant were soon headed toward the same destination in their vehicle. Mr. McCale called Mr. Jackson on a cell phone and they agreed not to proceed to the garage. The three of them met in a parking lot near Fairmont State College where Grievant got out of the truck and went over and argued with Mr. Jackson. There was limited physical contact with Grievant appearing to be the aggressor, pushing and shoving Mr. Jackson. Once again, Grievant called Mr. Jackson names, including "N _ _ _ _ r." Mr. McCale believed they were gone from the work site nearly two hours before they returned and put down the asphalt in Mr. Jackson's truck. Mr. Jackson believed these events took

approximately an hour. Everyone eventually calmed down, and they returned to the work site and resumed spreading asphalt for the rest of the work day.

Following the Ice's Run incident, Mr. Jackson went to his supervisor, Mr. Roncone, and asked not to be assigned to the same crew as Grievant. However, he did not tell Mr. Roncone about the alleged altercations at Four States, only about Grievant grabbing him by the neck at Ice's Run, and he did not seek to have Grievant disciplined for his conduct. Grievant testified that he did initiate a complaint about racially discriminatory treatment that he received while he was employed by a previous employer in Ravenswood, West Virginia, but did not do so in regard to these incidents.

Subsequent to the Four States incidents, Mr. Jackson would eat dinner with Grievant and other crew members approximately every other Friday when Grievant would treat his crew to pizza or other food to recognize their hard work. Mr. Jackson acknowledged that at that point in time, he hoped to get past these events. However, Mr. Jackson did not participate in these activities following the Ice's Run incident.

Mr. Jackson appeared to be a credible witness. His demeanor was neither evasive nor uncertain. There was no indication that he was out to get the Grievant or cause him to lose his job. Nonetheless, he was obviously offended by Grievant's aggressive conduct and use of racial epithets, as he had every right to be. Mr. McCale was also a credible witness, who gave every indication of striving to tell the truth as best he could remember events that took place more than two years ago. The fact that Mr. Jackson later began working for Mr. McCale might arguably give him some motive to slant his testimony toward Mr. Jackson's position, but there was simply no indication

that this was the case. Indeed, Mr. McCale was extremely candid and forthright in his testimony, volunteering personal information that he had no need to reveal.

Certainly, Grievant has a motive not to tell the truth in this matter because it is his job that is at stake. *See Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009). In this regard, Grievant appeared to focus more on poking holes in the details of the events related by Mr. Jackson and Mr. McCale than relating his version of the events. However, Grievant acknowledged in his Level Three testimony that after he went over the hill at Four States, he was "red hot" when he climbed back up on the highway and could not recall exactly what he said to Mr. Jackson at that point. He did note that he was not working in a supervisory capacity at the time of the Four States incident. Grievant also acknowledged that Mr. Sumlin intervened, telling them that they were going to lose their jobs if they did not cool down. Grievant acknowledged that what he and Mr. Jackson did was wrong, but asserted that they should have both been disciplined equally.

As for the Ice's Run incident, Grievant stated that the only argument that day involved a dispute between Mr. Jackson and Mr. McCale, and Grievant did nothing more than tell them both to get back to work. Grievant denied ever touching Mr. Jackson at the time he got up on the running board of his truck. However, he acknowledged that Mr. Jackson alleged that Grievant had threatened him, and that he was going to the garage to report the threat. Grievant testified that he told Mr. Jackson, "I will meet you there," and Mr. Jackson drove away. Grievant asserted that nothing else happened that day.

While there is evidence that demonstrates that this incident did not last as long as the employer's witnesses indicated, it really only took a few seconds for Grievant to grab Mr. Jackson. In assessing credibility of the respective witnesses, it is noted that Grievant confirmed important aspects of the testimony presented by Mr. Jackson and Mr. McCale regarding the earlier altercation at Four States. Further, Mr. Sumlin, who was a completely neutral and very credible witness, did not contradict the testimony of Mr. Jackson or Mr. McCale in any serious particular. Thus, the question arises as to why these two witnesses, who testified credibly and consistently regarding the Four States incident, should not be believed when relating what transpired at Ice's Run.

There were only three people present at Ice's Run, and two of them presented credible testimony indicating that Grievant engaged in prohibited misconduct as charged. Grievant's self-serving denial and circumstantial evidence was simply insufficient to undermine the story told by the employer's witnesses. Accordingly, DOH established by a preponderance of the evidence of record that Grievant assaulted Mr. Jackson in August 2011, and thereafter used racially offensive language while arguing with him, substantially as charged in the termination notice.

Mr. Jackson also described two other work-related disputes that took place subsequent to the Ice's Run incident, neither of which was referenced in the charges. These events do not appear to have any relevance to the merits of this grievance and have not been considered in reaching this decision.[3]

[3] Grievant asserted that he complained to Ray Urse, Assistant Maintenance Engineer for District IV, about being verbally threatened by Raymond Jackson and John McCale during one of these incidents. Mr. Urse could not recall this conversation. Eric Cosco, a Transportation Worker 2 who was assigned to serve as an acting supervisor at the time of this incident, recalled Grievant making a verbal complaint. He testified that he spoke to Delores Wood, Mr. Roncone's Office Assistant, who told him it was not a state issue because it took place off the clock. Ms. Wood could not recall this conversation with Mr. Cosco.

As a tenured public employee, Grievant has property and liberty interests which entitle him to procedural due process in regard to termination of his employment. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994). *See Matthews v. Eldridge*, 424 U.S. 319 (1976). Accordingly, where an act of misconduct is asserted in a notice of dismissal, it should be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the employee will have no reasonable doubt as to their identity. *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 232 S.E.2d 842 (1977). *See Arnett v. Kennedy*, 416 U.S. 134 (174).

The termination notice issued to Grievant indicates that he was being terminated for two incidents wherein he violently assaulted a fellow employee, Raymond Jackson, and used racially offensive language toward him. These incidents were alleged to have occurred in May and August of 2011. Although the specific dates and locations of these alleged events were not set forth in the termination notice, it does not appear that these deficiencies prevented Grievant from preparing his defense against the charges. Therefore, DOH met the minimum requirements for due process in this matter. *See Mangum v. Lambert*, 183 W. Va. 184, 394 S.E.2d 879 (1990); *Adkins v. Dep't of Health & Human Res*., Docket No. 2013-0264-DHHR (July 19, 2013). *See also Clarke*, *supra*; *Snyder*, *supra*.

The termination notice further asserted that the alleged events involving Mr. Jackson represented "a pattern of threatening and racially offensive behavior on your

part, which also occurred while you were employed with the Greenbrier County Maintenance Organization." G Ex 2. Had Grievant been disciplined while working in Greenbrier County, this language would provide adequate notice of the allegations against him. *See Clarke*, *supra*; *Snyder*, *supra*; *Adkins*, *supra*. However, DOH presented no evidence to support this allegation. Mr. Black admitted that there was no documentation of any corrective action being taken against Grievant while he was employed by DOH in Greenbrier County. Therefore, this portion of the charges against Grievant was not established by a preponderance of the credible evidence of record.

The termination notice makes no reference to two incidents taking place in May 2011, only that Grievant "physically and violently assaulted a fellow employee, Raymond Jackson, while using racially offensive language toward him." G Ex 2. Therefore, Four States incident No. 1 which began with horseplay based upon Mr. Jackson's fantasy of serving as a Navy SEAL, although involving physical violence, was not shown to involve any racial slurs. Such horseplay at a work site involves conduct which DOH traditionally prohibits and which is ordinarily alleged as such. Thus, it was not properly alleged as part of the charges against Grievant in his termination notice, and will therefore be considered solely as background to Four States incident No. 2 later that same day. *See Adkins*, *supra*. *See generally*, *Arnett*, *supra*.

Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. O*verbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1986). *See Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket

No. 89-SFC-145 (Aug. 8, 1989). However, where the employer proves some, but not all, of the charges against an employee, the Grievance Board must determine whether the penalty imposed, in this case termination of employment, is otherwise supported by the charges which were proven. *Knight v. Dep't of Health & Human Res*., Docket No. 2012-1517-CONS (Sept. 20, 2013). *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012). This determination must necessarily be made on a case-by-case basis. *Knight*, *supra*; *Bostic v. Ins. Comm'n*, Docket No. 07-INS-091 (June 3, 2008); *Conner v. Barbour County Bd. of Educ*., Docket No. 97-20-031 (Sept. 29, 1995).

As previously noted, DOH presented no evidence to support the allegation that the May and August 2011 incidents were part of a "pattern of threatening and racially offensive behavior . . . which also occurred while you were employed with the Greenbrier County Maintenance Organization." G Ex 2. Although Mr. Black indicated in his testimony that this particular charge was not important, and he would have reached the same decision in any event, the analysis does not stop here. Had such related or similar conduct by Grievant been documented before he transferred to Marion County, the employer's penalty selection would assuredly be upheld. However, the facts established in this record are that this is the first instance where Grievant has been disciplined for any misconduct while employed by Respondent since 2007. Therefore, it is necessary to more closely examine the penalty selected to address the misconduct which was proven by a preponderance of the evidence.

One of the specific reasons Mr. Black cited for deciding to terminate Grievant's employment, rather than impose a lesser penalty, was the potential for agency liability for failing to maintain a workplace free from racially-based harassment. Certainly, when an employer has notice of prohibited harassment, it should take prompt remedial action reasonably calculated to end the harassment. *EEOC v. Central Wholesalers, Inc*., 573 F.3d 167, 178 (4th Cir. 2009); *Fairmont Specialty Serv. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96-97, 522 S.E.2d 180, 190-91 (1999). *See EEOC v. Sunbelt Rentals, Inc*., 521 F.3d 306, 319 (4th Cir. 2008). Where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, the employer may not be held liable for the hostile work environment. *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995).

However, Title VII does not require that the employer impose the most severe sanction available in order to avoid liability under Title VII for the harassing behavior of one of its employees. *Reinhold v. Virginia*, 135 F.3d 920, 929 (4th Cir. 1998). *See Waymire v. Harris County*, 86 F.3d 424, 429 (5th Cir. 1996). Where an employer's remedial response results in the cessation of the complained of conduct, liability must cease as well. *Spicer v. Virginia*, 66 F.3d 705, 711 (4th Cir. 1995). Although an employee's termination will guarantee that the employee in question will not repeat the same offense, the forgoing rulings make clear that an employer need not implement a "zero tolerance" policy prohibiting all harassing conduct in order to protect itself against future liability. It appears that DOH placed too much emphasis on making an example of Grievant so as to demonstrate its commitment to stamping out racist misconduct in its

work force, and insufficient emphasis on matching the punishment to the offenses and the offender.

Prior to his termination, Grievant had not previously been disciplined for any misconduct, and certainly not for racial harassment. Further, Mr. Jackson had not previously complained to his employer about racial discrimination. Thus, DOH was not on notice that there was a problem regarding Grievant which needed to be corrected. By the time this matter was discovered, in the course of other unrelated events, over a year had passed without any further misconduct by Grievant, and without the necessity for remedial measures. In addition, Grievant had voluntarily transferred to another District, so he and Mr. Jackson would no longer have any foreseeable potential for further interaction. Each of these factors, particularly the passage of time[4] without any further misconduct, suggests that termination represents an excessive penalty.

It is also troubling that a DOH Foreman was aware of the Four States incident, but this event was not reported to higher management. Clearly, the incident did not generate any documented disciplinary action. Moreover, whatever informal action the first-line supervisor took in response to the Four States incident was obviously not adequate to prevent the subsequent event on Ice's Run. In addition, Grievant was not a supervisor at the time of this event, another factor which suggests that termination may have been excessive.

Ultimately, the decision by DOH to terminate Grievant must be reviewed to determine whether the action taken was arbitrary and capricious. In reviewing an agency action to determine whether it is arbitrary and capricious, consideration should

[4] Indeed, Grievant was promoted to the position of Transportation Crew Supervisor I on April 16, 2012, several months after the incidents for which he was terminated. *See* G Ex 4.

be given to whether the agency relied on prohibited factors, entirely ignored important aspects of the issue to be decided, explained its decision contrary to the available evidence, or whether the decision is so implausible it cannot be ascribed to a difference in view. *See Bedford County Memorial Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985); *Woolridge v. Dep't of Transp*., Docket No. 2008-0416-DOT (Jan. 23, 2009). Although a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). Ultimately, the arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid, as long as the decision is supported by substantial evidence, or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

As previously discussed, DOH failed to establish that Grievant's conduct was part of a pattern of behavior that existed when he worked in Greenbrier County. Indeed, Grievant had no disciplinary record before these incidents. Further, the employer had a clear opportunity to take appropriate remedial action after the first incident but, for whatever reason, failed to do so. Moreover, the District IV Administrative Services Manager and Marion County Highway Administrator, who were closer to Grievant and knew his work performance, recommended a demotion and 10-day suspension for these offenses. Mr. Black's rationale concerning the compelling need for DOH to take

remedial action to avoid future agency liability, as discussed above, is not supported by the legal posture adopted by the courts on this issue.

Accordingly, having carefully reviewed all of these factors, the undersigned Administrative Law Judge finds that the penalty imposed represents a clear abuse of discretion. Nonetheless, the proven offenses are serious and demonstrate that Grievant should not hold supervisory authority, until he has demonstrated that horseplay and racial epithets are no longer part of his repertoire. Neither Mr. Jackson nor any other employee should be supervised by someone who has not yet learned to control his temper and his speech. Grievant's termination was excessive in the circumstances presented and should be reduced to a thirty (30) day suspension and a demotion to a non-supervisory position as a Transportation Worker 2.

The following Conclusions of Law support the Decision reached.

## 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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that

‘dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Where an act of misconduct is asserted in a notice of dismissal, it should be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the employee will have no reasonable doubt as to their identity. *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v. Civil Serv. Comm’n*, 160 W. Va. 762, 232 S.E.2d 842 (1977).

4. DOH established by a preponderance of the evidence that Grievant physically and violently assaulted a fellow employee in May of 2011, while using racially offensive language toward the employee. DOH further established that Grievant assaulted the same fellow employee and used racially offensive language toward him on another occasion in August 2011.

5. DOH failed to establish by a preponderance of the evidence that Grievant’s actions in 2011 were part of a pattern of threatening and racially offensive

behavior which occurred while Grievant was employed by the Greenbrier County Maintenance Organization.

6. Given that one of the charges against Grievant was not sustained, Grievant had no record of any prior disciplinary actions relating to violent or racially offensive conduct, or any other form of misconduct, and that the agency's concerns about liability for failing to stop racial misconduct were overstated, the charges proven were not sufficiently egregious to warrant Grievant's termination. *See Knight v. Dep't of Health & Human Res*., Docket No. 2012-1517-CONS (Sept. 20, 2013); *Bostic v. Ins. Comm'n*, Docket No. 07-INS-091 (June 3, 2008).

Accordingly, this grievance is **GRANTED, IN PART**. Respondent DOH is hereby **ORDERED** to reinstate Grievant to a non-supervisory position as a Transportation Worker 2, or equivalent, without any loss of pay, seniority, tenure or benefits, except for a thirty (30) day suspension without pay. In addition, Grievant shall be paid statutory interest on any back pay he receives as a Transportation Worker 2 based upon his reinstatement, less the 30-day suspension. Respondent may revise and reissue the termination notice in this matter to reflect such demotion and 30-day suspension, consistent with the determinations made in this matter. Otherwise, any reference to this termination must be stricken and removed from any personnel records maintained on Grievant. All other relief requested in this grievance is hereby **DENIED**.

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date: December 5, 2013**

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**LEWIS G. BREWER**
**Administrative Law Judge**