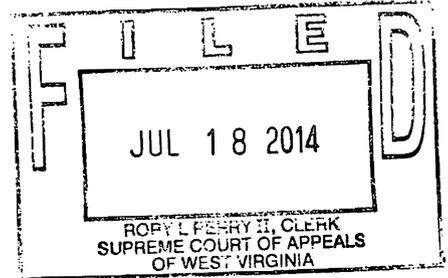


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0130



WEST VIRGINIA DIVISION OF NATURAL RESOURCES,

Respondent below, Petitioner

v.

JAMES FRANKLIN WILLIAMS,

Grievant below, Respondent.

REPLY BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

WILLIAM R. VALENTINO
ASSISTANT ATTORNEY GENERAL
State Bar I.D. No. 6502
c/o Division of Natural Resources
324 4th Avenue
South Charleston, WV 25303
(304) 558-2754
Counsel for Petitioner

TABLE OF CONTENTS

AGRUMENT	1
I. Respondent Has Not Presented Sufficient Law to Overcome the Circuit Court’s Failure to Consider His Entire Employment Record in Determining Whether Gross Misconduct Was Proven	2
II. Respondent Has failed to Demonstrate that Lesser Disciplinary Measures Should Have Been Considered by the Circuit Court in the Absence of a Finding of Gross Misconduct	3
CONCLUSION	5

TABLE OF AUTHORITIES

<i>Buskirk v. Civil Serv. Comm'n</i> , 175 W. Va. 279, 332 S.E.2d 579 (1985)	4
<i>Drown v. West Virginia Civil Service Comm'n</i> , 180 W. Va. 146, 375 S.E.2d 778 (1988)	4
<i>Gouge v. Civil Service Comm'n</i> , 181 W. Va. 814, 384 S.E.2d 855 (1989)	4
<i>Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.</i> , Docket No. 91-PEDTA-225 (Dec. 23, 1991)	3-4
<i>House v. Civil Service Comm'n of State of W. Va.</i> , 181 W. Va. 49, 380 S.E.2d 216 (1989)	4
<i>Messer v. Hannah</i> , 222 W. Va. 553, 668 S.E.2d 182 (2008)	2
<i>Oakes v. Dep't of Finance and Admin.</i> , 164 W. Va. 384, 264 S.E.2d 151 (1980)	3
<i>Reece v. Board of Trustees/Marshall University</i> , 202 W. Va. 93, 502 S.E.2d 190 (1998)	2
<i>Waugh v. Board of Educ. of Cabell County</i> , 177 W. Va. 16, 350 S.E.2d 17 (1986)	4

ARGUMENT

The instant case seeks a determination as to whether error was committed when the circuit court found that good cause did not exist for the dismissal of a civil service employee. The Division of Natural Resources (“Petitioner” or “DNR”) asserts that, in consideration of the entire employment history of the employee, gross misconduct was proven; good cause did exist for his dismissal; and the circuit court erred in failing to consider all relevant facts in its finding that gross misconduct had not occurred.

In his response Brief, Respondent Williams perpetuates the circuit court’s erroneous analysis. Respondent simply propounds the conclusory argument that the administrative law judge and circuit court were correct while simultaneously failing to fully address issues raised on appeal, including the effect the employment record should have had in a determination of misconduct, gross or otherwise. The circuit court erred in finding that an extortionary statement for purposes of coercing a supervisor to relieve the declarant of the conditions of a performance improvement plan was not misconduct. Respondent’s argument essentially mirrors his position when the matter was appealed from the administrative law judge to the circuit court, namely that the DNR failed to prove gross misconduct occurred and that the administrative law judge was neither clearly wrong nor arbitrary and capricious in his decision. A third argument, unsupported by law, simply asserts that the circuit court did not err in affirming the administrative law judge’s decision.¹ These repetitive and circular arguments do not substantively address the issues raised on appeal to this court and are without merit.

¹ Respondent raised a collateral issue of whether the circuit court erred in its refusal to award attorney’s fees and costs, which is beyond the scope of the issues raised on appeal.

I. Respondent Has Not Presented Sufficient Law to Overcome the Circuit Court's Failure to Consider His Entire Employment Record in Determining Whether Gross Misconduct Was Proven.

Despite the circuit court's dearth of findings regarding the brief and embattled employment history of Respondent, the record was clear on several points: *First*, Respondent was not a long-term employee of the DNR, having been employed for less than one year at the time of his dismissal; *Second*, even in his short tenure Respondent did not have a spotless employment record, as he was suspended without pay during his probationary period of employment for a sexually inappropriate remark regarding a co-worker; *Third*, Respondent was not a particularly effective employee, having been placed on a performance improvement plan shortly after completing his probationary employment due to performance deficiencies; and *Fourth*, Respondent apparently learned nothing from his first suspension, having made another inappropriate comment in the workplace, this time threatening potential harm ostensibly to the pecuniary interests and/or reputation of one of his supervisors. Nevertheless, both the circuit court and Respondent would have this court ignore the totality of those circumstances and consider his extortionary statement in a vacuum.

As previously pled, this Court has 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).

Despite the fact that Respondent Williams' unpaid suspension and poor performance were clearly delineated in the letter of dismissal as part of the determination of good cause, the circuit court focused on the extortionary statement alone in holding that the gross misconduct justifying the dismissal of a civil service employee had not been established. Petitioner has asked this Court for a review to determine whether that analysis was in error. Respondent has provided no additional relevant precedent to preclude such review and no substantive counterpoint to the issues raised on appeal.

II. Respondent Has Failed to Demonstrate that Lesser Disciplinary Measures Should Have Been Considered by the Circuit Court in the Absence of a Finding of Gross Misconduct.

In an unsupported statement, Respondent claims the determination of lesser disciplinary action is barred in the absence of a finding of gross misconduct. This is in clear conflict with the precedent cited by Petitioner on appeal.

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)).

Gross misconduct, if proven, is that of sufficient seriousness which constitutes good cause for the dismissal of a civil service employee. Respondent appears to assert that an agency's determination that gross misconduct has occurred prohibits a finding of less substantial misconduct, if that initial finding is determined erroneous. On the contrary, inherent in the definitions of "good cause" and "gross misconduct" is that certain misconduct rises above and beyond the ordinary to a level justifying greater punishment. Gross misconduct and misconduct are not mutually exclusive events. Respondent's assertion that DNR is precluded from imposing less severe disciplinary action because it moved directly to dismissal is therefore incorrect.

It is within the province of a reviewing court in an appeal of a disciplinary grievance to determine whether misconduct occurred, and whether such misconduct is gross justifying dismissal of a civil service employee. Similarly however, it is also within the province of this Court to determine, if misconduct is found insufficiently severe to justify dismissal, whether lesser disciplinary action should have been considered.² It is legally incorrect to assert, as Respondent has done, because the DNR moved "directly to termination" that mitigation is barred.

² 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).

The DNR strongly contends a threat to reveal information about a supervisor that may cause harm to his reputation or pecuniary interests for the express purpose of coercing that supervisor to relieve the declarant from the conditions of a performance improvement plan is gross misconduct. However, if this Court determines that such a threat did not rise to the level of gross misconduct, the DNR respectfully requests a determination as to whether lesser disciplinary action was warranted, including unpaid suspension from the date of dismissal to the date of reinstatement.

CONCLUSION

For the reasons stated above and in the Petitioner's Brief, the order of the Circuit Court of Kanawha County, reinstating Respondent Williams to his employment with the State of West Virginia must be reversed.

Respectfully submitted,

WEST VIRGINIA DIVISION
OF NATURAL RESOURCES
By Counsel

PATRICK MORRISEY
~~ATTORNEY GENERAL~~

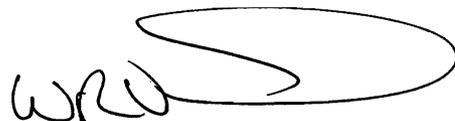


William R. Valentino, WV Bar #6502
Assistant Attorney General
c/o Division of Natural Resources
324 4th Avenue, Room 328
South Charleston, WV 25303
Phone: (304) 558-2754
Email: william.r.valentino@wvago.gov
Counsel for Respondent/Appellant

CERTIFICATE OF SERVICE

I, William R. Valentino, Assistant Attorney General and counsel for Petitioner, the West Virginia Division of Natural Resources, hereby certify that a copy of the foregoing "Reply Brief" was provided to Respondent by depositing the same in United States first class mail, postage prepaid, this 1st day of July, 2014, address as follows:

Michael E. Froble, Esquire
FROBLE LAW OFFICE
200 George Street, Suite 3
Beckley, WV 25801
Counsel for Appellee



William R. Valentino, WV Bar #6502
Assistant Attorney General