

14-0130

FILED

IN THE CIRCUIT COURT KANAWHA COUNTY, WEST VIRGINIA

2014 JAN 10 AM 8:47

JAMES FRANKLIN WILLIAMS,  
Grievant Below,  
Appellee,

CATHY L. BROWN, CLERK  
KANAWHA CO. CIRCUIT COURT

v

Civil Action No.: 13-AA-100

WEST VIRGINIA DIVISION  
OF NATURAL RESOURCES,  
Respondent Below,  
Appellant.

RECEIVED

JAN 15 2014

DNR  
DIRECTOR'S OFFICE

**ORDER DENYING THE APPEAL OF WEST VIRGINIA DIVISION  
OF NATURAL RESOURCES**

Pending before this Court is a petition for appeal by appellant and respondent below West Virginia Division of Natural Resources ("DNR"), filed on August 23, 2013, pursuant to W. Va. Code § 6C-2-5. through its appeal, DNR has requested that this Court review and reverse the Decision of the Administrative Law Judge ("ALJ") of the Public Employees Grievance Board ("Board") entered August 19, 2013, which found that DNR failed to demonstrate good cause for the dismissal of James Franklin Williams ("Williams") from his employment with Hawks Nest State Park ("Hawks Nest").

Having examined and carefully considering the entire record and briefs of the Parties as well as the pertinent legal authority this Court is of the opinion that the Board was not clearly wrong nor did the Board abuse its discretion and that the evidence supports that DNR failed to demonstrate good cause for the dismissal of James Franklin Williams at Hawks Nest. Accordingly, this Court hereby **DENIES** the DNR's appeal and **AFFIRMS** the Decision of the Board re-instating Williams to his employment with back pay. This Court **GRANTS** attorney fees and costs to Williams and **ORDERS** that

Williams be allowed to remain employed at the location he is currently working or return to Hawks Nest at his option. This Court based its opinion on the following factual and legal findings:

#### FINDINGS OF FACT

1. Shortly after Appellee 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 Superintendent Braken.
2. Approximately two weeks after being placed the Improvement Plan was imposed, Appellee had a conversation with the Assistant Superintendent Baughman.
3. Assistant Superintendent Baughman reported the conversation to Superintendent Braken, who then relayed the report to his supervisors. Appellee's employment was terminated for making a threat in order to subvert the Improvement Plan.
4. The ALJ, based on the credibility of witnesses, found that Appellant established, by preponderance of the credible evidence that Appellee engaged in the conduct alleged by making such comments. The ALJ did not find that such statements constituted a serious threat of harm or wrong doing and found that Appellant's reaction to the statements was inappropriate and grossly excessive.
5. In the course of employment, Superintendent Bracken asked Appellee to purchase Freon from the United Refrigeration using his contractor's license planning to pay for the Freon using a State purchasing card believing that Appellee's HVAC license allows him to purchase and install Freon. Appellee tried to explain to Superintendent Braken that although the license permitted him to purchase Freon, he could install Freon if he had

certain equipment required by Federal Regulations and that improper use of Freon would be grounds for revoking his contracting license for HVAC work.

6. On or about March 27, 2013, Superintendent Bracken began documenting problems he observed with Appellee's duty performance and on April 24, 2013, (within a week after the conversation regarding Freon purchase) Superintendent Bracken notified Appellee that he would be placed upon a Performance Improvement Plan (PIP).

7. After hearing this statement, Assistant Superintendent Baughman did not admonish Appellee for his disposed threat, nor did he make any effort to clarify what Appellee meant by his statement. Assistant Superintendent Baughman did not immediately report his statement to Superintendent Bracken. It was on a routine conversation later that evening, between Assistant Superintendent Baughman and Superintendent Bracken that he described this conversation with Appellee.

8. Assistant Superintendent Baughman why he was suggesting that approach did Assistant Superintendent Baughman relate the alleged conversation he had with Appellee earlier that day. Assistant Superintendent Baughman notified his immediate Supervisor, District Administrator, Paul Redford, and the Chief of Parks, Ken Kaplinger, but did not recommend any particular discipline in response to the alleged conduct such as termination or suspension.

9. On May 22, 2013, Frank Jezioro, Director of the Division of Natural Resources, issued a written termination notice to Appellee making reference to the October 16, 2012 suspension for making unacceptable statement concluding that the May 9, 2013, statement constituted misconduct sufficient to cause and concluded that Appellee did not

meet the acceptable standard of conduct as an employee for the National Division of Natural Resources thus warranting your dismissal.

### CONCLUSIONS OF LAW

1. In examining the standard of review set forth in the Grievance Act, the West Virginia Supreme Court of Appeals has held that a final order of an administrative law judge for the Grievance Board shall not be reversed unless clearly wrong. *Randolph County Bd. Of Educ. V. Scalia*, 387 S.E.2d 524 (W. Va. 1989).
2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the right 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. 1, *Oakes v. Dep't of Finance and Admin.*, W. Va. 384, 264 S.E.2d. (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).
3. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. And Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)).
4. In assessing whether the disciplinary action was excessive or disproportionate, the ALJ must look at the totality of the circumstances. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reach

a decision that was so implausible that it cannot be ascribed to a difference of opinion.

See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir.1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Eads*, supra (citing *Arlington Hosp. v. Schweiker*, 574 F. Supp. 670 (E.D. Va. 1982)).

6. The record does not support that Williams statements were intended to be a threat and the ALJ was not clearly wrong by finding such statements did not constitute misconduct justifying termination.

7. Williams’ statements did not constitute gross misconduct and the Board was not clearly wrong nor abused its discretion finding that the allegations of misconduct did not constitute good cause for the dismissal of Williams.

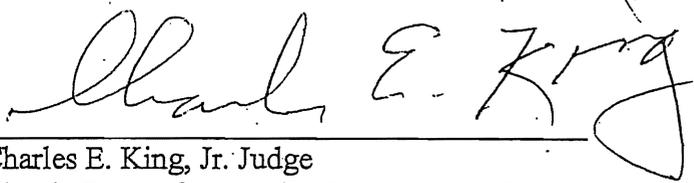
8. None of the facts or legal authority that DNR proffered to this Court supports its position that the statements/conducts of Williams’ constitutes gross misconduct justifying termination and the Board was clearly wrong or abused its discretion.

9. The ALJ made reasonable findings of fact after listening to the witnesses and did not make any clearly wrong considerations of law.

WHEREFORE, based upon the above stated findings of fact and conclusions of law this Court **ORDERS, ADJUDGES and DECREES** that the appeal be, and it is hereby **DENIED**, over the objection of DNR, and the decision of the ALJ and Board be **AFFIRMED** and Williams re-instated to employment with back pay, ~~attorney's fees,~~ costs and interest. The Court directs the Clerk of the Circuit to send certified copies of this Order to all counsel of record and to the following parties:

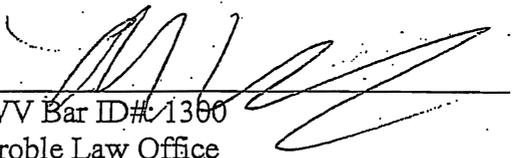
William R. Valentino  
ASSISTANT ATTORNEY GENERAL  
c/o Division of Natural Resources  
324 4<sup>th</sup> Avenue  
South Charleston, West Virginia 25303

ENTERED this 9<sup>TH</sup> day of Jan-2014 ~~December, 2013~~.

  
Charles E. King, Jr. Judge  
Circuit Court of Kanawha County, West Virginia

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
13<sup>TH</sup>  
DAY OF January 2014  
Cathy S. Gatson, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 1-13-14  
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Deputy Circuit Clerk