DONALD HAMILTON

v. Docket No. 94-DOH-1116

WEST VIRGINIA DIVISION OF HIGHWAYS

D E C I S I O N

Grievant Donald Hamilton was employed by Respondent West Virginia Division of Highways (DOH) from April 1978 until his termination, on or about December 2, 1994, on a charge of gross misconduct in conjunction with his "theft of materials owned by" DOH. Grievant invoked the expedited grievance procedure of W.Va. Code §29-6A-4(e), and, following several continuances of scheduled hearings at the request of the parties and for cause shown, a level four hearing was conducted on May 24 and 25, 1995. Following the hearing, the record remained open to permit either a follow-up hearing session or the proffer of additional evidence by other agreed-upon means. The record was officially closed for the taking of evidence on August 11, 1995, and the case became mature for decision on the designated last day for the submission of briefs and rebuttals, September 20, 1995. Specifically, Grievant was terminated for the theft of warehouse supplies and materials relative to his position as a Storekeeper 2 in DOH's warehouse in Hancock County. DOH and State police officials in the area had been aware of the theft of various types of DOH property for some time, and there had been an ongoing investigation. At some point in October 1994, DOH received an anonymous tip that Grievant was in possession of DOH materials at his home. Thereafter, some DOH officials traveled to Grievant's home to investigate at the same time that a State policeman contacted Grievant about the allegation that he had stolen goods on his property. Ultimately, Grievant

offered to let the officer and DOH personnel conduct a warrant less search of his home and garage. During the search, Grievant pointed out where some of the goods were stored.

In short, Grievant admitted to officials, and later in testimony at level four, that he had, for a number of years, taken various supplies from the warehouse, not for resale, but for his personal use at home. Most of the stolen items found in Grievant's home were paint and painting paraphernalia and automotive supplies such as spark plugs, gas, oil and air filters, and numerous containers of grease, oil, transmission fluid, windshield washer, undercoating, gas anti-freeze, battery cleaner, and brake cleaner. DOH estimated the value of the goods it recovered from Grievant's home at approximately $690.00. Grievant disputed those figures and claimed the items at his home which were DOH property were worth little more than $440.00.

Regardless of the precise value of the recovered goods, it is readily apparent at the onset that DOH has met its threshold burden of proving by a preponderance of the evidence that Grievant engaged in the behavior with which he was charged and which precipitated the dismissal. The primary issue raised by Grievant is whether the penalty of termination was proper under the circumstances.

DOH essentially contends that all regulations were followed and applied evenhandedly with respect to Grievant's termination. It further argues that the penalty matched the offense, espe cially in light of the fact that Grievant's storekeeper position is particularly sensitive. In DOH's view, the storekeeper serves as the "gatekeeper" of the warehouse, and the position's primary function of protecting and guarding DOH's possessions

from unlawful taking is an integral part of the job. It essen tially reasons that the theft of State property by an employee who is a storekeeper is a more serious violation of trust than the theft of State property by other types of employees. In this vein, DOH also relies on Symns v. W.Va. Div. of Highways, Docket No. 94-DOH-091 (July 7, 1994). In Symns, the Grievance Board upheld the dismissal of a Storekeeper 2 who had stolen DOH property for his own personal use.

Grievant first raises the issue that, after he filed his grievance, DOH failed to notify him of any laws, regulations of rules upon which it would rely in conjunction with the griev ance, pursuant to W.Va. Code §29-6A-3(b). He claims DOH only cited a West Virginia Division of Personnel regulation in the dismissal letter. Grievant also hints there were ulterior motives for the dismissal, such as his activity in an employees' union. He also claims that politics motivated the dismissal because, prior to his termination, he had applied for and was qualified for a posted job in another area. If Grievant had received the job, DOH would have been obligated to place him in a much higher pay grade than the other local applicants. In Grievant's view, he did not receive the job because DOH did not want to fund such an increase.

However, the real thrust of Grievant's case is that the penalty of dismissal was unwarranted and simply too harsh a punishment, given the particular circumstances of his employ ment. He reasons that he is a long-time employee with no prior offenses and above average evaluations and is thus deserving of progressive discipline. He also points out that another employ ee in the district who was involved in theft was suspended for twenty days, not terminated, although the value of the materials

recovered in that case exceeded the value of the DOH materials found in his garage.

Grievant also argues that his situation is different from that of the employee discharged in Symns, in that Mr. Symns had been employed by DOH for only six years, was not cooperative with investigators, and declined to testify at his grievance hearing. He also pointed out that Mr. Symns had taken DOH inventory valued at over $1000.00, which amounted to a felony crime of grand larceny. Grievant argues in his level four brief that the proper penalty for his misdeed, a misdemeanor of petty larceny, should be a twenty day suspension. During the level four hearing, Grievant argued he was entitled to reinstatement without back wages, on the basis that the intervening time between termination and reinstatement be considered the penalty of suspension.

Grievant's arguments fall short of convincing the under signed that he is deserving of reinstatement under any circum stances. Based on the weight of the evidence and the relevant law, as more fully explained below, the undersigned concludes that DOH's termination of Grievant must be upheld.

The first issue Grievant raises is whether DOH violated W.Va. Code §29-6A-3(b) after he filed a grievance protesting the termination. The statute in question is reproduced below (emphasis added via highlighted text):

If the employer or its agent intends to assert the application of any statute, policy, rule, regulation or written agreement or submits any written response to the filed grievance at any level, a copy thereof shall be forwarded to the grievant and any representa tive of the grievant named in the filed grievance.

Anything submitted and the grievant's response there to, if any, shall become part of the record. Failure to assert such statute, policy, rule, regulation or written agreement at any level shall not prevent the subsequent submission thereof in accordance with the provisions of this subsection.

Clearly, all the statute requires is that, if an employer asserts the application of any statute, policy, rule, regulation or written agreement or submits a written response to a griev ance at any level it must inform and/or copy the grievant. Such a written submission, and any written reply by the grievant, become part of the record. However, the statute permits the employer to make a "subsequent submission" of reliance upon a statute, policy, rule, regulation or written agreement at any subsequent time and/or written response to the filed grievance "in accordance with the provisions of this subsection [Code §29-6A-3(b)]," that is, by notifying the grievant. That DOH relied upon its own regulations and a case previously decided by the Grievance Board as authority to support the dismissal action was made known to Grievant and his counsel on the first day of the level four hearing. In this case, Grievant was fully apprised of the charges upon which the termination was based and was properly informed of the legal basis upon which DOH support ed its action.

Grievant's disparate treatment claim also does not hold up under scrutiny. His attempt to compare the value of the goods found at his home to the much greater value of goods found in the possession of some other DOH employees whose terminations were upheld as some type of justification for his own retention is without merit. While it may be true that the total value of

the DOH materials found in Grievant's garage in October 1994 was less than that found in the possession of a terminated employee in another district, Grievant's argument ignores the fact that his pilfering had gone on for a number of years. Thus, it is impossible to calculate the cumulative value of the materials Grievant depleted for his own use over the years.

Moreover, DOH provided a plausible reason why one relative ly newly-hired DOH employee involved in theft in the past was suspended and not terminated. That particular employee was given a second chance because he had not held a position of trust, and because DOH officials believed he had been unduly influenced by his supervisor, who ultimately resigned, to participate in the theft. Further, there is no evidence that Grievant's termination was prompted because he was active in union activities or because he had been the highest-ranking candidate for a higher paying job vacancy in another county.

Finally, Grievant has not established any other reasonable basis for mitigation of the penalty of termination. Grievant's work record from a prior employment with DOH is not unblemished. Grievant was employed for three years, from 1974 until he was terminated in May 1977 for misconduct involving the unauthorized use of DOH property during work hours. It is true that DOH examined Grievant's entire work record prior to the dismissal, but declined to rely upon that record to support the termination action. However, Grievant raised the issue of mitigation. Therefore, it is proper at this juncture to cite the prior work record as a factor for not mitigating the penalty of dismissal.

In addition to the foregoing findings and rulings, the following findings of fact and conclusions of law are appropri ate.

Findings of Fact

1. Grievant had been a storekeeper for several years in DOH's Hancock County warehouse.

2. A DOH storekeeper is entrusted with securing stored materials, supplies, and equipment, and serves as the "gatekeeper" of the DOH warehouse or storage facility in ques tion.

3. Over the years, Grievant removed automotive goods and other supplies from the warehouse and converted them to his personal use at home.

4. Additional pilfering at the warehouse by persons other than Grievant had occurred due to lax security beyond Grievant's control.

5. Because Grievant depleted some of the DOH goods he had taken and used for his own purposes over the years, it is impossible to calculate the total value of all of the stolen materials.

6. DOH property found in Grievant's home in October 1994, especially those goods which he admittedly removed from the warehouse for his own use, were valued at several hundred dollars.

Conclusions of Law

1. Respondent Division of Highways has established the facts giving rise to Grievant's termination by a preponderance of the evidence. See Symns v. W.Va. Div. of Highways, Docket No. 94-DOH-091 (July 7, 1994).

2. Grievant's theft of goods from the warehouse he was supposed to control adversely affected the rights and interests of the public and constituted reasonable grounds for his immedi ate dismissal from the classified service. See Guine v. Civil

Service Comm., 141 S.E.2d 364 (W.Va. 1965).

3. Grievant failed to establish sufficient mitigating circumstances which would warrant a lesser punishment than termination.

Accordingly, the grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: November 29, 1995