

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JEFFREY CLAGG and JOSHUA JAMES,**

**Grievants,**

**v.**

**Docket No. 2015-1631-CONS**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## **DECISION**

Grievant, Jeffrey Clagg, had been working for the Respondent, Division of Highways, since 2007 before his employment was terminated. He held the classification of Transportation Crew Supervisor 1. Grievant, Joshua James, was classified as a Transportation Worker 1 – Craftsman when his employment was terminated. He had been employed by the DOH since 2013. Both Grievants were assigned to the Cabell County Maintenance Headquarters. Both Grievants were fired for an incident involving the alleged theft of a chainsaw.<sup>1</sup>

Mr. Clagg filed an expedited grievance at level three, dated February 20, 2015, challenging his dismissal claiming improper evidence and procedures were used. He seeks to be reinstated with “back pay for time missed.”

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<sup>1</sup> Though both employees were dismissed related to the same incident, Grievant Clagg’s termination letter was dated February 18, 2015, and Grievant James’ letter was dated June 15, 2015.

Mr. James subsequently filed a grievance at level three, dated June 6, 2015, challenging the termination of his employment, alleging that he was “falsely accused.” Mr. James also seeks reinstatement to his position.<sup>2</sup>

On June 29, 2015, Respondent moved that the two grievances be consolidated for hearing and decision at level three. Grievants opposed the consolidation. By Order dated July 6, 2015, the undersigned consolidated the grievances since they both dealt with nearly identical facts arising out of the same incident and would require the attendance of the same witnesses.

A level three hearing was held over two days; September 30, and October 7, 2015, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant Clagg was present and represented by Gordon Simons, UE Local 170, Grievant James was present and was represented Kris Mallory, American Federation of Teachers. Respondent DOH was represented by Krista D. Black, Esquire, DOH Legal Division. This matter became mature for consideration on December 1, 2015, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.<sup>3</sup>

### **Synopsis**

Respondent had suffered the loss of expensive tools and materials from DOH Cabell County Maintenance Headquarters in recent years, including chainsaws. When the DOH replaced a number of chainsaws, the management implemented a policy

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<sup>2</sup> WEST VIRGINIA CODE § 6C-2-4(a)(4) authorizes employees to file directly to level three when challenging the termination of their employment, among other things.

<sup>3</sup> On December 4, 2015, Respondent filed a motion to strike evidence alleged to be discussed in Grievant Clagg’s written proposal which was not part of the hearing. No response was received from either Grievant. Only evidence properly placed on the record at the level three hearing will be considered in deciding these consolidated grievances.

requiring all such tools to be locked in an equipment cage each evening and checked out by the crew leader when they were needed for a particular job. Crew leaders were advised that they were charged with ensuring that the equipment was returned to the cage after each shift and they would be held accountable if the equipment was not returned.

Grievant Clagg was recorded by a video camera removing a chainsaw from the equipment cage to be used on a job by the crew he was supervising. Grievant James was recorded with Crew Supervisor Clagg when the saw was taken from the building. The chainsaw was removed and both Grievants were fired for involvement in taking the chainsaw.

Respondent was unable to prove that either Grievant actually took the chainsaw or specifically knew how it disappeared. However, Grievant Clagg was specifically charged with the return of the equipment and his failure to meet that duty was grounds for dismissal under the totality of the circumstances and his grievance is DENIED. Respondent did not prove Grievant James was involved in the chainsaw loss and his grievance is GRANTED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, Jeffrey Clagg, has been employed by the DOH since 2007. For the last two years he has been classified as a Transportation Crew Supervisor 1 assigned to the District 2 Cabell County Maintenance Headquarters.
2. The Crew Supervisor (also referred to as "Crew Leaders") is assigned a crew of transportation workers to perform specific assignments for road maintenance

each day. The crew leader decides what equipment is necessary to take to perform the specific assignment and assigns individual duties to the transportation workers to get the job done, e.g. grading, mowing, flagging, etc.

3. Grievant, Joshua James, was also employed by the DOH and assigned to the Cabell County Maintenance Headquarters in District 2. He has been employed by the DOH since 2013 in the Transportation Worker 1 – Craftsman classification. At the time relevant to this grievance, Mr. James was assigned to the crew supervised by Mr. Clagg.

4. Over a period of time, the Cabell County Maintenance Headquarters had lost a number of tools and other equipment, including heavy duty chainsaws which can cost between three and seven hundred dollars each.

5. On October 8, 2014, Alice Riffie, CPA, District 2 Comptroller, authorized the purchase of two STIHL Chainsaws for the Cabell County Maintenance Center to replace two which were reported as “missing.” Comptroller Riffie required that the following procedure be put into place as a condition to authorizing this purchase:

The Comptroller’s office is giving Org: 0206 one chance – I approve the purchase of two (2) STIHL chainsaws:

Qty: 1 - Model # MS391 [\$607.65]

Qty: 1 - Model # MS250 [\$370.75]

Once we receive them, the serial numbers will be recorded and a tag place on each saw according to the tag numbering system in place at 0206 Storeroom. All Chainsaws are to be signed out and signed back in with each use. The next “missing” saw – the last person on the sign out sheet that was responsible for the equipment will be held responsible and disciplinary actions as appropriate will be taken.

(Joint Exhibit 1.)<sup>4</sup>

6. After receiving this requirement related to the chainsaws, a sign-out procedure was established and extended to power tools including: chainsaws, pole saws, concrete saws, leaf blowers, water pumps and weed-eaters. Serial numbers were recorded for all of the equipment and a sign-out sheet was placed in the office of the Storeroom Clerk, Doug Call. (Joint Exhibit 5). A new lock was purchased for the equipment cage and keys were given to Mr. Call; Acting County Administrator, John Pendleton; Acting Assistant Administrator, Larry Thacker; and Crew Supervisors, Scotty Scarberry, Jessie Ferrell and Grievant, Jeffrey Clagg.

7. A security camera was installed to take video footage of the equipment cage and the area surrounding it. The camera filmed much of the warehouse area including the door where employees routinely exited.<sup>5</sup>

8. In October 2014, Administrator Pendleton held a meeting with all the crew leaders to discuss the new sign-out procedure. Due to illness, Grievant Clagg missed a considerable amount of work during this period and may not have attended that meeting. He received the new keys from Mr. Call but the date he received the keys was not specifically established.

9. Grievant Clagg led crews occasionally during the period of October through December, 2014 and needed equipment for those jobs. The new sign-out sheet was hung

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<sup>4</sup> Immediately prior to the first day of hearing, the parties went through the various exhibits they anticipated would be introduced and asked that they be marked and numbered as Joint Exhibits. The request was granted and the exhibits were marked and numbered accordingly. A few additional exhibits were offered by parties which were marked and numbered as the exhibit of the party who offered each one.

<sup>5</sup> Six other working security cameras are around the building and premises. All seven camera views can be monitored at one time.

on a clipboard on the wall in the Storeroom Clerk's office and the new procedure was frequently and widely discussed at the facility.<sup>6</sup> Additionally, in his statement to the investigators Grievant Clagg noted that around November 1, 2014, Mr. Pennington told him the new walkie-talkies would have to be signed in and out. (Joint Exhibit 14). This is the same general time period in which the sign-out policy was established for chainsaws and other equipment. The clipboard holding the sheet for this purpose has large yellow tape at the bottom upon which is written in letters about an inch high "SIGN OUT SHEET CHAIN SAW, WEEDEATER AND POLESAW." It is more likely than not that Grievant Clagg knew about the new requirement to sign equipment out and back in.<sup>7</sup>

10. Even though the Maintenance facility is surrounded by a fence, there are places where a person can get in after hours.<sup>8</sup> Accordingly, equipment left in trucks at night can be stolen. This is commonly known to Grievants and other DOH employees at the facility.

11. On December 11, 2014, Grievant Clagg was supervising a crew of transportation workers. They had an assignment to complete in the morning and one scheduled for the afternoon. The afternoon job was installing a culvert pipe in a roadside ditch adjacent to a residential driveway on Howell's Mill Road. This task involved installing

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<sup>6</sup> Crew Supervisor Kimball testified that he was aware of the sign-out procedure stating "I was responsible for getting the chainsaw and making sure it come back to the garage." He was not clear if the consequence for failing to return the saw would be suspension, dismissal or replacing the saw but stated, "You're responsible for it is all I know."

<sup>7</sup> A worker on Grievant Clagg's crew testified that he learned of the sign-out procedure from Mr. Clagg when he sent him to sign out a chainsaw for a specific job. However, he testified that this occurred between April 2014 and July 2014 which is before the new procedure was implemented, so this statement is of no value to the case at hand. (Joint Exhibit 12.)

<sup>8</sup> There are two places where a car hit the fence and made holes through which a person can gain access to the facility.

a large section of eighteen inch diameter plastic pipe under the road for water to pass through. Grievant Clagg's supervisor Larry Thacker told Grievant Clagg to take two sections of Pipe which were each twenty feet long. Mr. Thacker suggested that they take a chainsaw because they might need to cut one of the pipes to fit the job.<sup>9</sup>

12. Around mid-day on December 11, 2014, Grievant Clagg and his crew came to the Maintenance office to eat and prepare to go to the Howell's Mill Road job. The crew for that assignment included: Grievant, Jeffrey Clagg, Crew Leader; Grievant, Joshua James; Justin Riggs; D. Lucas; R. Adkins; W. Luker; R. Chapman; and Butch Clagg.<sup>10</sup> (Joint Exhibit 8, Daily Work Report completed by Jeffrey Clagg for December 11, 2014).

13. In the time before the crew left for the Howell's Run job, the security camera monitoring the equipment cage recorded the following:<sup>11</sup>

11:37:33 - Joshua James enters the facility through the back door, looks at the camera and makes a face.

12:00:12 - Jeffrey Clagg goes to the equipment cage, unlocks it, gets out the chainsaw and places it on a table where he checks the oil and gasoline levels. Thereafter he relocks the cage.

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<sup>9</sup> Mr. Thacker believed they would only need to install thirty feet of pipe which would have required the crew to cut one of the lengths of pipe in half.

<sup>10</sup> Butch Clagg and Grievant Clagg are not related to Grievant's knowledge. Butch Clagg apparently was not interviewed and did not testify.

<sup>11</sup> The times and date stamped on the recording are wrong. Doug Call determined the actual time and date of the recording by observing the recording on a known date and time and noting the date and time recorded. Knowing the difference from the real time, Mr. Call was able to observe a prior time and use the known difference to calculate the actual time and date of the prior recording. The times listed above are only used to demonstrate the amount of time which passed between each event and do not accurately reflect the time of day the events occurred. Obviously, having the accurate time and date recorded on the video would be preferable for evidentiary purposes.

12:01:07 – Jeffery Clagg steps out of view, into the men’s room.

12:02:37 – Jeffery Clagg reenters the picture, pulls his cell phone from his pocket and appears to send a text message.

12:03:11 – Jeffrey Clagg steps to the bin where protective gear is kept, looks inside but takes nothing out.

12:03:42 - Joshua James reenters the picture from the break area and converses with Jeffrey Clagg.

12:03:57 - Joshua James goes to the rear door, opens it slightly, lets it close, reopens it and holds it open for Jeffrey Clagg.

12:04:07 - Jeffrey Clagg exits with the chainsaw followed by Joshua James. During the brief time the door is closing it is apparent that both Grievants go to the left as they exit the door. The parking area for employees’ personal vehicles is in that direction.

12:08:05 – Joshua James reenters the facility through the back entrance and steps into the men’s room.

12:08:45 - Joshua James reenters the picture and heads toward the front of the facility where he apparently exits through the front door.

(Joint Exhibit 4). Two other DOH employees, Randy Adkins and Rick Chapman, also appeared on the video for brief moments. No other DOH employee was in the area when Grievant Clagg retrieved the chainsaw and left the facility. (Joint Exhibit 4).

14. Grievant Clagg did not sign the chainsaw out on the sign-out sheet in the Storeroom Clerk’s office, as required by the procedure adopted two months earlier.

15. Doug Call appears to be the only employee at the facility who knows how to operate the video equipment. Assistant Administrator Thacker told Mr. Call to review the video for Thursday, December 11, 2014, to see what happened with the saw. Mr. Call reviewed all of the video for the days in question, saved the portion which showed



Grievant James arriving and making a face at the camera, Grievant Clagg retrieving the saw, both Grievants leaving the facility through the back door with the chainsaw, Grievant James returning going to the men's room and leaving toward the front of the facility, and the truck pulling away from the facility. (Joint Exhibit 4). Mr. Call did not see anyone return the chainsaw after it was removed from the cage by Grievant Clagg and the video did not reveal anyone stealing the chainsaw.<sup>12</sup> Clerk Call gave the portion of the video he copied and saved to Administrator Pennington. No one else reviewed the complete video.

16. To complete the Howell's Mill Road project, the crew used all forty feet of pipe and did not need to use the chainsaw.

17. Justin Riggs was on the crew led by Grievant Clagg at the Howell's Mill Road site. He rode to the site in the crew cab of Grievant Clagg's truck. He did not see the chainsaw in the crew cab or the back of the truck when he unloaded the tools and equipment he needed to be a flagger at the site. The investigators did not take a written statement from any other member of the crew and no other member of the crew was called to testify.

18. Butch Clagg was also on the crew. Early on Monday, December 15, Doug Call asked Butch Clagg if he knew anything about the chainsaw. Butch Clagg told Mr. Call that Jeffrey Clagg had taken the chainsaw on December 11, 2014, the last day it was seen. Butch Clagg was not in the area of the facility when Grievant Clagg retrieved the chainsaw and left the building. Butch Clagg apparently was not interviewed by the investigators since no written statement from him was included in their report.

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<sup>12</sup> Testimony of Doug Call.

19. The back of the truck was visible in the video saved by Doug Call as the truck was leaving the maintenance facility. Visible in the back of the truck were two large metal signs that were standing on end, a large water job, two traffic cones, and long handled tools. The bottom of the bed of the truck could not be seen in the video. There was room in the truck bed for a chainsaw which might have been difficult to see with the other equipment. (Joint Exhibit 4).

20. Based mainly on fact that Grievant Clagg and Grievant James appeared to turn left when leaving the rear of the facility, Respondent's investigator speculated that Grievant Clagg put the chainsaw in his car instead of putting the chainsaw in the truck to take to the Howell's Mill Road site. No evidence was presented demonstrating the actual location of Grievant Clagg's car, or that Grievant Clagg took the chainsaw to his car. Given this lack of evidence and the fact that Butch Clagg, who was on Grievant Clagg's crew, knew that Grievant Clagg had taken the saw that day, it is more likely than not that Grievant Clagg placed the chainsaw in the truck and took it to the Howell's Mill Road site on December 11, 2014.

21. Near mid-day on Friday, December 12, Doug Call was informed by acting crew supervisor, Chris Kimble that the chainsaw was not in the cage.<sup>13</sup> Mr. Call informed Crew Supervisor Scarberry that the chainsaw was missing and had not been signed out the previous day. Crew Supervisor Scarberry checked the cage and looked in all of the

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<sup>13</sup> There is conflicting testimony about when it became apparent that the chainsaw had not been returned on Thursday. Mr. Kimball testified that he had told Mr. Call that the chainsaw was not in the cage when he returned his at 3:00 pm. on Thursday. That would have been before Grievant Clagg and his crew returned from the Howell's Mill Road site. The exact time at which Clerk Call was informed of the missing chainsaw is not critical inasmuch as the video evidence demonstrates that Grievant Clagg was the last one to remove it from the cage and it was not returned after he took it.

trucks that were in the facility lot to determine if the chainsaw had been misplaced or forgotten. When he left work at the end of the day on Friday, Mr. Scarberry left a note for Assistant Administrator Thacker informing him that a chainsaw was missing.

22. Assistant Administrator Thacker came to work at 8:00 p.m. on Friday, December 12, 2014. When he found the note left for him by Crew Leader Scarberry, Mr. Thacker searched all of the trucks at the facility to see if the chainsaw might have been left in one of them. Mr. Thacker looked in the toolbox on the truck assigned to Grievant Clagg and found that it had too much equipment and tools in it to hold the chainsaw. He also looked in the bed of the truck and noticed that it had signs and other equipment but was not completely full. Mr. Thacker had to move some of the equipment around to see all of the bed of the truck and did not find the chainsaw.

23. Mr. Call was apparently a “Facebook friend” with Grievant Clagg. On Saturday, December 13, 2014, Mr. Call received a Facebook post from Grievant Clagg. The post showed a picture of what appeared to be ten \$20 bills fanned out on a tabletop. The caption in large letters read, “Play money what’s out there.” Mr. Call believed this post might indicate that Grievant Clagg had sold the chainsaw for the \$200 shown on the posting. He made a copy of the posting and gave it to Administrator Pennington on Monday, December 15, 2014.

24. Mr. Thacker reported the missing chainsaw to the District 2 Administrator, Scott Eplin.<sup>14</sup> Mr. Eplin came to Cabell Maintenance Facility on Wednesday, December 16, 2014, to meet with employees regarding the chainsaw. He met with Grievant Clagg who stated that he did not know what happened to the saw or where it might be. Grievant

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<sup>14</sup> District 2 is includes Cabell, Lincoln, Logan, Mingo, and Wayne counties.

Clagg was texting during most of the conversation with Mr. Eplin and appeared to be irritated that he was being questioned. Mr. Eplin became agitated with Mr. Clagg because he did not appear to be taking the matter seriously. Ultimately, Mr. Eplin indicated that if the saw was returned the matter could be forgotten, but if he had to report to Charleston, disciplinary action would likely result.

25. None of the employees were able to explain why the chainsaw was missing, so Mr. Eplin reported the matter to Charleston and an investigation was commenced. After the investigation was concluded, Mr. Eplin held a predetermination meeting with Grievant Clagg. Grievant Clagg maintained that he did not know what happened with the saw, but he did not take it. In June 2015, Mr. Eplin held a predetermination meeting with Grievant James. Grievant James also denied any knowledge of the missing chainsaw. Administrator Eplin recommended terminating the employment of both Grievants based upon the actions that were captured on the video on December 11, 2014. Administrator Eplin opined that the video demonstrated that Grievant James was acting as a lookout for Grievant Clagg.<sup>15</sup> (Testimony of District 2 Administrator Scott Eplin).

26. Administrator Pennington filed a police report with the Barboursville Police Department. All of the information from the investigation was supplied to the police and no charges were filed.

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<sup>15</sup> During cross-examination, Administrator Eplin indicated that he was told by somebody else that Grievant James was acting as a lookout and that was not his opinion. However, on redirect, it was pointed out to Mr. Eplin that he had accused Grievant James of actively participating in the theft of the chainsaw on the RL – 544 Form used to notify an employee of disciplinary charges, dated June 2, 2015. It remains unclear whether Administrator Eplin felt that the video indicated that Grievant James was acting as a lookout or if he was expressing the opinions of the investigator.

27. David Fix and Kevin Quinlan are investigators for the DOH and were assigned to investigate the missing chainsaw. Mr. Fix was the lead investigator. They came to the Cabell Maintenance Facility on multiple occasions and took statements from staff members including both Grievants. They also reviewed the video clips prepared by Store Clerk Call.

28. Grievant Clagg was interviewed for the first time on December 30, 2014. The interview started at 10:50 a.m. with the signing of an Administrative Notice of Rights. Grievant Clagg then wrote out a four-page statement that was signed and notarized. The time listed for starting his written statement was 11:30 a.m.

29. Grievant Clagg was interviewed a second time on January 6, 2015. The written statement that he began on that day indicated that it started at 1:00 p.m., after two and a half pages, the statement is left unfinished. Investigator Fix noted that “Jeff Clagg got mad, refused to answer any more questions, walked out, said he was going home.” Mr. Fink noted the time was 2:15 p.m. Apparently, Grievant Clagg had answered questions for more than an hour before getting angry, shouting, and leaving the building. (Joint Exhibit 14).

30. In those statements, Grievant Clagg acknowledged that he took the chainsaw from the cage and placed it in the bed of his truck before going to the Howell’s Mill Road job. He offered no alternative explanation as to why the chainsaw was not in the truck the next day.<sup>16</sup>

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<sup>16</sup> In testimony the investigator and DOH management seem to infer that Grievant Clagg was being uncooperative because he denied stealing the chainsaw but did not offer an alternative explanation. Grievant Clagg had no obligation to offer a theory to proving that he did not steal the chainsaw. It is Respondent’s burden to prove that he did.

31. Grievant James was interviewed for the first time on December 30, 2014, at 9:30 a.m. In this initial statement Grievant James indicated that he did not remember seeing anyone take a chainsaw out the back door of the facility during the month of December. He remembered the crew had been assigned a job which required a chainsaw, but did not remember seeing it being placed in or taken out of the truck. (Joint Exhibit 15).

32. Grievant James gave another statement on December 30, 2014, at 1:45 p.m. In that statement, he indicated that on the day of the Howell's Mill Road job, they had returned to the facility and parked the truck in the "wash bay behind the shop." Grievant James said that he did not see Grievant Clagg take the chainsaw from the building or put it in the truck. He also said that he did not see the chainsaw in the truck on that date. *Id.*

33. Grievant James was interviewed a third time on January 6, 2015, at 9:30 a.m. During that interview, Grievant James was shown the video clips copied by Doug Call. In his written statement, he stated that he did not remember walking out the door with Jeffrey Clagg and the chainsaw on December 11, 2014. *Id.*

34. On January 28, 2016, Administrator Pendleton hand delivered to Grievant Clagg a Form RL-544, *Notice to Employee*, stating that he was recommending Grievant Clagg's dismissal for "Theft of state property on December 11, 2014. Specifically alleging:

On December 11, 2014, you removed a chainsaw from the workplace, without following proper procedures and did not return the chainsaw. This constitutes theft of state property. Additionally, you failed to fully cooperate with an official agency investigation into the disappearance of the chainsaw, at one point you refused to answer questions and left the workplace without approval.

Your blatant disregard of the DOH Standards of Work Performance and Conduct and theft of state property constitutes gross misconduct and therefore dismissal from employment is recommended.

(Joint Exhibit 16).

35. On January 30, 2015, Grievant Clagg participated in a predetermination meeting with District 2 Administrator, Scott Eplin. Grievant Clagg summarized his response to the charges on a Form RL-546. He reiterated that he got the saw for the Howell's Mill Road job and did not check it back in but does not know what happened to it. He apologized for walking out of the investigation but noted that the investigator kept asking him the same question and he was not going to make up a different answer to make him happy. (Joint Exhibit 16).

36. By letter dated February 18, 2015, the Department of Transportation, Human Resources Director, Kathleen Dempsey, informed Grievant Clagg his employment with the DOH was terminated effective March 6, 2015, for "violation of workplace standards/theft of State property." Director Dempsey specifically noted:

On December 11, 2014, despite a well-known and documented sign out procedure designed to curtail the theft of state property, you removed a chainsaw from the equipment cage without signing it out and it was never returned. Witness statements and video support the assertion that you removed the saw and did not return. As a supervisor you are held to a higher standard to not only follow procedures, rules and regulations, but to expect the same of your subordinates. During the course of the official investigation you became belligerent, refused to answer questions and left the worksite without permission. Your actions constitute theft of state property and refusal to cooperate with an official investigation. These actions constitute gross misconduct which warrants your dismissal.

(Joint Exhibit 16).

37. On June 1, 2015,<sup>17</sup> Grievant James was given a Form RL-544, *Notice to Employee*, by Administrator Michael Spry, stating that he was recommending Grievant James' dismissal for "Theft of state property on 11 December 2014. Specifically alleging:

On December 11, 2014, you are an active participant in the theft of a chainsaw. This constitutes theft of state property. Additionally, you have failed to fully cooperate with an official agency investigation into the disappearance of the chainsaw.

Your blatant disregard of the DOH Standards of Work Performance and Conduct and active participation in theft of state property constitutes gross misconduct and therefore your dismissal from employment is recommended.

(Joint Exhibit 17).

38. On June 2, 2015, Grievant James participated in a predetermination meeting with District 2 Administrator, Scott Eplin. Grievant James summarized his response to the charges on a Form RL-546 by stating that he "never played any role in the theft the state property" and "cooperated with investigators to the best of [his] knowledge and ability. . ." (Joint Exhibit 17).

39. By letter dated June 15, 2015, Human Resources Director, Kathleen Dempsey, informed Grievant James his employment with the DOH was terminated effective July 1, 2015, for "gross misconduct, violation of workplace standards and being an active participant in the theft of State property." Director Dempsey specifically noted:

On December 11, 2014, despite a well-known and documented sign out procedure designed to curtail the theft

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<sup>17</sup> In response to a question regarding the significant difference passage of time between the disciplinary actions for the two Grievants, Director Dempsey testified that there was confusion between the District Administrators and the Division of Human Resources regarding who was going to prepare the disciplinary documents related to Grievant James.



of state property, you actively aided another employee as he stole a chainsaw from the organization's equipment cage. Video footage clearly reveals you actively assisting in the removal of the stolen chainsaw, yet you denied any knowledge of such activity to the investigators. These actions constitute gross misconduct which warrants your dismissal.

(Joint Exhibit 17).

40. Volume V, Chapter 6, of the Department of Transportation Administrative Procedures contains the following two definitions:

**“Stolen”** property is property which is *known* to have been physically or illegally removed from the organization's premises, vehicle, or personnel. (Emphasis in original).

**“Missing”** is property that, for whatever reason, cannot be physically located or accounted for.

(Grievant James Exhibit 2).

### **Discussion**

As these grievances involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievants by a preponderance of the evidence.

Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

*W. Va. Dep't of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides,

a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Both Grievants were permanent classified state employees. 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 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. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *White v. Dep't of Health & Human Res.*, Docket No. 2014-0478-DHHR (Nov. 25, 2015). See also W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent dismissed both Grievants for theft of State property and failure to cooperate with an agency investigation. However, there is a significant difference between the specific charges of theft made against each Grievant. The DOH apparently has "zero tolerance for theft of State property." *Department of Transportation Administrative Procedures*, Volume V, Chapter 6, Section III, Paragraph A. While that policy requires that disciplinary action be taken when State property is found to be stolen by an employee, it does not dictate that the employee be discharged from employment in every instance. *Id.*, at Paragraph A. Subsection 4. In fact, such a requirement could violate an employee's substantive due process rights. See *Blake v. Civil Service Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Waugh v. Bd. of Educ.*, 177 W. Va. 16, 350 S.E.2d 17 (1986); *Matney v. Dep't of Health and Human Res./Welch Comm. Hosp.*, Docket No. 2011-0972-DHHR (Mar. 30, 2012).

Grievant Clagg maintains that he did not steal the chainsaw and Respondent failed to prove that he did. He acknowledges that he took the chainsaw to a job without signing it out or back in and the saw was lost thereafter. But he argues that he was unaware of the sign-out policy and the punishment of dismissal is too severe for losing the chainsaw.

Grievant James denies any wrong doing and contends he had nothing to do with the chainsaw or its disappearance. He points out that the disciplinary action occurred an inexplicable amount of time after the alleged event, and avers that Respondent did not prove the charges against him.

**Grievant Jeffrey Clagg:**

In the letter terminating his employment Grievant Clagg was generally charged with “violation of workplace standards/theft of State property.” However, the specific charge of theft was summarized by Administrator Pendleton as “you removed a chainsaw from the workplace, without following proper procedures and did not return the chainsaw. This constitutes theft of state property.” (Joint Exhibit 16). Director Dempsey added that Grievant Clagg was the Crew Supervisor and the work procedure required him to follow the sign out procedure. *Id.* These charges better fit the DOT definition of “missing” than “stolen” property which would require actual knowledge that the property was taken away from the facility. Yet, Respondent spent a significant portion of the hearing attempting to prove that Grievant Clagg actually stole the chainsaw and sold it.

Many facts are not disputed. In the previous year the Cabell facility had a significant problem with missing equipment. At least three chainsaws had been lost and needed to be replaced. As a condition for replacing the chainsaws, a sign-out procedure was implemented and the crew supervisors were charged with signing the equipment in and

out. If a chainsaw went missing, the crew supervisor who signed it out would be held responsible and disciplinary action would be taken. (Joint Exhibit 1).

Grievant Clagg testified that he had missed a great deal of work at the time the policy was being implemented and did not know about the policy. This testimony is not credible because the policy had been in place for nearly three months when this incident occurred and Grievant Clagg had supervised crews and used equipment during that time. Additionally, Grievant Clagg knew that new keys had been issued to the equipment case and the sign-out procedure was required for the new walkie-talkies. The sign-out sheet stated in large highlighted letters that chainsaws were included.<sup>18</sup> It is more likely than not that Grievant Clagg knew about the sign-out procedure.

It is also undisputed that on December 11, 2014, Grievant Clagg took the chainsaw from the locked cage, left the building with it in his hand, and did not return it to the cage at the end of his shift. Grievant did not sign the chainsaw out, and it was missing from the facility the next day.

Respondent alleges that rather than taking the chainsaw from the facility to his work truck, Grievant Clagg took it to his personal vehicle. Respondent further alleges that

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<sup>18</sup> The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant Clagg then sold the chainsaw for \$200. As proof of these allegations, Respondent presented what it characterized as “circumstantial evidence” which consisted of:

- Grievants Clagg and James turned to the left when exiting the rear door of the facility. Personal vehicles are normally parked to the left and the work trucks are generally parked to the right.
- Grievant James and Transportation Worker Riggs gave written statements that they did not see the chainsaw on the truck when they unloaded the signs for flagging at the Howell’s Mill Road site.
- Grievant posted what appeared to be ten \$20 bills fanned out on a table on his Facebook page on the morning of December 12, 2014.

Respondent asserts that this circumstantial evidence proves that Grievant Clagg took the chain to the left to go to his vehicle as opposed to the right to place the chainsaw in his work truck. It argues that this position is bolstered by the statements of Grievant James and Mr. Riggs that they did not see the chainsaw in the truck. Finally, Respondent asserts that the Facebook posting is circumstantial evidence that Grievant Clagg sold the purloined chainsaw for \$200 which was the source of the bills posted on Facebook.<sup>19</sup>

The West Virginia Supreme Court of Appeals has given guidance in the assessment of “circumstantial evidence.” In the case of *Morgan v. Insurance Co. of N. Am.*, 146 W. Va. 868, 122 S.E. 2d 838 (1961) the Court wrote:

Where circumstantial evidence is relied on it must be such as does more than throw a mere suspicion of guilt on plaintiff and the inference or presumption to which the facts proved give rise must be strong and almost inevitable. If the circumstances

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<sup>19</sup> Circumstantial evidence has been accepted by the Grievance Board to prove allegations such as political motivation in hiring. See, *Mercer v. Dep’t of Highways*, Docket No. 01-DOH-604 (Mar. 20, 2002) and *Wiley v. W. Va. Dept. of Highways*, Docket No. 99-DOH-109 (Aug. 3, 1999). However, speculation is not sufficient to meet the proof burden. See, *Coleman v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004).

are such as to be fairly susceptible of two constructions, the one that frees them from the imputation of fraud must be accepted." 46 C.J.S., Section 1359, pages 567-68.

The Court went on to note that the proof must accomplish more than establish a basis for mere suspicion, speculation or conjecture; but proof by a preponderance of the evidence is sufficient. *Id.*<sup>20</sup>

Respondent's evidence does not meet this standard. There are a number of reasons that both Grievants turned left when they exited the facilities rear door which have nothing to do with going to Grievant Clagg's car to hide a stolen chainsaw. Most importantly, there was testimony that the work truck had been parked to the left of the door in the wash bay instead of the normal area to the right. This is a reasonable explanation considering the fact that the truck was only temporarily parked while the crew had lunch and prepared to go to the next worksite. Additional explanations could include seeing someone they wished to talk with to the left, or even perhaps avoiding some disagreeable substance on the lot immediately outside the door. The notion that Grievant Clagg turned left for the sole purpose of placing the saw in his private automobile is no more likely than these other possible explanations and constitutes mere speculation on the part of the investigators. These proffers are fairly susceptible to at least two or more reasonable constructions, and do not carry any conviction of the truth of the charge,

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<sup>20</sup> Similarly in a family law case the court stated:

[T]hough circumstantial evidence is admissible and sufficient to prove adultery in a suit for divorce, it must be so clear and strong as to carry conviction of the truth of the charge, and, if it does no more than raise a suspicion of unchastity, it is insufficient. (Citations omitted).

*Nicely v. Nicely*, 81 W. Va. 269, 97 S.E. 749 (1917).

Likewise, the fact that Mr. Riggs and Grievant James gave statements that they did not see the saw in the truck when they unloaded the signs for flagging purposes does not prove Grievant Clagg did not place the chainsaw in the bed of the truck. First, Grievant James' statement in this regard lacks credibility because he also said he remembered nothing about walking out of the facility with Grievant Clagg when he took the chainsaw out on December 11, 2014. Yet that fact was clearly demonstrated on the video. Grievant James' memory of that day is suspect at best. The statement of Mr. Riggs is similarly unreliable. He became confused about when the sign-out policy was established stating that Grievant Clagg had required him to sign out tools at least four months before the policy was implemented. Additionally, while he seemed to be very earnest he also seemed very eager to please Respondent's representatives when they questioned him.<sup>21</sup> Additionally, Assistant Administrator Thacker testified that the bed of the truck was cluttered with tools and equipment when he searched it. He had to move things around to inspect the bed of the truck. Under these conditions the chainsaw could have been on the bed of the truck but hidden from sight by other tools and equipment, effectively blocking it from the view of Grievant James and Mr. Riggs since they were not specifically looking for it. Significantly, on the day the saw was discovered to be missing, Butch Clagg told Mr. Call that Grievant Clagg was the last person to have the chainsaw. Butch Clagg was on the crew at Howell's Mill Road and it is unlikely that he would've known that Grievant Clagg had the saw had he not seen it at the Howell's Mill Road site.

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<sup>21</sup> See footnote 18 *supra*, for the standard applied by the Grievance Board in making credibility assessments.

Finally, we come to the Facebook page posting of what appeared to be ten \$20 bills. (Joint Exhibit 6). Respondent asserts that this should be taken as circumstantial evidence that Grievant Clagg sold the chainsaw for \$200 because it was posted on his site within two days of the chainsaw's disappearance. This exhibit does not provide any proof of that allegation. Grievant Clagg testified, without contradiction, that these bills were play money that he had purchased at the local discount store. He noted that while the exhibit in black and white does not reflect the true color the bills which was reddish, identifying them as fake.<sup>22</sup> This testimony is bolstered by the caption which was placed above the picture when it was posted stating, "**Play money** what's out there."<sup>23</sup> (Emphasis added). Even had the money been real, there is nothing connecting it to the sale of a chainsaw.

These proffers are fairly susceptible to several reasonable constructions, do not carry any conviction of the truth of the charge and constitute speculation and conjecture on the part of the investigators. They do not meet the standards for circumstantial evidence. Accordingly, Respondent did not prove by a preponderance that Grievant Clagg took the chainsaw to his car and subsequently sold it, nor did Respondent prove that Grievant Clagg stole the chainsaw.

Respondent did prove that it had established the work procedure to specifically address the serious and ongoing problem of chainsaws and other equipment being taken from the facility and not being returned. That procedure required all crew supervisors to

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<sup>22</sup> Doug Call was present and available to rebut Grievant Clagg's testimony regarding the color of the \$20 bills but was not called upon to do so.

<sup>23</sup> The undersigned took this heading to mean that the \$20 bills were examples of the sort of play money that was available for purchase. The heading is, of course, is subject to different interpretations as well.



properly sign out the chainsaws before taking them to a job and sign them back in immediately upon returning to the facility. Additionally, when the chainsaws were replaced in the fall of 2014, the workers were specifically and unequivocally warned that “The next “missing” saw – the last person on the sign out sheet that was responsible for the equipment will be held responsible and disciplinary actions as appropriate will be taken.” Crew leaders at the facility testified that they were made aware of the policy and understood that if a chainsaw that their crew used was missing, the crew leader could be subjected to serious consequences including suspension, dismissal, and/or restitution. Footnote 6, *supra*. Grievant Clagg, as a Crew Supervisor, was required by that procedure to sign out the saw that he took from this facility on December 11, 2014, and sign it back in upon his return. It is undisputed that he failed to follow that policy even though it was more likely than not that he knew of it. It is also clear that if Grievant Clagg had followed the policy, the chainsaw would not be missing. Respondent proved by a preponderance of the evidence that Grievant Clagg violated this procedure, that it is more likely than not that he knew about the procedure and chose not to follow it, and an expensive chainsaw was once again lost from the facility as a direct result of this violation.<sup>24</sup> Therefore, discipline was appropriate.

This is not a situation where discipline for a particular act was made more severe than usual without notice to the employees.<sup>25</sup> Rather, Respondent was addressing a very

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<sup>24</sup> Notwithstanding the additional evidence offered to prove actual theft, these are the specifics of the charges given to Grievant Clagg.

<sup>25</sup> See *Farr v. W. Va. Reg. Jail & Corr. Facility Auth.*, Docket No. 2009-0532-MAPS (Jan. 2, 2009), holding that it was arbitrary to give all offenders the same light penalty for fourteen years and then go to the most extreme punishment without any notice to the employees.

serious problem and gave their employees sufficient notice for them to understand that future loss of equipment could lead to significant discipline including termination. Accordingly, the grievance of Jeffrey Clagg is DENIED.

**Grievant James:**

Grievant James is a Transportation Worker 1, and had no obligation under the procedure to sign the chainsaw out or sign it back in. He did not violate the sign-out procedure. The only evidence against him is the “circumstantial evidence” that Grievant Clagg stole the chainsaw and that Grievant James actively participated in the theft. Respondent offers one additional piece of circumstantial evidence related to Grievant James. On the video, Grievant James goes to the rear door, starts to open it looks back at Grievant Clagg, closes the door and then reopens it when Grievant Clagg comes to him with the chainsaw. Respondent avers that when Grievant James initially opened the door he was acting as a look out to see if anyone would see them leaving with the chainsaw. It is just as likely that Grievant James was about to leave the building and decided to wait and hold the door for his supervisor who was carrying a chainsaw and could use the assistance. More to the point, the video clearly demonstrates that Grievant James was aware that the security camera was taking footage of the cage and door area of the facility. If he was actively participating in the theft it seems more likely that he would have attempted to block the camera view rather than checking for witnesses outside the door.

Once again, the circumstantial evidence offered by Respondent is insufficient to prove even by a preponderance of the evidence that the chainsaw was stolen by Grievant Clagg or that Grievant James abetted in that theft.

The other charge against Grievant James is that he did not cooperate with the investigation. Grievant James answered all the questions of the investigators and gave them written statements when they requested them. The mere fact that the investigators did not believe the statements given by Grievant James does not constitute failure to cooperate. Respondent did not prove by a preponderance of the evidence that Grievant James did not cooperate with the investigation into the missing saw. Accordingly, the grievance of Joshua James is GRANTED.

### **Conclusions of Law**

1. As these grievances involve a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievants by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *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. *Id.*

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 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. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *White v. Dep't of*

*Health & Human Res.*, Docket No. 2014-0478-DHHR (Nov. 25, 2015). See also W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. “Where circumstantial evidence is relied on it must be such as does more than throw a mere suspicion of guilt on plaintiff and the inference or presumption to which the facts proved give rise must be strong and almost inevitable. If the circumstances are such as to be fairly susceptible of two constructions, the one that frees them from the imputation of fraud must be accepted.” 46 C.J.S., Section 1359, pages 567-68.” *Morgan v. Insurance Co. of N. Am.*, 146 W. Va. 868, 122 S.E. 2d 838 (1961). The proffer must accomplish more than establish a basis for mere suspicion, speculation or conjecture; but proof by a preponderance of the evidence is sufficient. *Id.*

4. Respondent did not prove, by a preponderance of the evidence, that Grievant Jeffrey Clagg took the chainsaw to his car and subsequently sold it, nor did Respondent prove that Grievant Jeffrey Clagg stole the chainsaw.

5. Respondent proved by a preponderance of the evidence that Grievant Jeffery Clagg violated a required work procedure, that it is more likely than not that he knew about the procedure and chose not to follow it, and an expensive chainsaw was once again lost from the facility as a direct result of this violation. Therefore, the discipline was appropriate and reasonable.

6. Respondent did not prove by a preponderance of the evidence that Grievant Joshua James participated, actively or passively, in the theft of State property, a chainsaw.

7. Respondent did not prove by a preponderance of the evidence of the evidence that Grievant Joshua James failed or refused to cooperate with the investigation into the missing chainsaw.

Accordingly, the grievance of Jeffery Clagg is DENIED and the grievance of Joshua James is GRANTED.

Respondent is ORDERED to immediately reinstate Grievant James to his employment in his prior classification. Respondent is further ORDERED to pay Grievant Joshua James back pay from the date he was initially suspended through the date he is reinstated, plus statutory interest and benefits. Respondent may deduct from the back pay any amount of wages Grievant James earned during the period he was suspended and dismissed from his employment with the DOH and Grievant James is ORDERED to cooperate with Respondent by complying with reasonable requests for information necessary to determine that amount.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

**DATE: FEBRUARY 10, 2016.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**