THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES FRANKLIN WILLIAMS,
Grievant,

v. **DOCKET NO. 2013-1980-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

This grievance was filed directly at Level Three of the grievance procedure by Grievant, James Williams, on May 23, 2013, appealing his dismissal by Respondent, Division of Natural Resources ("DNR"). Grievant's statement of grievance challenged his termination on the following grounds:

> Section G item 1 & 4 of Prohibited Workplace Harassment Policy: Nondiscriminatory Hostile Workplace Harassment:
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> 1. Unwarranted constant and destructive criticism;
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> 4. Threatening, shouting at, and humiliating particularly in front of others.
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> Mr. Bracken has repeatedly verbally abused the grievant in front of his staff, and the staff of other departments. On or about the middle of April Mr. Bracken began attempting to coerce the grievant into actions that are outside the job description held by the grievant, including the purchase of HVAC equipment via the grievant's contractor and Freon license, install of said equipment to avoid the competitive bidding process, and mishandling of a regulated substance without proper documentation, and procedure (Freon) A (*sic*.) federal offense. Grievant attempted to explain the hardships and vulnerability this would cause; however Mr. Bracken began bullying grievant after this discussion. Additionally, Mr. Bracken demanded the Grievant work 9 hours a day for 8 hours of pay, per his improvement plan.

> When the grievant refused to do these things, Mr. Bracken continuously increased the verbal humiliation and threatening the grievant with his job, repeatedly calling him lazy, and belittling his performance. He additionally over rode (*sic*.) the grievant's authority of (*sic*.) his staff by bestowing preferential treatment of a worker with whom Mr. Bracken has a personal relationship. The Grievant had received a review [a] month prior to the improvement plan, and this assessment was above satisfactory.

As relief, Grievant requested "[r]einstatement of grievant to the position held prior to termination in either the same location, or a location not exceeding the distance grievant traveled from his home to his prior location."

The undersigned Administrative Law Judge conducted a Level Three hearing regarding this grievance on July 30, 2013, in Beckley, West Virginia. Grievant appeared *pro se,* and Respondent was represented by Assistant Attorney General William R. Valentino. The parties waived filing of written, post-hearing arguments, and this matter became mature for decision at the conclusion of the hearing.

Synopsis

Shortly after Grievant completed his probationary period as the Maintenance Supervisor at Hawks Nest State Park, and received an above average employee evaluation, he was placed on a Performance Improvement Plan by the park's Superintendent, John L. Bracken. About two weeks after the Performance Improvement Plan was imposed, Grievant had a conversation with the park's Assistant Superintendent, Joe Baughman. In the course of that conversation, Grievant stated that Superintendent Bracken "had better back off" the improvement plan or he would make statements regarding litigation filed by a former park employee which would be personally detrimental to Superintendent Bracken. Assistant Superintendent Baughman believed that Grievant

was making a threat, and reported the conversation to Superintendent Bracken, who relayed the report to his supervisors. Grievant's employment was terminated for making a threat in order to subvert the improvement plan.

Grievant denied under oath that he said anything during his conversations with Assistant Superintendent Baughman that resembled the comments alleged. Based solely upon witness credibility, Respondent established by a preponderance of the credible evidence that Grievant engaged in the conduct alleged. However, it was not demonstrated that Grievant's statements constituted a serious threat of harm or wrongdoing, and it appears that the employer's reaction to these statements was inappropriate and grossly excessive.

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

Findings of Fact

1. Grievant was hired by Respondent on September 10, 2012, to serve as the Supervisor of Maintenance at Hawks Nest State Park. This position is classified by the West Virginia Division of Personnel as a Building Maintenance Supervisor II. *See* R Ex 2.

2. Grievant was responsible for the maintenance of all buildings, facilities, equipment and grounds throughout the park which include a lodge, restaurant, museum, pool, and tramway.

3. During his first six months of employment, Grievant was a probationary employee.

4. John L. Bracken is the Superintendent of Hawks Nest State Park. Superintendent Bracken participated in the interview process and decision to hire Grievant as Maintenance Supervisor.

5. Grievant's prior experience in the heating, ventilation and air conditioning (HVAC) business and his certification to work on HVAC equipment were considered as noteworthy qualifications in reaching the decision to hire Grievant as the park's Maintenance Supervisor.

6. Joe Baughman is the Assistant Superintendent of Hawks Nest State Park. Prior to becoming Assistant Superintendent, Mr. Baughman preceded Grievant as the park's Maintenance Supervisor. Assistant Superintendent Baughman also participated in Grievant's hiring interview with Superintendent Bracken.

7. On October 16, 2012, Grievant was suspended without pay for two days based upon his "making a sexually overt comment regarding another employee that was overheard by other employees." R Ex 3. Grievant did not grieve this disciplinary action.

8. On March 4, 2013, Superintendent Bracken issued an employee evaluation to Grievant in which he rated Grievant "Excellent" in one category, "Very Good" in twelve categories, and "Good" in eleven categories. Grievant was not rated "Fair" or "Unsatisfactory," the two lowest rating levels, in any category. *See* R Ex 4. Superintendent Bracken described this evaluation as "average."

9. At or about the time this employee evaluation was issued, Superintendent Bracken determined that Grievant had successfully completed his probationary period.

10. In the course of his employment, Superintendent Bracken asked Grievant to purchase Freon from United Refrigeration using his contractor's license. The Superintendent was planning to pay for the Freon using a state purchasing card. Superintendent Bracken believed Grievant's HVAC license allowed him to purchase and install Freon.

11. Grievant attempted to explain to Superintendent Bracken that although his license permitted him to purchase Freon, he could only install Freon if he had certain equipment required by federal regulations. Further, Grievant stated that improper use of Freon would be grounds for revoking his contracting license for HVAC work.

12. On or about March 27, 2013, Superintendent Bracken began documenting problems he observed in regard to Grievant's duty performance. *See* R Ex 7.

13. On April 24, 2012, within a week after the conversation regarding Freon purchases, Superintendent Bracken notified Grievant that he was being placed on a Performance Improvement Plan ("PIP"), based upon Grievant's alleged "unacceptable performance." The PIP included specific times each day for Grievant to perform certain duties, and listed other duties which needed to be performed on a weekly and monthly basis. *See* R Ex 5.

14. Superintendent Bracken permitted Grievant to take the original PIP home for review. Grievant signed the original PIP on April 24, 2013, adding the following hand-written statements below his signature:

> Being used as pressure to violate state licensure code as well as insurance & states a 9 hour workday & that I will be recorded (*sic*.) this time by the state. Do not fully understand. Set up for Dismissal."

See G Ex 2.

15. Superintendent Bracken approached Grievant the following day and asked him to sign another copy of the PIP. Grievant complied, this time adding the hand-written comment: "Do not fully understand or is this a 9 hour workday now." Superintendent Bracken responded by inserting the following hand-written comment: "This is based on an 8 hr. day! Shift for James will be 7:00 – 3:00." *See* R Ex 5.

16. On May 9, 2013, Grievant had a conversation with Assistant Superintendent Baughman, in Assistant Superintendent Baughman's office, wherein one of the topics discussed was Superintendent Bracken's PIP requirement. Grievant stated to Assistant Superintendent Baughman that Superintendent Bracken "had better back off" the improvement plan or he would make statements regarding "the Flynn case" (which involved sexual harassment litigation filed by a former park employee), which would be personally detrimental to Superintendent Bracken. Assistant Superintendent Baughman believed that Grievant was making a threat.

17. After hearing this statement, Assistant Superintendent Baughman did not admonish Grievant for this supposed threat, nor did he make any effort to clarify what Grievant meant by this statement. In addition, Assistant Superintendent Baughman did not immediately report what Grievant had said to Superintendent Bracken.

18. During a routine conversation with Superintendent Bracken later that evening, Assistant Superintendent Baughman described his conversation with Grievant. Superintendent Bracken was not working on May 9, but was in the park because the Superintendent and Assistant Superintendent reside within the park in state-provided housing.

19. In that conversation, Assistant Superintendent Baughman began by recommending to Superintendent Bracken that he should consider backing off on the PIP. Only when Superintendent Bracken asked why he was suggesting that approach did Assistant Superintendent Baughman relate the conversation he had with Grievant earlier that day.

20. Superintendent Bracken notified his immediate supervisor, District Administrator Paul Redford, and the Chief of Parks, Ken Kaplinger, of the allegations relayed by Assistant Superintendent Baughman in a written memo the following day, May 10, 2013. *See* R Ex 6. Superintendent Bracken did not recommend a particular response to Grievant's alleged conduct, such as termination or suspension.

21. On May 22, 2013, Frank Jezioro, Director of the Division of Natural Resources, issued a written termination notice to Grievant which included the following pertinent statements:

> The purpose of this letter is to advise you of my decision to dismiss you from employment as a Building Maintenance Supervisor II with the West Virginia Division of Natural Resources (DNR) effective June 2, 2013.
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> * * *
>
> On April 24, 2013, a discussion was held with you regarding the nature of your ongoing unacceptable performance. On this date, a "Performance Improvement Plan" was discussed with you, and a copy of the same was supplied to you at that time. It shared with you a number of particular instances where you failed to meet the agency's work expectations and indicated that you were expected to fulfill your responsibilities as a dependable and conscientious employee. You returned the signed document Performance Plan (*sic*.) that outlines your expectations and job responsibilities to Superintendent Bracken on April 25, 2013.
>
> It has now been reported to this office that on May 9, 2013, you advised Assistant Superintendent Baughman that Superintendent Bracken,

"had better back-off the Improvement Plan," or that you would make statements regarding a separate and on-going personnel and legal matter involving a former employee of the park that would ultimately be personally detrimental to Mr. Bracken. After reviewing this threat and having considered the obviously gross and egregious intent to subvert the improvement plan and the Superintendent's authority, I have decided that your dismissal is warranted. This is not only due to your failure to contribute to a positive, cooperative, and harmonious relationship with your supervisor, but also due to your attempts to intimidate and threaten the Superintendent and coerce the Superintendent away from fulfilling his supervisory responsibilities.

Your conversation was with the park's Assistant Superintendent. That individual also has the responsibility of monitoring your compliance with the plan. Further, it is not credible to believe that you did not intend for your comments to reach the Superintendent. Any logical person would conclude that you, in effect, were attempting to coerce the Superintendent.

Additionally, this is not your first offense. On October 16, 2012, you were suspended without pay for two working days due to your unacceptable behavior of making a sexually overt statement regarding a co-worker. At that time, you were warned to refrain from making any inappropriate comments or any comments that could be perceived as inappropriate. Also, at that same time, you were warned that any further neglect of duty or any other infractions would be viewed as your unwillingness, rather than your inability, to comply with reasonable expectations and such would result in further disciplinary action up to and including dismissal. Obviously, you did not heed this advisory.

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct as well as poor performance is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee of the West Virginia Division of Natural Resources thus warranting your dismissal.

* * *

R Ex 1.

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 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 generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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. *Leichliter, supra*.

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); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

In this grievance, the critical 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's 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*.

It is further noted that the merits of any prior disciplinary actions which Grievant failed to timely grieve when they were administered are not properly at issue here. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). Indeed, all such information contained in the documentation of Grievant's prior discipline must be

accepted as true. *Aglinsky, supra*. *See Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994). Consistent with this principle, the two-day suspension Grievant was administered for making a sexually overt comment regarding another employee must be accepted as factually accurate.

Grievant asserts that the charge that he communicated a threat against Superintendent Bracken in a conversation with Assistant Superintendent Baughman is false. Further, Grievant contends that Superintendent Bracken engineered this entire scenario in order to retaliate against him for refusing to violate federal law relating to the purchase and use of Freon. The primary issues presented in this grievance are whether Grievant made the statements attributed to him by Assistant Superintendent Baughman, and, if he did, whether those comments represent a serious threat constituting prohibited misconduct or normal grousing by one supervisor to another. Reaching a determination as to what took place during this conversation must necessarily be based solely on witness credibility.

Having observed the speech, mannerisms, expressions, demeanor and body language of the witnesses, it is clear to the undersigned Administrative Law Judge that Superintendent Bracken and Grievant began operating in a state of hostility and animosity at some point after Grievant was hired. Superintendent Bracken obviously did not approve of Grievant's management style, expecting him to perform more hands-on work, consistent with his job description which Superintendent Bracken interpreted as requiring a "working supervisor."

On the other hand, Grievant had significant supervisory experience in the private sector, operating his own business, and was convinced that some of his subordinate employees at Hawks Nest required closer supervision, if they were to perform at a proper level of productivity. Thus, Grievant was clearly offended by Superintendent Bracken's insistence, as part of the PIP guidance issued on April 24, 2013, that Grievant's work schedule be modified from a 7:00 AM to 3:00 PM shift to an 8:00 AM to 4:00 PM shift, ostensibly so that Grievant could meet with the two employees who reported for the "evening" shift at 3:00 PM, and pass on any special instructions to them.[1]

Grievant protested that the vast majority of jobs to be performed on the evening shift were part of a well-established daily routine, and any "special" assignments could be communicated to these employees by some other means. Grievant was also critical of the employee Superintendent Bracken reassigned to perform park-opening duties, in lieu of Grievant, based upon that employee's record of chronic absenteeism.

It was equally clear to the undersigned that this same pronounced and palpable animosity did not exist between Grievant and Assistant Superintendent Baughman. Indeed, it was evident that Assistant Superintendent Baughman and Grievant had consistently worked cooperatively in a climate of mutual respect. Moreover, Grievant was not hostile toward Assistant Superintendent Baughman, even though his recollection of their May 9 conversation regarding the PIP, and Grievant's comments in regard to Superintendent Bracken, was totally different from Grievant's version.

[1] Assistant Superintendent Baughman, under cross-examination by Grievant, also testified that the eight to four schedule adjustment was appropriate in his experience, and that Grievant had demonstrated a lack of efficiency, and a need for additional structure in his work environment.

Assistant Superintendent Baughman described how their May 9 conversation developed, acknowledging that he had previously told Grievant that he needed to speak up to Superintendent Bracken if he disagreed with a proposed decision, and to explain his reasons for supporting a different course of action. Assistant Superintendent Baughman recalled that Grievant proceeded to state that "Bracken needs to back off" regarding the PIP and, if the Superintendent did not, Grievant had information which he would reveal that would be personally detrimental to Superintendent Bracken in regard to a pending legal action brought by a former DNR employee at Hawks Nest, or words to that effect.

Grievant's version of that same conversation described Assistant Superintendent Baughman asking about the PIP and Grievant indicating that he would do whatever was necessary to keep his job. Grievant testified that he told Assistant Superintendent Baughman that he would do whatever it took to "appease" Superintendent Bracken. Grievant insisted that he made no mention of any pending litigation, and was adamant that he did not say anything adverse regarding Superintendent Bracken that could reasonably be interpreted as a threat. Grievant also testified that the only conversation he had where Assistant Superintendent Baughman asked about the PIP was in the parking lot, not in an office.

Having directly observed the demeanor of Assistant Superintendent Baughman, the undersigned Administrative Law Judge notes that his testimony was candid, straightforward and consistent. His statements did not appear to be rehearsed or insincere. Indeed, he was direct and straightforward in responding to questions about his conversation with Grievant on May 9. Although it appeared that Assistant Superintendent

Baughman did not want to give testimony that was critical of Superintendent Bracken, there was nothing in his demeanor to suggest that he, or anyone else, made up the story concerning his conversation with Grievant, or that he was coerced by Superintendent Bracken into giving perjurous testimony. Indeed, Assistant Superintendent Baughman appeared reluctant to testify against Grievant solely because he had no ill will toward Grievant.

This lack of ill will is a key element in evaluating the contradictory testimony of Grievant and Assistant Superintendent Baughman. While there was credible evidence presented that Superintendent Bracken may have had multiple improper motives for fabricating testimony against Grievant, Assistant Superintendent Baughman had no such motive. Despite Grievant's contention that Superintendent Bracken would do whatever it took to get rid of him, there was no credible evidence to suggest that Superintendent Bracken conspired with Assistant Superintendent Baughman to fabricate this charge.

Grievant's contention that Superintendent Bracken initiated a Performance Improvement Plan as part of an effort to terminate his employment may not be far off the mark. Superintendent Bracken did not adequately explain how Grievant was succeeding in every aspect of his performance during his six-month probationary period, only to fail within the next 45 days to the point where it was necessary to initiate a PIP. However, as indicated at the Level Three hearing, Grievant failed to grieve the initiation of the PIP within the 15-day time limit established in W. Va. Code § 6C-2-4(a)(1). Therefore, the propriety of the PIP is not properly before this Grievance Board for adjudication in this grievance.

In any event, the existence of the PIP only provides a motive for Grievant to make a statement that would be critical of Superintendent Bracken. The mere existence of the PIP does not suggest that Grievant's testimony was not truthful. However, there is other evidence that Grievant was not an exemplary employee. He was suspended for two days during his probationary period for making an improper sexual comment to a co-worker. Regardless of his work performance, Respondent DNR could have exercised its discretion to terminate Grievant's employment prior to the conclusion of his probationary period based solely upon this single offense. Although Superintendent Bracken rated Grievant as satisfactory or better in every category, that evaluation did not suggest that Grievant's performance was exceptionally meritorious.

Beyond the single disciplinary suspension and the performance evaluation, there was no evidence presented regarding the character and reputation for honesty and veracity of either Grievant or Assistant Superintendent Baughman. In any event, these factors are not favorable to Grievant because there was nothing to suggest that Assistant Superintendent Baughman was dishonest or a liar, only Grievant's uncorroborated assertion that Superintendent Bracken might coerce Assistant Superintendent Baughman into making statements to support Grievant's termination.

For all of the foregoing reasons, the undersigned Administrative Law Judge finds the testimony of Assistant Superintendent Baughman presented the more credible version of the conversation that took place between Grievant and him on May 9, 2013, and Respondent thereby established the charge for which Grievant was terminated by a preponderance of the credible evidence of record.

Having found that the conversation in question took place substantially as alleged by DNR, the next issue to be determined is whether this statement provides good cause for Grievant's termination. In evaluating whether employee statements constitute a threat, this Grievance Board has previously referred to the West Virginia Division of Personnel's Workplace Security Policy which requires examination of whether the threat seems real, and the nature, likelihood and imminence of potential harm. *See Jefferson v. Shepherd Univ*., Docket No. 07-HE-116 (Mar. 12, 2008). Placing this statement in the context of the full light of day, it appears that Grievant's comments have been blown out of proportion.

In analyzing the magnitude of this alleged threat, it must be noted that there was no allegation that Grievant ever stated he was going to make something up or say anything regarding Superintendent Bracken that was not true. Grievant simply stated that he was aware of unspecified statements that, if revealed in regard to "the Flynn case," might be detrimental to Superintendent Bracken. If Grievant should be called as a witness, or deposed in discovery, in the course of that litigation, he would be obligated to tell the truth, whether it was detrimental to Superintendent Bracken, or not. Merely indicating that he was aware of information that might be detrimental to the position of the Superintendent or DNR is not communicating an intent to cause harm or injury.

It is also significant that Assistant Superintendent Baughman, as Grievant's immediate supervisor, did not react to this statement at the time it was made. He neither admonished Grievant for making a threat to the park's supervisor, Superintendent Bracken, nor did he ask Grievant to clarify what he meant by his statement. Further,

Assistant Superintendent Baughman did not consider this "threat" sufficiently noteworthy to immediately notify Superintendent Bracken regarding its utterance. Instead, he waited until he saw Superintendent Bracken after normal work hours and obliquely mentioned it by initially stating that they might want to reconsider pursuing Grievant's PIP.

Only when Superintendent Bracken inquired as to the rationale for Assistant Superintendent Baughman making that suggestion was it revealed that Grievant said something about providing information relating to the Flynn case that might be detrimental to Superintendent Bracken. Rather than investigate this allegation, or confront Grievant to find out what he meant by it, Superintendent Bracken communicated the essence of Grievant's statements, without placing them in the context in which they were received, to his DNR superiors, and this termination resulted.

In summary, even assuming that Grievant made each and every statement exactly as alleged by Assistant Superintendent Baughman, the only witness to his conversation with Grievant, the statements alleged do not represent a serious threat to engage in any improper or prohibited conduct. At most, this is just one supervisor grousing to another about his treatment by their mutual boss, rather than a threat of real or actual harm. *See Jefferson*, *supra*; *Bowe v. Workers Comp. Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004); *Burkhammer v. Dept' of Health & Human Res*., Docket No. 03-HHR-276 (Nov. 12, 2003). Accordingly, the charge alleged against Grievant does not involve misconduct of a substantial nature directly affecting the rights and interests of the public, nor does it provide good cause for Grievant's termination. See *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989); *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279,

332 S.E.2d 579 (1985); *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980).

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 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). *See Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012). Non-probationary state employees in the classified service may only be dismissed for "good cause," meaning "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).

3. If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). *See Stamper v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994).

4. The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

5. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

6. Grievant failed to initiate a grievance concerning the imposition of a Performance Improvement Plan within the statutory time limit in W. Va. Code § 6C-2-4(a)(1).

7. Although Respondent established by a preponderance of the credible evidence that Grievant stated to Hawks Nest State Park Assistant Superintendent Joe Baughman that Park Superintendent Bracken "had better back off" in regard to Grievant's recently-imposed Performance Improvement Plan, or Grievant would make statements in regard to the "Flynn case," it was not shown that this statement communicated a serious threat of harm or an intent to engage in prohibited or improper conduct. *See Jefferson v. Shepherd Univ.*, Docket No. 07-HE-116 (Mar. 12, 2008); *Bowe v. Workers Comp. Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004); *Burkhammer v. Dept' of Health & Human Res.*, Docket No. 03-HHR-276 (Nov. 12, 2003).

8. Respondent failed to establish by a preponderance of the evidence that Grievant engaged in misconduct of a substantial nature directly affecting the rights and interests of the public, or that the conduct in which he participated provided good cause

for his termination. See *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989); *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980).

Accordingly, this grievance is **GRANTED.** Respondent DNR is hereby **ORDERED** to reinstate Grievant with full back pay, to pay prejudgment simple interest on this back pay at the statutory rate currently set in W. Va. Code § 56-6-31, and to restore Grievant with all benefits and seniority to which he would have been entitled had his employment not been terminated. Respondent DNR is further ORDERED to expunge any reference to this disciplinary action from Grievant's personnel records.

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 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: August 19, 2013

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LEWIS G. BREWER
Administrative Law Judge