DANIEL KEITH VIERS,

Grievant,

v. DOCKET NO. 97-DOH-562

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION

OF HIGHWAYS,

Respondent.

DECISION

Grievant, Daniel Keith Viers, challenges his termination from employment as a Transportation Worker III for Respondent Division of Highways ("DOH") for alleged "gross misconduct" arising from a physical altercation between Grievant and Terry Spry, a county supervisor. Grievant requests reinstatement to his position, back pay and benefits with interest, along with attorney's fees. Pursuant to W. Va. Code § 29-6A-4(e), this matter was filed directly at level four, where a hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on February 11, 1998. This matter became mature for decision upon receipt of the parties' post-hearing submissions on March 9, 1998. (See footnote 1)

The following findings of fact are made from the credible evidence introduced at level four.

Findings of Fact

1. Prior to his termination, Grievant was employed by DOH as a Transportation Worker III at the Kenova substation in Wayne County. Grievant had been employed byDOH for approximately thirteen years, with satisfactory or better evaluations throughout his employment.

2. On November 15, 1997, DOH employees, including Grievant, were called out to work SRIC (snow removal and ice control) duty. Grievant began work at approximately 7:00 p.m.

3. Grievant returned from SRIC duty at 2:35 a.m. on November 16, 1997, and returned his truck keys to the office at the Kenova substation. Inside the office at that time were Robert Jeffries, Grievant's immediate supervisor, and Terry Spry, County Maintenance Superintendent.

4. When Grievant entered the office, Mr. Spry informed him that quitting time was 2:30 and that he could not have any overtime pay for the evening's work. (See footnote 2) He also stated that, if Grievant didn't like it, he could "file another grievance." (See footnote 3) Grievant responded that he "just might," at which time Mr. Spry charged at him, "headbutting" and striking Grievant with his fists. Grievant asked Mr. Spry to stop (hitting him) at least twice before returning any blows.

5. Grievant attempted to retreat from Mr. Spry, who followed him out the door of the office onto its small porch, where Mr. Spry pushed Grievant against the porch railing, striking him again. At that point, Grievant, who had a flashlight in his hand, struck Mr. Spry with the flashlight. 6. Grievant hit Mr. Spry at least twice more with the flashlight, until Mr. Spry ended up on the floor with Grievant straddling him.

7. Once Grievant had Mr. Spry on the floor, he jumped up and ran out, driving his vehicle to the nearest police station for help. He was treated and released from an emergency room for lacerations and bruises resulting from the incident.

8. An investigation was conducted by DOH investigators, who concluded that Mr. Spry was the aggressor in this incident, and his termination was recommended. The investigators also recommended that Grievant be disciplined for "taking what some may consider excessive force in defending himself" by hitting Mr. Spry with the flashlight, but they recommended that his punishment be less than Mr. Spry's.

9. Other employees of DOH have witnessed Mr. Spry screaming at, cussing and threatening his subordinates, including Grievant, on prior occasions. Mr. Spry also was reputed to harass and assign more difficult work to employees he did not like or who complained about him.

10. Mr. Spry bragged to Grievant on several occasions about fights he had been in at various local bars, and Grievant had seen Mr. Spry with a gun on at least one occasion. Grievant was afraid of Mr. Spry.

11. By letter dated December 10, 1997, Grievant was dismissed from employment with DOH. The letter from Jeff Black, Human Resources Director, stated, in part:

> The reason for your dismissal is gross misconduct. More specifically:
>
> On November 16, 1997, after completing SRIC duties you engaged in a violent, physical altercation with Terry Spry, County Maintenance Superintendent. You have admitted to hitting Mr. Spry numerous times witha flashlight. This type of behavior is not acceptable in the workplace, and will not be tolerated.

12. Mr. Spry was also dismissed by DOH because of the altercation with Grievant.

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.). DOH based its decision to terminate Grievant upon provisions of its Administrative Operating Procedures regarding Disciplinary Action, Suspension and Dismissal. “Addendum B” to that document lists examples of first offense dismissals, which includes “acts of physical violence on the job” and “other harmful acts of a substantial nature.” Jeff Black testified on behalf of DOH that Grievant was terminated because his conduct fit within both of those categories. Although agreeing that Mr. Spry was the aggressor and that Grievant was acting in self defense, Mr. Black believed that Grievant reacted in an unacceptable manner, specifically with regard to hitting Mr. Spry several times with a flashlight There are no provisions regarding self defense in DOH's procedures.

Grievant does not dispute that the incident occurred as set forth in the findings of fact above. However, he contends that he was only acting in self defense, and that DOH's procedures did not provide a sufficient basis for his dismissal in these circumstances. “Gross misconduct” is not defined in DOH's procedures, nor is it defined by the Division of Personnel, which regulates many matters applicable to DOH classified employees. However,

DOH's operating procedures provide that an employee may be dismissed for "good cause." The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997). Faced with defining "gross misconduct" justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.

The instant case presents a unique situation. While it is quite reasonable for an employer to have no tolerance for employees who engage in physical altercations in the workplace, what is an employee to do when violently attacked by another? While it has not been specifically held in prior cases that self defense is a justifiable reason for engaging in violent conduct in the workplace, the Supreme Court of Appeals has intimated that, if self defense was appropriate, then perhaps discipline was inappropriate. See Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994).

The evidence indicates that Mr. Spry used an aggressive, antagonistic manner with his subordinates on a regular basis and that he was reputed to engage in violent behavior. In addition, there is no dispute that Mr. Spry was the aggressor in this altercation. (See footnote 4) Unfortunately for Mr. Spry, (and Grievant, for that matter) Grievant had a flashlight in his hand at the time Mr. Spry attacked him. In the "heat of the moment" and having been violently attacked, Grievant eventually responded by using the flashlight as a weapon. However, Grievant clearly attempted to retreat, even actually going out the front door of the office, only to be pursued by Mr. Spry. It seems to have been at that point when Grievant decided that force was necessary. Grievant testified that, based upon his impressions of Mr. Spry and his fear of him, he felt it was necessary to incapacitate him to the point that he could get away. Mr. Spry did not lose consciousness, and the evidence indicates that his injuries were similar to Grievant's, consisting of abrasions and bruises.

In the past, this Grievance Board has determined that, in some cases, dismissal can be an excessive punishment for the offense committed. In Hercules, supra, the employee had used profanity toward two supervisors and made a threatening gesture, for which he was dismissed. However, the administrative law judge found that good cause did not exist for dismissal, considering the grievant's long and respectable work record, the fact that his supervisors had only recommended suspension, and the absence of any evidence that his behavior had affected other employees or disrupted their work. By comparison, Grievant has had an unblemished, thirteen-year record of employment with DOH, and his actions were a response to a violent attack, rather than overt insubordination. In fact, witnesses who testified on behalf of Grievant stated that Mr. Spry often "got in [Grievant's] face," threatening him, which Grievant did not respond to with any acts of violence or insubordination. Also, the investigators who investigated this incident recommended thatGrievant's punishment be less than dismissal. (See footnote 5)

A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Overbee v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). In addition, Overbee provides that "deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Likewise, in Hercules, supra, the administrative law judge noted that, since dismissal is such an extreme measure, it should only be used when it is clear that removal of the employee from the work environment is absolutely necessary.

The undersigned finds that dismissal in the circumstances of this case was an excessive punishment. Grievant was involved in a "no-win" situation, and he reacted as best he could in the heat of a violent altercation. Although he may have, at some point during the incident, begun to use force which was not absolutely necessary, dismissal was not an appropriate response. As noted earlier, employees are not to be dismissed for misconduct which is not "substantial," and has no effect on the rights and interests of the public. Grievant was placed in a difficult situation, and he should not be excessively punished for "spur of the moment"

reactions brought on through no fault of his own. His conduct had no effect on his work or any other employee's, unlike Mr. Spry's. Removal ofGrievant from the workplace serves no public interest.

Although dismissal was inappropriate in this case, it was proper for DOH to punish Grievant in some respect for his use of excessive force in defending himself. W. Va. Code § 29-6A-5(b) provides authority to an administrative law judge of the Grievance Board to "provide such relief as is deemed fair and equitable." In this case, the undersigned finds that a thirty-day suspension was an appropriate punishment for Grievant's offense.

As to Grievant's request for attorney's fees, the Grievance Board is without authority to award attorney's fees at level four, W. Va. Code § 29-6A-10 allowing only for such awards at the circuit court level. Hall v. W. Va. Dept. of Trans., Docket No. 96-DOH-433 (Sept. 12, 1997); Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). However, under W. Va. Code § 29-6A-7, the undersigned has the authority to allocate the costs of the hearing to a party found to be acting in extreme bad faith. Chafin, supra. There is no evidence or allegation in the instant case upon which to base such a finding of bad faith.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.).

2. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than some trivial or inconsequential matters, or some technical violations of statuteor official duty without wrongful intention. Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

3. Respondent proved by a preponderance of the evidence that Grievant was involved in a physical altercation with Terry Spry, County Maintenance Superintendent.

4. Respondent did not prove by a preponderance of the evidence that Grievant's actions of self defense constituted “gross misconduct” or provided “good cause” for his dismissal.

5. Discipline may be inappropriate in cases in which an employee engaged in violent behavior only to defend himself against an attack. See Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994).

6. A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP- 412 (Dec. 31, 1997); Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96- HHR-371 (Oct. 30, 1996); Overbee v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

7. W. Va. Code § 29-6A-5(b) provides authority to an administrative law judge of the Grievance Board to “provide such relief as is deemed fair and equitable.”

8. Grievant established that dismissal was disproportionate to the charges proven in this case. The maximum appropriate penalty, given the fact that Grievant was defending himself against the violent attack of another employee, and in view of hisunblemished thirteen-year work record, is a 30-day suspension.

9. W. Va. Code § 29-6A-10 allows for an award of attorney's fees only at the circuit court level of the grievance procedure. Hall v. W. Va. Dept. of Trans., Docket No. 96-DOH-433 (Sept. 12, 1997); Chafin v. Boone County Health Dept., Docket No. 95- BCHD-362 (June 21, 1996).

Accordingly, this grievance is GRANTED, and the Division of Highways is ORDERED to reinstate Grievant to his prior position, with back pay, benefits and interest, with a thirty-day suspension period to be deducted from such calculation.

Any party 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.

Date: March 25, 1998

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Pursuant to Grievance Board policy, this grievance has been placed in a priority position on the decision docket, because it involves a termination.

Footnote: 2

Evidence indicated that, when Mr. Spry arrived at the substation that evening, he decided to call the crews in and cut the shift short, because the roads had been sufficiently cleared.

Footnote: 3

Grievant had filed an unrelated grievance just prior to this incident, for which a hearing was scheduled the following Monday, November 17, 1997.

Footnote: 4

Mr. Spry did not comply with a subpoena for his testimony at the level four hearing. By agreement of the parties, the undersigned issued a subpoena for Mr. Spry to submit toa deposition to be conducted within two weeks of the conclusion of the level four hearing. Mr. Spry also failed to comply with that subpoena.

Footnote: 5

No evidence was obtained from Grievant's district engineer, who made the formal recommendation to the Human Resources Division that Grievant be dismissed. Therefore, it is unknown on what facts he based his recommendation.