RONALD G. WRIGHT

v. **Docket Nos. 97-DOH-285/347**

DIVISION OF HIGHWAYS

D E C I S I O N

Grievant, Ronald G. Wright, employed by the Division of Highways (Respondent) as an Engineering Technician - Construction, filed grievances directly at level four pursuant to W. Va. Code §29-6A-4(e) on June 27, 1997, and July 29, 1997, contesting his suspension and dismissal from employment. The grievances were consolidated and evidentiary hearings held on August 21, September 10, and September 30, 1997. The matter became mature for decision with the submission of Proposed Findings of Fact and Conclusions of Law by both parties on or before October 21, 1997.

Grievant had been employed by Respondent for approximately twelve years on June 19, 1997, when Jeff Black, Director of Respondent's Human Resources Division, advised him by letter that a thirty day suspension had been imposed "pending the outcome of an investigation into alleged improprieties concerning travel time, improper use of state time and facilities, and violation of the Workplace Security Policy while [he was] working on the Laurel Park Truss Bridge project." Mr. Black advised Grievant that upon conclusion of the investigation, further disciplinary action, including dismissal, might be taken.

By letter dated July 17, 1997, Mr. Black advised Grievant that his employment was terminated, effective that date. The reason given for the dismissal was gross misconduct, specifically:

> Between August 1, 1996 and June 4, 1997, while assigned to the Laurel Truss Bridge Project in Harrison County, you charged travel time for days when no travel time was actually incurred.

> There were approximately 79 instances in which you charged travel time but did not have sufficient mileage on your state vehicle to travel from your pooling location to the project site and return to the pooling location.
>
> Information gathered in the course of Auditing Division's investigation of this matter indicate that you in effect resided, at least on one occasion, at the field office. You also kept firearms in the field office, which is in violation of the Workplace Security Policy. In addition, statements indicate that you canned deer at the field office while on state time.

The following findings of fact have been determined based upon a preponderance of the credible evidenced presented at the level four hearing.

Findings of Fact

1. At the time of the dismissal Grievant was employed by the Respondent West Virginia Division of Highways as an Engineering Technician - Construction, assigned to District Four. Grievant's primary duty was inspection of construction projects.

2. Grievant was initially employed by Respondent as a Structure Book Analyst, a position he held for thirteen months in 1971 and 1972. Grievant had been continuously employed as an Engineering Technician since October 1985, and prior to the present matter, had never been subjected to any disciplinary action.

3. Beginning August 1, 1996, Grievant was assigned to the Laurel Park Truss Bridge project. The bridge was designated as an expedited project with a target completion date of October 31. 1996. Upon This Rock Construction Company substantially met the completion date, and the structure was opened to traffic on October 31, 1996.

4. Due to the expedited nature of the project, the construction company was

permitted to work 24 hours per day, 7 days per week. Although it was originally anticipated that two shifts or very long hours of work would be required to complete the project, records indicate that Grievant worked only 10 days of 13 hours or more, including travel time.

5. Respondent requires that an inspector be on a project when the contractor is working. Four inspectors, Bill Reed, Jim Quinn, Grievant, and Project Supervisor Dan Westfall, were assigned to the Laurel Park project.

6. Although the bridge was opened on October 31, 1996, Respondent compiled a multiple item "punch list" which the contractor was required to complete prior to project finalization and payment of a retainer. This list included the removal of waste, grading, and seeding, the property of James Allen which had been used during the construction.

7. The "punch list" items were completed by May 1997, with the exception of the James Allen property. Grievant refused to grant final approval to the project based upon this item.[1]

8. On or about May 30, 1997, Chuck Prosser, superintendent for Upon This Rock, called Don Williams, Assistant District Engineer for Construction in District Four regarding the finalization of the project, and the conduct of Grievant and Mr. Westfall. Mr. Prosser's complaints, as set forth in Respondent's investigative report, were as follows:

a. Danny Westfall cleaned deer at the field office.
b. Danny butchered and canned deer on state time.
c. Ron Wright, inspector, was living at the field office.
d. Ron Wright was selling guns out of the field office. He had tried to sell guns to Upon This Rock employees.
e. He was going to have to pay the owner of the field

[1]The project was eventually received for acceptance on July 15, 1996. Mr. Allen completed a "save harmless" agreement to the contractor, dated July 31, 1996.

office for damages to clean blood off the carpet.

f. Danny kept a dog in the field office and it destroyed things.

g. Danny did not have a waste agreement and was going to forge cross sectioning.

h. Alleged that Ron Wright had sexually harassed one of the female flaggers on the project. Prosser had brought it to Westfall's attention; however, nothing was done about it.[2]

9. Pursuant to the construction contract, Respondent required that the contractor provide a field office of certain specifications. In this instance, the contractor rented a one story, three bedroom house, which was air-conditioned and contained standard modern appliances and utilities, at a cost of approximately $600.00 per month, which was partially reimbursed by Respondent.

10. The following Monday, June 2, 1997, Mr. Williams and Harry Looker made an unannounced visit to the project office. During this initial visit to the office, Mr. Williams and Mr. Looker observed a dog tied up in the living room, a mattress and television set in a bedroom, clothes hanging in the closet, along with other personal belongings including an antique flint-lock pistol on top of the belongings in the closet, toiletries in the private bathroom adjoining the bedroom, clothes lying on the floor of the bedroom, food in the freezer in the kitchen, and that the shower had been recently used.

11. Based upon these observations, Mr. Williams requested a more detailed investigation be conducted by the Auditing Division. Earl Boylen and Ken Patrick were assigned the task.

12. Following review of the final investigation report, Respondent terminated Grievant's

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[2]The charges against Mr. Westfall are to be addressed in a separate grievance.

employment.

Discussion

In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges upon which the action was based by a preponderance of the evidence. Spencer v. W. Va. Bureau of Employment Programs, Docket No. 96-BEP-134 (Sept. 30, 1997); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). See W. Va. Code §29-6A-6. Therefore, Respondent must prove that Grievant engaged in an act or acts of gross misconduct, warranting termination of his employment. Dismissal of a civil service employee must be for "good cause," which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code §29-6-11(12); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 385, 264 S.E.2d 151 (1980).

Issue 1: Travel Time

Pursuant to Volume IV, Chapter 8, of Respondent's Administrative Operating Procedure, entitled "Individually Assigned Highways Transportation Vehicles", Section V, Grievant was entitled to travel time to and from the pooling place of his assigned vehicle to the project site. The Laurel Park project was 20 miles from the pooling place, and Grievant was allocated 1.5 hours for the round trip travel time. Employees are required to complete DOT form 12, to report the number of hours or miles equipment was used, and DOH form 65, to report the odometer reading of the state vehicle, on a daily basis.

Respondent asserts that its review of the records reported by Grievant during the period

of August 2, 1996, through May 28, 1997, revealed 79 instances of travel time charged without enough mileage on the state vehicle to complete the trip to the project site and back to the pooling location. Respondent notes that on 19 occasions Grievant charged travel time when the vehicle was either idle or in the shop. In response to Grievant's claim that he used his personal vehicle at times, Respondent notes that its policies do not allow for payment of travel time in a personal vehicle unless a properly completed form is approved by the District Engineer. District Four Engineer Harry Carr testified that he did not approve Grievant's use of his personal vehicle. Respondent asserted that there was no occasion that a state vehicle was not available for Grievant's use. Respondent calculated the total travel cost of the 79 incidents to be $2, 223.32.

Grievant admits that three or four times he stayed overnight at the project and claimed no travel time, or three-quarters of an hour for travel one-way, on those occasions. Grievant also stated that he used both the state vehicle and his personal vehicle to travel to and from his pooling place and/or residence during the period of time in question. Grievant explained that he used his personal vehicle primarily when visiting his father who was in a nursing home and was hospitalized with a number of serious medical conditions during the period of time in question. Grievant claims that when using his personal vehicle, the state owned vehicle remained on the project site for use by himself and others. Addressing the 79 dates listed on Respondent's Exhibit #5, Grievant testified that the mileage was often estimated, a common practice by DOH employees. He also noted that errors could be made when completing mileage forms, explaining days when negative mileage, or excessively high mileage, was reported. He also noted that the information used by Respondent was gleaned from vehicle maintenance

records which are not completed for the purpose of correlating travel time with vehicle mileage.

Grievant presented corroborating testimony that exact odometer readings were not always reported on a daily basis, and that estimates were generally accepted. Grievant's claim that negative or exorbitant mileage was the result of errors when recording mileage, is reasonable; however, Respondent indicated that those reports were obviously errors and not included in the list of 79 incidents. Although Respondent apparently does not prohibit employees from driving their personal vehicles to work sites, they are not granted travel time, without prior approval, when they choose that type of transportation. Grievant did not specify the dates he had driven his own vehicle, and those days are not considered to his detriment in Respondent Exhibit #5. However, a substantial number of the incidents cited by Respondent involved days the vehicle was idle or in the shop, yet Grievant claimed that he driven it to the project site. Twice Grievant claimed travel time one-way, yet the following day he claimed travel time for the round trip. These claims cannot be attributed to inadvertent clerical error. Therefore, it is determined that Grievant improperly charged travel time between August 2, 1996, and May 28, 1997.

Issue 2: Personal use of the field office

_____Respondent charges that Grievant used the master bedroom of the field office for his own personal use by storing clothes, guns, and other personal belongings there, and by staying overnight on occasion. In support of the charge, Respondent offered the testimony of Mr. Prosser who stated that he had been advised by two individuals that Grievant was staying in the office. He also stated that Grievant had made comments directly to him such as, "maybe I'll rent a room" and "tell them I'm renting from you." Mr. Prosser concluded that Grievant's use

of the office would not have become an issue if he had gotten out in a reasonable time.

Bill Reed testified that he normally opened the office in the morning and that approximately 10 times he had observed Grievant in the master bedroom, upon his arrival. Reed further testified that Grievant once told him he should have pecked on the bedroom door to make sure he was up, and that it was a common joke that Grievant should pay rent.

Jim Quinn testified that approximately three times he observed Grievant at the project office in a state that suggested he had just arisen, i.e., he did not have shoes on and/or was not completely dressed. He also observed a smoker on the back porch, and knew that turkey and ham were cooked on it. He further confirmed that Grievant used the washer and dryer.

Investigator Patrick testified to finding clothes and other personal items, including firearms, in the bedroom closet, clothes in the washer, toilet items in the bathroom medicine chest, and food in the refrigerator. He also found the shower was still wet from recent use. Mr. Patrick stated that the bedroom door was locked, but was opened by Mr. Westfall, and that Grievant initially denied having guns on the premises, but when he learned that the investigators knew of their presence, conceded to storing them at the office.

At hearing, Grievant denied that he lived at the field office, and identified two personal residences during the period of time in question. The first, referred to as his fathers camp at Audra State Park, and also a room in a home in Belington. He characterized the Belington residence "as needed" because the camp at Audra "can be inconvenient at times." Grievant admitted that he stayed overnight at the project on three or four occasions when he had worked extended hours, or had personal matters to attend. He also acknowledged napping before and/or after work and eating at the office quite frequently. He also admitted that he and Mr. Westfall

smoked some meats which he "really enjoyed". Grievant further admitted to using the washer and dryer because it was convienent, and does not deny that he kept clothing, toiletries at the office. He explained that he was storing the firearms at the office because his camp had been broken into, and small children had moved into the Belington house, making their presence unsafe at that location. Grievant opined that the office was not used improperly.

Testimony indicated that the food primarily belonged to Mr. Westfall, and that the other inspectors had also brought lunches to work at times. Mr. Westfall also testified that the television, mattress, and box springs were his, brought in anticipation of working long hours. Because Grievant did not dispute that the clothes and other personal items found in the house were his, it is determined that he was using the residence for his own personal gain, and, for some period of time, as his domicile. This conclusion is based upon the fact that Grievant had not simply brought an extra change of clothes, but had several pairs of jeans hanging in the closet, along with other clothing items which were folded and stored on the overhead shelf. He had not simply brought a toothbrush and razor in case he worked long hours, but had placed them in the medicine chest indicating daily use. By his own admission, he was using the field office to store the firearms. Further supporting this finding is that Grievant did not appear to have a comparable domicile during this period of time. The camp at Audra is located 9/10 of a mile off the Audra Park Road, on a dirt and rock gas well road. Pictures taken of the camp indicates that it is fully furnished and appears to have electrical service, the investigators testified that the electric meter was not running. The shutters on the windows were closed and the screen on the outside door had been half ripped out. Grievant testified that it does not have running water. The photos further illustrate that the property lacked maintenance, and generally

presented the appearance of being vacant. They found no recent tracks on the road leading to the camp.

After much evasion, Grievant finally admitted to have a personal relationship at times with Jean Robinson, the owner of the house in Belington. He denied paying rent, but indicated that he provided approximately $150.00 per month for the utilities. He characterized the situation as "a good deal." Grievant offered numerous cancelled checks which he purported to be payment for the room; however, they are inconclusive in establishing his domicile in that many are written to cash, and are inconsistent in the amount. Checks for April, June, and July 1, 1996, were made to Ms. Robinson for $150.00 each. A check dated July 26, 1996, to Ms. Robinson, was in the amount of $800.00. A receipt, dated July 20, 1996, indicates the money to cover rent of a room from August 1996, to February 1997. A check dated August 6, 1996, for $50.00, written to "Cash", was identified on the receipt as partial rent for March 1997. Other checks written to "Cash" were dated September 20, 1996, ($100.00 for balance of March 1997); September 31, 1996, ($150.00, although the receipt is for only $50.00 for the month of April 1997); October 2, 1996 ($150.00); May 19, 1997, ($200.00); and June 15, 1997, ($150.00). The fluctuating amounts, and payments so far in advance, make this evidence suspect. It is also of interest that Grievant did not mention this residence to Mr. Patrick during his interview.

Mr. Wright had also testified that Ms. Robinson's daughter and grandchildren had moved in, and it appears that the Belington house may no longer have been available to Grievant at that point. The undersigned is not persuaded that Grievant was in residence at either location during the time in question. The evidence establishes that Grievant was using the field office for personal use to store clothing and personal items, wash clothes, and take showers. The lack of

a residence with running water, together with observations of coworkers, and Grievant's own admission that he stayed at the office a number of nights, leads to the conclusion that he was using the field office as his residence.[3] This action can not be condoned even when the project was under construction, and surely cannot be justified after the project was open for use on October 31, 1996.

Issue 3: Violation of the Workplace Security Policy

Respondent charges that Grievant violated this policy by having six firearms stored at the field office. Four of the guns were muzzle loaders and two others had been made by Grievant's father. No ammunition was found; however, Investigator Boylen opined that the guns were operable. Grievant explained that he initially denied have firearms at the office, in that he meant that he had none for sale or trade. He does not now deny that he kept the guns at the field office for reasons previously stated herein. Grievant asserts that there is no evidence that he sold, or attempted to sell firearms in the workplace, as had been initially stated, nor had he ever displayed the guns in the actual work area of the office, or threatened anyone with the firearms. Grievant argues that none of the other employees in the field office were even aware of the presence of the firearms prior to their being found by the investigators.

The Workplace Security Policy provides in pertinent part that "firearms or dangerous weapons and/or threatening/violent behavior are prohibited in the workplace." An employee found to possess a firearm or dangerous weapon in the workplace is subject to disciplinary action which may include dismissal. By his own admission, Grievant was in possession of six

[3]It is noted that while the other inspectors presumably worked equally long hours, there is no indication that any of them felt compelled to stay at the office overnight.

firearms at his workplace. The fact that other employees did not know of their presence is irrelevant. The policy does not require that ammunition be present or that the employee brandish the weapons. Grievant signed an Employee Acknowledgement Form on April 29, 1995, indicating that he had read and was familiar with the policy. Placing and keeping the guns in the field office was in violation of the policy.

Issue 4: Canning deer in the field office on state time

Respondent withdrew this charge at level four.

Conclusion

Grievant presents an interesting argument that while he technically engaged in the activities constituting the charges, the situations are a matter of degree which does not warrant dismissal. In his proposed findings and conclusions Grievant states "[t]he mere fact that the mileage reported on the DOH-12's is less than the distance between the pooling place and the job site does not prove that the grievant did not actually travel to and from the job site on the particular day in question by either the assigned state vehicle or his private vehicle." This statement misses the point that Grievant is not entitled to claim travel time when using his personal vehicle, and is supposed to accurately report his mileage. Grievant claims that other employees, particularly Mr. Westfall, engaged in activities at the field office similar to those for which he was charged, does not lessen his own culpability. Grievant acknowledges that state property may have been used for personal purposes, but that he was not charged with misappropriating state property, and that the type of activity for which he was charged rises to a dischargeable offense only when it interferes with the state's work or causes economic loss to the state. This argument is also misdirected in that Grievant clearly received benefits to

which he was not entitled as a state employee. Finally, Grievant alleges that the violation of the Workplace Security Policy was a matter of degree because the firearms presented no imminent threat to persons or property. He suggests that some form of reprimand and prohibition against future conduct would be acceptable discipline for this charge, and that the initial 30 day suspension during the investigation would be appropriate.

The suggested discipline is expressly dismissed because, despite Grievant's admirable attempt to downplay his actions, the proven charges were more than de minimis in degree. The evidence shows that Grievant was essentially acting in his own benefit, in violation of a number of Respondent's policies, procedures, and plain common sense. The charges cannot be considered individually, and when evaluated as multiple activities occurring simultaneously, it cannot be determined that Respondent's decision to terminate Grievant's employment was clearly disproportionate or excessive, even when consideration is given to his years of service and past disciplinary record. Therefore, there is no basis to mitigate the discipline. See Evans v. Dept. of Health and Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997); Stewart v. W. Va. Alcohol Beverage Control Comm'n., Docket No. 91-ABCC-137 (Sept. 19, 1991).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Pursuant to W. Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Evans v. Dept. of Health and Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997); Ramey v. W. Va. Dept. of Health, Docket

No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for "good cause," which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code §29-6A-11(12); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 385, 264 S.E.2d 151 (1980).

3. Respondent has proven by a preponderance of the evidence that Grievant claimed travel time to which he was not entitled, used the field office for personal gain, including as a residence for a number of days, and violated the Workplace Security Policy by storing firearms at the field office, conduct of a substantial nature, rather than trivial or inconsequential.

4. Respondent's termination of Grievant's employment was for good cause and was not clearly disproportionate or excessive, even when considering Grievant's years of service and prior disciplinary record.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, 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.

DATE: November 26, 1997

SUE KELLER
Senior Administrative Law Judge