LUKE SIMPLICIO

v.

Docket No. 97-DOH-094

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

The grievant, Luke Simplicio, is employed by the West Virginia Division of Highways (DOH) as a Highway Transportation Worker III/Equipment Operator assigned to the agency's District 10 Maintenance Garage in McDowell County. He filed a grievance at Level I on July 31, 1996, protesting a three-day suspension without pay. The grievance was denied at the lower levels, and appeal to Level IV was made on February 18, 1997. A hearing was held May 30, 1997, and the parties submitted proposed findings of fact and conclusions of law by July 2, 1997.

Background

Much of the background of the case is not in dispute. On or about December 17, 1991, the grievant was charged with insubordination and/or leaving his job without authorization. On February 5, 1992, he met with Assistant County Supervisor Charles Lane, Maintenance Engineer William Bennett, and District Engineer Bruce Leedy to resolve his grievance over the disciplinary action. For reasons which are unclear, the grievant's dissatisfaction with his classification and the process for assigning employees to particular types of road maintenance equipment in District 10 became an issue during the conference.

At the conclusion of the meeting, Mr. Leedy agreed to post a Motor Grader position, rescind the suspension, and remove all related records from the grievant's personnel file, if the grievant would accept the loss of one day's pay for unauthorized absence, and withdraw his complaint. Thegrievant

agreed. Any records pertaining to the suspension were removed from the grievant's personnel file, but he and DOH retained a copies of the suspension notice. An entry in the grievant's payroll records reflected the loss of pay, but did not make reference to any disciplinary action. There was no written record of the parties' agreement.

On July 16, 1996, Mr. Lane directed the grievant to operate a “roller” instead of the motor grader he was typically assigned. The grievant protested, and Mr. Lane reacted angrily. Accounts of their conversation differ, but there is no dispute that, at some point, Mr. Lane unequivocally advised the grievant that he would not change the assignment. There is also no dispute that the grievant then left, and did not report for work until his next regularly scheduled shift.

Mr. Bennett, who had since been promoted to District Engineer, discussed the incident with Mr. Lane and County Supervisor Clarence Shelton, and determined that the grievant's conduct warranted disciplinary action. Although Mr. Bennett was aware of the terms of the resolution reached on the grievant's December 1991 suspension, he did not consider himself bound to disregard the conduct which precipitated that action. He ultimately concluded that the grievant had committed second offenses of insubordination and unauthorized leave on July 16. The decision to impose a three day suspension without pay was to a large part based on this conclusion. Since he did not work on July 16, the grievant also lost wages for that day.

DOH has adopted personnel policy which provides guidelines for District Engineers and other administrators involved in disciplinary actions. Under the policy, an administrator considering a suspension of more than three days, must refer the matter to DOH's Personnel and Legal Departments. While the policy does not purport to identify and assign a penalty to all punishable offenses, it characterizes unauthorized leave as minor, and suggest an oral written reprimand for afirst time offense. “Failure to follow major instructions” is also considered minor misconduct, but a written reprimand or suspension of up to three days is recommended for the first time offense. The policy suggests a “progressive” approach to discipline.

Argument

The grievant's Level IV legal arguments are somewhat inconsistent, and at odds with his testimony. He primarily contends that it was violative of the parties' February 1992 agreement, and inherently arbitrary for Mr. Bennett to consider the December 1991 suspension when deciding on a penalty for his July 16 conduct.

The grievant concedes in his proposals that his conduct warranted discipline, but the clear import of his testimony is that he did nothing wrong. He represented that he left work without authorization because the confrontation with Mr. Lane made him ill, and/or because he had concerns over the safety of the equipment he was directed to operate. During other portions of his testimony, the grievant appeared to assert that his decision to disobey Mr. Lane's order and leave the work site was justified in light of Mr. Lane's attitude and demeanor.

DOH responds that the grievant had no valid reason for disobeying the order, and leaving work. The agency denies that a three-day suspension without pay was disproportionate to his conduct or inconsistent with its disciplinary guidelines.

Findings and Conclusions

Insubordination is generally defined as the refusal or failure to carry out the lawful order of a superior entitled to give such order. There are few defenses to the charge; unless the order entails an illegal act or undue physical danger, the employee must obey and contest the legality of the order later. Maxey v. W.Va. Dept. of Health and Human Resources, Docket No. 93-HHR-424 (Feb. 28,1995). This is so even when the order appears contrary to statutes, policies or agreements governing the employee-employer relationship. Id.

To the extent that the grievant relies on his temporary illness and concerns over the safety of the vehicle he was assigned as justification for any portion of his conduct, the evidence does not support his claims. The grievant was not at all convincing in his assertions that Mr. Lane caused him to be ill, and the brakes on the roller equipment were not safe. A preponderance of the evidence establishes that it is more likely than not that he disobeyed and left work simply because he disagreed with the order, and did not like the manner in which it was given. The grievant does not cite, and the undersigned is unaware of any authority which holds that displeasure with the command or the superior's demeanor is a defense to an insubordination charge.

Despite that the parties characterize the grievant's departure from work as unauthorized leave, that conduct was also insubordinate. In every employer-employee relationship, there is an implicit, standing order not to leave work without permission. DOH has demonstrated that the grievant was insubordinate on two occasions on July 16, 1996.

Nevertheless, the grievant has shown that DOH entered into a binding agreement to settle his dispute over the December 1991 suspension, and that the agency violated the agreement when Mr.

Bennett took the earlier action into account when deciding on the grievant's punishment. It is clear that the grievant would have received a lesser penalty had he not done so. The reliance on a purged disciplinary action warrants some reduction in the length of the suspension.

After careful consideration of the parties' arguments and the various equities involved, the undersigned finds that it is consistent with DOH's disciplinary policy and otherwise reasonable to reduce the suspension by two days. DOH recovered any monetary loss the grievant's actions mayhave caused by docking his pay for the failure to work on July 16. It appears that the penalty for conduct involving two separate but related, first time insubordination offenses falls between a written reprimand and a three-day suspension. One day without pay is commensurate with the grievant's conduct and the progressive approach of DOH disciplinary policy; reimbursement for two days is also a sufficient sanction for the agency's refusal to abide by the February 1992 agreement.

Accordingly, the grievance is **GRANTED** to the extent that the West Virginia Division of Highways is hereby **ORDERED** to change any and all records of the July 16 suspension to reflect that it was imposed for a period of one day, and reimburse the grievant for the loss of two days' wages. No other relief is granted.

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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: November 19, 1997