

**NO. 14-0130**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
(Appealed from Kanawha County Circuit Court - Civil Action No. 13-AA-100)

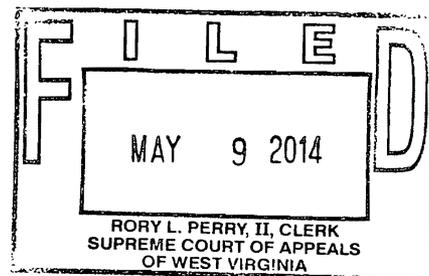
WEST VIRGINIA DIVISION OF NATURAL RESOURCES,

Respondent Below, Petitioner,

v.

JAMES FRANKLIN WILLIAMS,

Grievant Below, Respondent.



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**PETITION FOR APPEAL**

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## **ASSIGNMENTS OF ERROR**

1. Whether the Circuit Court erred by ruling that a proven extortionary threat to supervisor by a public employee with a prior history of misconduct—made for the express purpose of subverting a Performance Improvement Plan imposed by a supervisor—was not sufficient misconduct to justify discharge for cause as a matter of law.
2. Whether the Circuit Court erred by ordering reinstatement and effectively barring the employer from imposing a lesser form of disciplinary action on Respondent for his disrespectful and inappropriate remarks.

## **STATEMENT OF THE CASE**

On September 10, 2012, Respondent was hired as a Maintenance Supervisor at the Hawks Nest State Park (“Hawks Nest”) for a six-month probationary period. At all relevant times, John Bracken was the Superintendent of Hawks Nest, which is the highest level employee at an individual park in the West Virginia parks system, and Joe Baughman was the Assistant Superintendent of Hawks Nest and Respondent’s immediate supervisor.

On October 16, 2012, little more than one month into his employment, Respondent was suspended without pay for two days for making a sexually inappropriate comment about a female employee. Respondent did not grieve the suspension [App. 199]. The same female employee also accused Superintendent Bracken of sexual harassment in an unrelated matter and filed a sexual harassment suit in the Circuit Court of Kanawha County.

On March 4, 2013, Bracken completed a final evaluation of Respondent for completion of his probationary period, which Bracken rated “good” [App. 203]. Respondent was thereafter certified as a tenured employee in the classified service. Almost immediately after his certification as a tenured employee, Respondent’s performance deteriorated. In order to remedy this performance deficiency, Bracken and Baughman devised a “performance improvement plan” (“PIP”) designed to address Respondent’s performance deficiencies. On April 24, 2013,

the PIP was delivered to Respondent [App. 205 - 209]. Respondent did not exercise his right to grieve the imposition of the PIP.

As a result of this increased scrutiny of his performance, Respondent had a conversation with Baughman regarding the PIP on May 9, 2013. Respondent told Baughman that Superintendent Bracken better “back off” the PIP, otherwise Respondent would publicize certain damaging statements allegedly made privately by Bracken about the female employee who was then suing Bracken. The following day, Baughman informed Bracken of this threat and indicated that Bracken may wish to submit to Respondent’s demands [App. 149, 211]. Baughman told Bracken that he construed it as a threat [App. 149].

Rather than capitulate to a threat by a subordinate and cancel or alter the PIP as Respondent demanded, Superintendent Bracken reported the threat to his superiors at the Division of Natural Resources (“DNR”) [App. 99]. In light of his previous discipline, poor performance, and extortionary threat, DNR dismissed Respondent for cause. On May 22, 2013, DNR Director Frank Jezioro issued a letter to Respondent notifying him of his dismissal for cause [App. 192 - 194].

On May 23, 2013, Respondent filed a grievance pursuant to the Public Employees Grievance Act, W. Va. Code § 6C-2-1 *et seq.*, grieving his dismissal from employment with the DNR. Pursuant to W. Va. Code § 6C-2-4(a)(4), the Respondent’s grievance was heard directly at Level Three<sup>1</sup> before an Administrative Law Judge (hereinafter “the ALJ”) for the Public Employees Grievance Board on July 30, 2013.

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<sup>1</sup>The grievance process has three levels pursuant to W. Va. Code § 6C-2-4. Level One is before the agency’s chief administrator; Level Two is mediation or arbitration; and Level Three is before the Public Employees Grievance Board. Pursuant to W. Va. Code § 6C-2-4(a)(4), an employee may file grievances involving dismissal directly at Level Three.

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On August 19, 2013, the ALJ entered a decision granting Respondent's grievance. Even though the ALJ *credited* DNR's factual assertion that Respondent in fact made the alleged comments (App. 49, 59-60), the ALJ concluded that the remarks did not constitute good cause for the dismissal. Pursuant to W. Va. Code § 6C-2-5, the DNR filed its petition for appeal in the Circuit Court of Kanawha County on August 23, 2013, with Judge Charles E. King, Jr. presiding. The parties submitted the case to the court upon written briefs, and the matter became mature for decision on or around December 10, 2013.

On January 9, 2014, Judge King entered an order denying the appeal, concluding that the statements made by Respondent did not constitute a threat as a matter of law and that Petitioner did not establish the ALJ was clearly wrong in reinstating the employee. The order, in finding the conduct did not constitute grounds for dismissal, also precluded lesser disciplinary action for the conduct *shown* to be—at a minimum—disrespectful and inappropriate. DNR now appeals.

### SUMMARY OF ARGUMENT

The Circuit Court erred for two reasons. *First*, good cause existed for the dismissal of an employee with a prior history of misconduct who verbalized an extortionary threat for the express purpose of subverting a Performance Improvement Plan. This is particularly true where, as here, the ALJ found that Respondent had made the alleged comments as a matter of fact. *Second*, even if the proven misconduct under the totality of the circumstances did not justify Respondent's dismissal, the Circuit Court should have permitted the DNR to impose a lesser form of disciplinary action.

## REQUEST FOR ORAL ARGUMENT

The Petitioner requests oral argument in this case under West Virginia Rule of Appellate Procedure 19. The Circuit Court below denied the appeal based on errors of law, and oral argument would significantly aid the decisional process.

### ARGUMENT

#### **AN EXTORTIONARY THREAT CONSTITUTES GROSS MISCONDUCT JUSTIFYING THE DISMISSAL OF A PUBLIC EMPLOYEE WITH A HISTORY OF MISCONDUCT.**

##### **A. Misconduct Justifying Dismissal of a Public Employee.**

The facts of the instant case are largely undisputed. The lower court found that the statement in question was made, but that it was not an extortionary threat as a matter of law. However, Respondent simply denied making the statement, and Baughman recounted that he understood the statement to be threatening. Baughman's recollection of the statement was accepted as fact by the lower court, and Respondent's denial was found not to be credible. Nevertheless, the lower court affirmed the ALJ's conclusion that Respondent's remarks were not threatening. The DNR based its conclusion to commence disciplinary action upon the credible statement of Baughman, yet little or no deference was afforded the agency in its sound discretion evaluating the conduct of its employees.

##### *i. Standard of review.*

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing

examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo. *Cahill v. Mercer County Board of Education*, 208 W. Va. 177, 539 S.E.2d 437 (2000). See also Syl. Pt. 1, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996) (holding that “[g]enerally, findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed de novo.”).

*ii. Good cause defined.*

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 intentions.” Syl. Pt. 1, *Oakes v. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). 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)).

Whether the conduct for which a civil service employee is accused rises to the level of misconduct justifying dismissal has been previously decided by this Court on a largely case-by-

case basis.<sup>2</sup> 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 reached 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). Moreover, an action is arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

The DNR relies upon the body of law created and interpreted by the West Virginia Public Employees Grievance Board (the “Board”) in the discipline of its employees. The Board has previously addressed the issue of disrespectful behavior of employees as a basis for disciplinary action:

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<sup>2</sup> See *Reese v. Board of Trustees/Marshall University*, 202 W. Va. 89, 502 S.E.2d 186 (1998) (upholding dismissal of an employee for a variety of technical and serious violations); *State ex. rel Ashley v. Civil Service Comm’n for Sheriffs of Kanawha County*, 183 W. Va. 364, 395 S.E.2d 787 (1990) (upholding dismissal for conduct giving rise to felony indictment despite later acquittal); *Magnum v. Lambert*, 183 W. Va. 184, 394 S.E.2d 879 (1990) (holding that attempting to persuade a police officer to withdraw a criminal complaint for personal reasons was good cause for dismissal); *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (holding that acquittal for driving under the influence did not bar administrative disciplinary dismissal); *Trimble v. West Virginia Board of Directors*, 209 W. Va. 420, 549 S.E.2d 294 (2001) (holding that Constitutional due process is denied when a tenured public higher education teacher was terminated for a minor incident of insubordination after long-term employment); *Gouge v. Civil Service Comm’n*, 181 W. Va. 814, 384 S.E.2d 855 (1989) (holding that totality of the circumstances of bringing pornographic material into a prison warranted suspension but not dismissal).

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Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. All employees are expected to treat each other with a modicum of courtesy in their daily contacts. Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment.

*Keaton v. W. Va. Dep't of Trans./Div. of Highways*, Docket No. 2011-0188-DOT (May 9, 2011) (internal citations and quotation marks omitted).

This Court has previously ruled that it is improper for a reviewing Circuit Court to focus only on certain incidences of misconduct. “The Court . . . believes that in focusing only upon two incidents rather than the overall conduct of [the employee], and by ignoring evidence of serious misconduct by the employee, the circuit court erred.” *Reece v. Board of Trustees/Marshall University*, 202 W. Va. 93, 502 S.E.2d 190 (1998). *See also Messer v. Hannah*, 222 W. Va. 553, 668 S.E.2d 182 (2008) (overruling a Civil Service Commission finding that probable overstatement of travel time was trivial, inconsequential and without wrongful intent for, *inter alia*, the Commission’s failure to consider an important aspect of the problem).

**B. Making an Extortionary Threat to Subvert Conditions of Employment is Cause for Dismissal of a Public Employee With a Prior History of Misconduct.**

In its order denying the appeal, the Circuit Court began and concluded its analysis of the law regarding the dismissal of Respondent with the threat against Superintendent Bracken. It did not consider the totality of the circumstances and failed to analyze the DNR decision for dismissal in light of the poor performance of the employee and his prior suspension without pay. However, the dismissal letter issued to the Respondent states in detail that the disciplinary action was carefully considered based on the misconduct, his poor performance, and the fact this incident was not his “first offense” [App. 192].

*i. The prior suspension of the employee.*

Little over a month into his employment, Respondent was suspended for an inappropriate sexual remark about another employee [App. 199 - 201]. The suspension letter indicated that two other employees heard Respondent make an offensive and derogatory remark about the employee. As in the instant case, Respondent denied making such a statement—a denial the ALJ found to lack credibility. Respondent was warned that such conduct violated the West Virginia Division of Personnel's Prohibited Workplace Harassment Policy and that any further misconduct would lead to additional disciplinary action up to and including dismissal. Respondent was advised that derogatory comments about other employees are particularly serious in the case of a supervisor.

Like the ALJ, the Circuit Court failed to address the DNR's evaluation of this suspension and notice of progressive disciplinary action in its conclusions of law and its effect on the decision of dismissal.

*ii. Poor performance.*

Within a month after completing his probation, Respondent began exhibiting problems completing his duties, and Superintendent Bracken was required to impose the PIP to address these issues. Respondent's performance deficiencies included his failure to fulfill required obligations such as monthly reports, gassing of vehicles, fixing doors, shutting doors to offices, and dereliction of other similar duties [App. 205 - 209]. Respondent's performance deficiencies were documented as early as March 27, 2013 [App. 213] and persisted until his dismissal.

This poor performance was also a component of the DNRs decision justifying dismissal, but was not included or referenced as a factor in the Circuit Court's order. Thus it appears the Circuit Court failed to consider this relevant misconduct in its decision.

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*iii. The extortionary threat.*

As noted, the ALJ concluded as a matter of fact that Respondent made the underlying remarks that Baughman considered extortionary. Given this credited testimony, deference should have been afforded to the DNR in its assessment of the seriousness of the misconduct, and the lower court should not have substituted its opinion for that of the agency. The threat against the superintendent which was expressed to the assistant superintendent was—at a minimum—inappropriate and disrespectful. It was error to find that the verbalization of such a threat simply “did not constitute gross misconduct” such that reinstatement was warranted [App. 6].

Respondent could have exercised his lawful right to grieve the imposition of the PIP pursuant to the provisions of W. Va. Code § 6C-2-1 *et seq.*, but instead he chose to express his dissatisfaction in the form of an extortionary threat to Superintendent Bracken. Whether he intended to follow through with his threat, or whether the information of which he claimed knowledge was true or false, is simply irrelevant. Employers have the right to expect respectful behavior, and circumventing the lawful process for employee grievances by expressing such a threat is serious misconduct. A finding that the verbalized threat was not misconduct is an error as a matter of law.

However, in addition to his obviously inappropriate threat, the DNR based its decision on poor performance and a prior suspension without pay. Failure to consider these factors created a fatal flaw in the Circuit Court’s consideration of what constituted excessive or disproportionate punishment. The Circuit Court did not squarely address evidence of serious prior misconduct in the form of a suspension for making a derogatory remark in violation of the Prohibited Workplace Harassment Policy, and also failed to address documented evidence of poor performance leading up to the dismissal. The DNR set forth a factual basis for each step in the

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disciplinary process of this employee, and proved each allegation in the dismissal letter. The conclusion that any threat against an employer, in light of the prior issues, did not constitute misconduct is clearly wrong and should be reversed by this Court.

*iv. Lesser disciplinary action should have been considered.*

The Petitioner strenuously objected to the ALJs failure to consider the dismissal in light of Respondent's prior misconduct and poor performance in its brief to the lower court [App. 8 -9, 30, 34, 37-38, 40] and failure to consider mitigation to a lesser disciplinary action [App. 40].

This Court has observed that, while a particular dismissal might be unjustified, such a "finding does not preclude other disciplinary action." *Drown v. West Virginia Civil Service Comm'n*, 180 W. Va. 146, 375 S.E.2d 778 (1988). *See also Gouge v. Civil Service Comm'n*, 181 W. Va. 814, 384 S.E.2d 855 (1989) (holding that while dismissal was not warranted, two-year suspension without pay was proper disciplinary penalty); *House v. Civil Service Comm'n of State of W. Va.*, 181 W. Va. 49, 380 S.E.2d 216 (1989) (holding that discharge of employee was too severe but ordering only partial repayment of back wages); *Waugh v. Board of Educ. of Cabell County*, 177 W. Va. 16, 350 S.E.2d 17 (1986) (holding that mitigating factors warranted reduction from dismissal to a two-year unpaid suspension).

In finding that the verbalized threat was not gross misconduct and ordering reinstatement, the lower court essentially found the threat was not misconduct at any degree. In so ruling, the lower court effectively precluded a lesser form of disciplinary action for the misconduct, thus similarly depriving the DNR from citing this incident for purposes of progressive discipline should Respondent engage in similar, or even different, misconduct in the future.

While employed in a supervisory position, Respondent had, in his short tenure of employment, been suspended for making derogatory remarks about another employee and

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demonstrated his lack of willingness to adequately perform the tasks for which he was hired. He expressed an extortionary threat to coerce the superintendent from performing his lawful duty to direct the actions of his employees rather than pursue a lawful course of redress. In both instances when he was accused of wrongdoing, Respondent denied the misconduct, which again indicates his unwillingness to accept the responsibility of his position.

To find that such an employee should *not* be held accountable *in any way* for making a remark that was construed by the listener as a threat against the superintendent deprives the DNR of its core right, responsibility, and discretion to determine an acceptable level of professional behavior from its employees. The failure to include a provision for lesser disciplinary action in this case was error, and prevents the DNR from considering this information for purposes of future progressive discipline.

### CONCLUSION

For the foregoing reasons, the order of the Circuit Court of Kanawha County should be reversed.

WEST VIRGINIA DIVISION OF  
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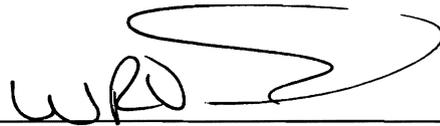
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**CERTIFICATE OF SERVICE**

I, William R. Valentino, Assistant Attorney General and counsel for West Virginia Division of Natural Resources, hereby certify that the foregoing "Petition for Appeal" with appendix was provided to the following counsel of record by depositing the same in United States first class mail, postage prepaid, this 9<sup>th</sup> day of May, 2014:

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