

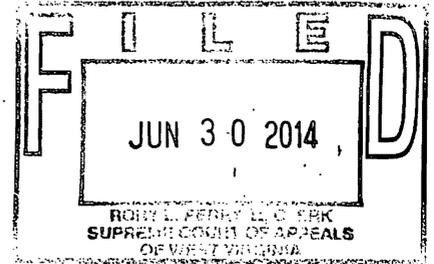
APPEAL NO.: 14-0130
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

West Virginia Division of Natural Resources,
Respondent/Appellant,

vs.

James Franklin Williams,

Grievant/Appellee.



BRIEF ON BEHALF OF JAMES FRANKLIN WILLIAMS

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TABLE OF CONTENTS

	Page
TABLES OF AUTHORITIES	3
STATEMENT OF CASE	4
STATEMENT OF FACTS	5
ARGUMENT:	7
A. APPELLANT FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE ALLEGED MISCONDUCT CONSTITUTED SUFFICIENT GROUNDS FOR TERMINATION.	7
B. THE ADMINISTRATIVE LAW JUDGE'S DECISION WAS NOT CLEARLY WRONG NOR ARBITRARY NOR CAPRICIOUS.....	10
C. THE CIRCUIT COURT'S AFFIRMING THE ALJ AND DENYING THE APPEAL WAS APPROPRIATE AND CORRECT AND APPELLEE SHOULD BE AWARDED ATTORNEY FEES AND COSTS.....	13
RELIEF SOUGHT/CONCLUSION	15
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

1. W.Va. Code § 6C-2-1, et seq;
2. W.Va. Code § 6C-2-5;
3. *Procedure Rule of the W.Va. Public Employee's 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);
4. *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009);
5. *Leichliter v. W.Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993);
6. *House v. Civil Serv. Comm'n*, 181 W.Va. 49, 51, 380 S.E.2d 216, 218 (1989)
7. *Syl. Pt. 2, Buskirk v. Civil Service Comm'n*, 175 W.Va. 279, 332 S.E.2d 579 (1985);
8. *Oakes v. W.Va. Dept. of Finance & Admin.*, 164 W.Va. 384, 264 S.E.2d 151 (1980);
9. *Jefferson v. Shepherd Univ.*, Docket No. 07-HE-116 (Mar. 12, 2008);
10. *House v. Civil Serv. Comm'n*, 181 W.Va. 49, 51, 380 S.E.2d 216, 218 (1989);
11. *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996);
12. *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).

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I.

STATEMENT OF CASE

On January 15, 2014, Kanawha County Circuit Court Judge Charles E. King, Jr., entered an order denying the appeal of the West Virginia Division of Natural Resources (“Appellant”). Appellant appealed such Order and a Scheduling Order was entered allowing Respondent until June 30, 2014, to submit his brief.

On May 23, 2013, Appellee filed his grievance pursuant to the Public Employees Grievance Act, W.Va. Code §6C-2-1, et seq. Appellee was dismissed from employment as a Maintenance Supervisor with Appellant based upon an alleged extortion threat against the Park Superintendent.

On July 30, 2013, the Level Three Hearing was held before Administrative Law Judge Lewis Brewer (“ALJ”), and, on August 19, 2013, the ALJ entered his Decision granting Appellee’s grievance.

Appellant appealed the ALJ’s Decision to the Circuit Court of Kanawha County pursuant to W.Va. Code §6C-2-5 and on September 9th, a hearing was held on Appellant’s motion for Stay of the August 19, 2013, Order reinstating Appellee to his

position. Judge King entered an Order on September 12th denying the Stay, in part, and granting it, in part, reinstating Appellee to his employment making him eligible for insurance coverage.

Judge King affirmed the decision of the ALJ and found that the alleged extortion threat was not gross misconduct and that the ALJ was not clearly wrong or arbitrary capricious. Appellant moved for a Stay of the reinstatement of pay pending this appeal which was granted and Appellee filed for reconsideration of awarding attorney fees which Judge King denied resulting in Appellee not getting reimbursed for attorney fees despite his prevailing on the appeal.

II.

STATEMENT OF FACTS

Shortly after Appellee completed his probationary period as the Maintenance Supervisor at Hawk's Nest State Park, receiving an above average employee evaluation, he was placed on a Performance Improvement Plan ("PIP") by Superintendent Bracken. Approximately two weeks after being placed on the PIP, Appellee had a conversation with Assistant Superintendent Baughman. There is some conflict as to the exact conversation but it was alleged that Appellee stated to Assistant Superintendent Baughman that Superintendent Bracken "had better back off" the PIP or he would make statements regarding litigation filed by a former park employee, which would be personally detrimental to Superintendent Bracken. Assistant Superintendent Baughman did not immediately report the statements but when he later ran into Superintendent Bracken, he mentioned the statements to him and Bracken ultimately relayed the statements to his supervisors. Appellee was terminated.

Weighing the credibility of witnesses, the ALJ found that Appellant had established, by preponderance of the credible evidence, that Appellee engaged in conduct of allegedly making such comments but the ALJ did not find that such comments constituted a serious threat of harm or wrong doing and found that Appellant's reaction to the statements was inappropriate and grossly excessive.

In the course of employment, Superintendent Bracken had asked Appellee to purchase Freon from the United Refrigeration using his contractor's license and paying for the Freon with a State Purchasing Card believing that Appellee's HVAC license allows him to purchase and install Freon. Appellee tried to explain to Superintendent Bracken that although license permitted him to purchase Freon, he could install Freon if he had certain equipment required by the Federal Regulations and that improper use of the Freon would be grounds for revoking his contracting license for HVAC work. It was about on March 27, 2013, Superintendent Bracken in documenting problems he observed with Appellee's duty performance and on April 24, 2013, (within a week after the conversation regarding Freon purchases), Superintendent Bracken notified Appellee that he would be place upon a PIP.

After hearing the statement that was later characterized as a threat or extortion, Assistant Superintendent Baughman did not immediately admonish Appellee for his supposed threat, nor did he make any effort to clarify with Appellee what he meant by the statement. He did not even immediately report his statement until a routine conversation later that evening between Assistant Superintendent Baughman and Superintendent Bracken in which he described the statement that Appellee had made earlier that day. Superintendent Bracken requested that Assistant Superintendent Baughman notify his

immediate Supervisor, District Administrator, Paul Redford, and the Chief of Parks, Ken Kaplinger, but Assistant Superintendent Baughman did not recommend any particular disciplinary response to the alleged conduct and it was on May 22nd that Director of the Division of Natural Resources, Frank Jezioro, 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 conclude that Appellee did not meet the acceptable standard of conduct as an employee for the National Division of Natural Resources thus warranting his dismissal.

III.

ARGUMENT

A. APPELLANT FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE ALLEGED MISCONDUCT CONSTITUTED SUFFICIENT GROUNDS FOR TERMINATION.

There seems little dispute that the burden of proof in disciplinary matters rests with the employer requiring Appellant to meet the burden of proving the charges against Appellee by a preponderance of the evidence. *Procedure Rule of the W.Va. Public Employee's 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). It is generally accepted that the 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). When the evidence equally supports both sides, the employer has not met its burden. See *Leichliter v W.Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

More importantly, the employer has also the requirement to demonstrate that any alleged misconduct which forms the basis for the dismissal is of a "substantial nature

directly affecting rights and interest of the public”. *House v. Civil Serv. Comm’n*, 181 *W.Va.* 49, 51, 380 *S.E.2d* 216, 218 (1989). Additionally, 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).

The ALJ made the factual determination that Appellee made a statement to Assistant Superintendent Baughman not justifying termination. The ALJ looked at the content and background of such statement and noted, on page 12, that the pronounced and palpable animosity that existed between Appellant and Superintendent did not exist between Appellee and Assistant Superintendent Baughman apparently or cooperatively in a climate of mutual respect. Assistant Superintendent Baughman testified how the May 9th conversation developed, acknowledging that he had previously told Appellee 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. The lack of ill will was a key element for the ALJ evaluating the conversation and the existence of the PIP provided motivation for Appellee to make statements that would be critical of Superintendent Bracken. For all the reasons thoroughly described by the ALJ, he gave more credibility to the testimony of Assistant Superintendent Baughman regarding the conversation but then went on, page 16, to determine this statement did not provide good cause for termination. Specifically, the ALJ 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). The ALJ determined that "placing this statement in the context of the full light of day, it appears that Grievant's (Appellee's) comments have been blown out of proportion".

The ALJ noted, pages 16-17, that it was significant that Assistant Superintendent Baughman did not react to the alleged statement at the time it was made neither did he admonish Appellee for making any alleged threat nor ask for any clarification as to what Appellee meant by his statement. Further Assistant Superintendent Baughman did not consider this alleged threat sufficiently noteworthy enough to immediately notify the Superintendent Bracken regarding its utterance; instead, it was in a conversation when they ran into each other later that night while not on duty that such comment were mentioned. It was only when Superintendent Bracken inquired of Assistant Superintendent Baughman what he meant by his comment that Superintendent Bracken needed to back off of Appellee that the alleged comments made earlier that day by Appellee were mentioned to Superintendent Bracken. Superintendent Bracken, then communicated the essence of the statements, without placing them in the contents in which they were received, to his superiors and his termination resulted. It was critical and important to the ALJ that Superintendent Bracken did not completely and fully describe the alleged misconduct on the part of Appellee or place such comments in the contents of their relationship fully explaining Assistant Superintendent Baughman's failure to respond or ask Appellee for clarification.

The ALJ went on to conclude, on page 17, that even assuming Appellant made each and every statement exactly as alleged by Assistant Superintendent Baughman, the statements did not represent a serious threat to engage in any improper or prohibited conduct. At most, it seemed to be one supervisor grouching to another about his treatment by their mutual boss, rather than a threat of real or actual harm. So the basis for the ALJ to find that the charges did not involve misconduct of a substantial nature directly affecting the rights and interest of the public nor did it provide good cause for his termination. See *House v. Civil Serv. Comm'n*, 181 W.Va. 49, 51 380 S.E.2d 216, 218 (1989).

B. THE ADMINISTRATIVE LAW JUDGE'S DECISION WAS NOT CLEARLY WRONG NOR ARBITRARY NOR CAPRICIOUS

Appellant attempts to argue that arbitrary and capricious actions have been found to be closely related to ones that are unreasonable under, *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996). This recognizes arbitrary as capricious when it is "an unreasonable, without consideration, and in disregard of facts and circumstances of the case". This arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

In the case at hand, clearly the ALJ was in the position to hear the testimony of the witnesses in order to evaluate their credibility and trustworthiness and not only did the ALJ consider the witnesses but entered a detailed decision on August 19, 2013, specifying his specific Findings of Fact and Conclusions of Law in a reasonable discussion of facts to the law at arriving at his well reasoned decision. The ALJ determined that the statements were taken out of contents and did not constitute an immediate threat or amount to conduct justifying termination.

Appellant's argument that the ALJ substituted his judgment or failed to give proper deference to the severity of the disciplinary action is not well founded or supported by the record. The ALJ gave Appellant the favorable finding of fact that Appellee made the statements but made a well reasoned, detailed analysis as to the contents that the statements were made saying all the relevant and presented testimony and evidence in making his conclusions regarding whether such statements constituted misconduct or constituted any kind of immediate threat on the part of Appellee toward Superintendent Bracken.

Appellant's argument that the Grievance Board has limited power to reduce disciplinary penalty and that Appellee's grievance that he should not have been terminated should be considered an affirmative defense thereby prohibiting the ALJ from using such disciplinary action is misguided and inapplicable to this case. The ALJ did not reduce the termination to a suspension but, rather, found that the alleged statements did not constitute misconduct or an immediate threat. The term misconduct is used in the contents of an employer/employee relationship implies a willful disregard of employer's interest or a wanton disregard of standard or behavior which employer has a right to expect of his 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).

The ALJ found that making the alleged comments made by Appellee in the contents of the relationship between Appellee and Assistant Superintendent Baughman, the relationship between Appellee and Superintendent Bracken, the conversations between Appellee and Superintendent Bracken regarding Freon, the discussion regarding

the terms and conditions of the Improvement Plan, lack of response from Assistant Superintendent Baughman toward Appellee at the time the statements were allegedly made, and the failure of the Assistant Superintendent to immediately report the statements to Superintendent Bracken until unscheduled meeting and conversation off duty establish, by preponderance of the evidence, that such statements were taken out of content by the employer when reported by Superintendent Bracken to his supervisors without complete and full explanation.

Much of the reasoning for the determination seems to surround Superintendent Bracken's obvious conflict between them that started with the conversation about the Freon and was fueled by Superintendent Bracken's attempt to document and discipline and/or terminate Appellee, which believed he had achieved by incompletely reporting to his supervisors about May 9th conversation without full explanation. Mitigation of the punishment was not an issue at the hearing nor was Appellee's prior disciplinary action an issue but, rather, the issue was whether the May 9th alleged comment constituted an immediate threat constituting a gross misconduct justifying termination the ALJ did not find.

It's noteworthy to mention that after the ALJ granted the grievance reinstating Appellee to his position granting him back pay and affording him health insurance coverage, Appellant dragged their feet regarding allegedly having to do paperwork and filed a Motion For Stay of the Order arguing, at the September 9th hearing, that the Court not return Appellee to Hawk's Nest State Park. Thankfully, Judge King denied the Motion For Stay granting a middle ground where Appellee was employed at a different park affording him income and insurance status, but not granting him back pay until this

matter could be resolved. Appellee argues that there was improper bias on the part of the ALJ by his making multiple editorial comments unsupported by the direct testimony which is exactly what Appellant attempted to do at the September 9th hearing regarding allegations that Appellee should not be reinstated because he appeared on the job site at Hawk's Nest Park. Any alleged bias on the part of the ALJ is not supported by the record and is an improper personal attack on the professionalism of the ALJ. These allegations of bias and favoritism seem to surround ALJ's interaction with Superintendent Bracken and his apparent credibility analysis of him. The ALJ did not find Appellee's testimony regarding the May 9th statements as credible disregarding his testimony providing the greater credibility of weight to the testimony of the Assistant Superintendent Baughman. The issues as to credibility and trustworthiness of testimony should not be the basis of a claim of bias on the part of the ALJ.

C. THE CIRCUIT COURT'S AFFIRMING THE ALJ AND DENYING THE APPEAL WAS APPROPRIATE AND CORRECT AND APPELLEE SHOULD BE AWARDED ATTORNEY FEES AND COSTS.

Judge King was correct in his denying the appeal filed by Appellant in the Circuit Court of Kanawha County by Order entered January 15, 2014, affirming the Decision of the ALJ reinstating Appellee's employment and awarding back pay. Judge King should have awarded Appellee his attorney fees and costs reimbursing Appellee for having to employ an attorney and defending both the appeal filed by the Appellant in the Circuit Court of Kanawha County and this appeal filed before the Supreme Court of Appeals for West Virginia. Appellee is entitled to his attorney fees and costs in the event that he prevails on appeal.

Appellant terminated Appellee characterizing the statements he made to Assistant Superintendent Baughman as threats and extortion. Appellant attempted to Stay the Decision of the ALJ by requesting Judge King not reinstate him nor pay back wages pending the appeal. Judge King denied this request primarily because of the loss of the insurance status of Appellee and his not receiving wages. Judge King did not require the payment of the back award but did order that Appellee be relocated to another park. After Judge King denied the appeal, Appellee filed this appeal before the Supreme Court of Appeals and requested a Stay of the payment of the back award which was granted by Judge King. But Judge King did not award attorney fees or costs at January 15, 2014, Order nor grant the motion for reconsideration of awarding attorney fees and costs.

In his Conclusions Of Law, Judge King concluded that the record did not support that Appellee's statements were intended to be a threat and the ALJ was not clearly wrong by finding such statements did not constitute misconduct justifying termination. Judge King went on to indicate that Williams's statements did not constitute gross misconduct and were not clearly wrong nor abuse of discretion in finding that the allegation of misconduct did not constitute good cause for the dismissal of Appellee. Judge King stated that none of the facts or legal authorities that Appellant offered to the Court supported the position that the statements/conduct of Appellee constitutes gross misconduct justifying termination nor was it clearly wrong or abuse of discretion. The ALJ made reasonable findings of fact after listening to the witnesses and did not make any clearly wrong considerations or conclusions of law.

Appellant's argument that the State Agency should have the right to determine the seriousness of misconduct of a public employee for the purpose of disciplinary action and

to determine whether a lesser disciplinary action is barred in the absence of a finding of gross misconduct. Appellee never proposed any less fair disciplinary action and moved directly to termination. At this point, it would be inappropriate for this Court to consider or give discretion to Appellant to consider less severe disciplinary action given any event that the statements are directly considered as not constituting gross misconduct. The issue in this appeal is whether Appellant established "gross misconduct" on the part of Appellee justifying his termination and whether it was clearly wrong for the ALJ and Judge King to conclude that the alleged statements did not constitute serious threats and not constitute gross misconduct justifying termination. Judge King's denial of the appeal was correct and appropriate.

RELIEF SOUGHT/CONCLUSION

Appellee respectfully requests that this appeal be DENIED and that Appellant be immediately ordered to affirm the reinstatement of Appellee and pay him his back award plus interest and reimburse him for his attorney fees and costs in defending both the appeal in the Circuit Court of Kanawha County and this appeal before the Supreme Court of Appeals of West Virginia. Appellee asks for any other relief deemed just and equitable by this Court. WHEREFORE, based upon the foregoing, Appellee respectfully requests that this Court affirm the January 15, 2014, Order of Judge King, which Affirmed the August 19, 2013, Decision by the ALJ reinstating Appellee to employment granting him back award plus interest and that this Court further award him attorney fees and costs in defending both the appeal in the Circuit Court of Kanawha County and in his having to retain counsel to represent him in this appeal before the Supreme Court of

Appeals of West Virginia. Appellee asks for any other relief deemed just and equitable by this Court.

A handwritten signature in cursive script, reading "Michael E. Froble". The signature is written in black ink and is positioned above a horizontal line.

Michael E. Froble

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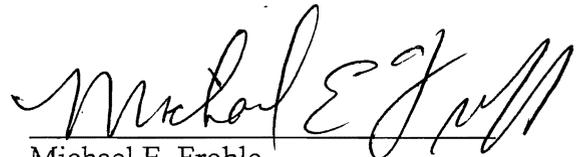
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CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that the foregoing BRIEF ON BEHALF OF
JAMES FRANKLIN WILLIAMS has been served upon the following by U.S. Mail,
postage pre-paid, this the 26th day of June, 2014.:

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