RICHARD C. YOHO,
Grievant,

v. **Docket No. 98-DOH-370**

WEST VIRGINIA DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, Richard C. Yoho, employed by the Division of Highways (DOH or Respondent) as a Transportation Crew Chief, filed an expedited grievance at level four, consistent with the provisions of W. Va. Code §29-6A-4(e), following the imposition of a thirty (30) day suspension, and two-step demotion to Transportation Worker II. Grievant requests reinstatement to the position of Crew Chief, and a reduction of the suspension to ten (10) days.

A level four hearing was conducted in the Grievance Board's Wheeling office on July 26 and September 22, 1999, at which time Grievant was represented by Sherrilyn Farkas, Esq., and Respondent was represented by Krista Duncan, Esq. The matter became mature for decision upon the receipt of Respondent's proposed findings of fact and conclusions of law on November 3, 1999.

The following findings of fact are made based upon the record in its entirety, including testimony offered at the level four hearing, the investigative report compiled by Respondent, and all other documentation made a part of the record.

Findings of Fact

1. Grievant has been employed by the West Virginia Division of Highways for approximately eleven (11) years. He has held the classification of Transportation Crew Chief since September 1996.

2. On or about March 27, 1998, Robert Reed was hired as a Temporary Laborer and assigned to Grievant's crew.

3. Mr. Reed's father expressed concern to Assistant Operations Engineer Mark Edge regarding his son's fear of the equipment, and perception that he was not accepted by his coworkers. Mr. Edge relayed the concerns to Grievant, and requested that he assist Mr. Reed in adjusting.

4. In response to the aforementioned concerns, Grievant attempted to establish a more interactive relationship with Mr. Reed at work and at home, including joking, and physical contact in the form of horseplay.

5. On July 5, 1998, Grievant was engaging in horseplay with Mr. Reed when the younger man fell, injuring his ear. Mr. Reed was subsequently taken to the emergency room and received stitches for the laceration. He returned to work the next day.

6. Ron Reed, Mr. Reed's father, contacted Delegate Tal Hutchins and requested an investigation of Grievant, and his supervisors. An investigation was subsequently made into the matter, resulting in the imposition of a thirty (30) day suspension and two-step demotion for 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). A preponderance

of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Jeff Black, Director of Respondent's Human Resources Division, advised Grievant of the discipline by letter dated September 3, 1998. He stated, in pertinent part:

> Pursuant to Sections 11.04 and 12.03 of the State Division of Personnel's Administrative Rule, you are being demoted from Transportation Crew Chief at $10.64 per hour, to Transportation Worker 2 - Equipment Operator at $9.58 per hour, and suspended without pay for a period of thirty calendar days. Prior to these actions being taken you were given an opportunity to discuss with your District Engineer the charges made against you.
>
> The reason for your demotion and suspension is that on July 30, 1998 you initiated and engaged in behavior with Robert Reed, an employee under your supervision, which resulted in injury to the employee and a workers' compensation claim against the Division of Highways. Statements given by other employees under your supervision indicate a pattern of inappropriate behavior toward Mr. Reed bordering on violence and harassment. This behavior, on your part, is considered all the more serious since you occupy a supervisory position, and are expected to support and enforce workplace standards.
>
> Any future infractions of this nature will result in more severe disciplinary action up to and including dismissal.

At hearing Mr. Black testified that he considered the incident to be so serious in nature, more than horseplay, but less than outright physical violence, that it was nearly a dismissible offense. He also determined the fact that Grievant was Mr. Reed's supervisor to be particularly important, because a higher standard is expected of supervisors. Mr. Black concluded that Grievant had demonstrated an inability to be a supervisor, or even capable of being told how to be a supervisor.

Mr. Black acknowledged that Respondent's policy indicates that horseplay warrants a written reprimand, or suspension for one (1) to three (3) days; however, he noted that the policy established only guidelines, and the measure of discipline was not mandated for every situation. Based upon all the information available to him, Mr. Black stated that he considered whether Grievant's actions were simple horseplay, or part of a pattern of behavior, the fact that an injury had been incurred, and the supervisor-subordinate relationship, in determining that the recommended level of discipline and/or progressive discipline was not appropriate in this case. He concluded that an attempt was made to discipline Grievant in a manner consistent with that imposed upon others in Hancock County.

Jesse Haynes, Respondent's Equal Employment officer, testified that he became involved with this matter based upon his perception that Mr. Reed's "special education" status rendered him handicapped. Mr. Haynes stated that he had visited each and every DOH district in the state in 1997 to advise employees there was to be no horseplay, and that anyone who engaged in such behavior would be severely disciplined. Based upon the information provided to him, Mr. Haynes understood that Grievant had engaged in horseplay involving physical violence. He opined that because he took advantage of a handicapped individual, Grievant should have been fired.

DOH Personnel Operating Procedures, Vol. IX, Chapter 12, "Disciplinary Action, Suspension and Dismissal", provides in pertinent part:

> III. A. General - Disciplinary action may be recommended or taken by authorized managers in accordance with this policy whenever an employee violates any work rule, policy, procedure of the Department, or fails to conform to the expected standard of performance or conduct. Disciplinary

> action can be taken in the form of an oral reprimand, written reprimand, demotion, suspension or dismissal. The type of action taken for an offense depends on the severity of the offense measured by the standards of conduct and the circumstances surrounding the offense. . . .

Addendum A of this policy provides a list of examples of minor infractions and possible disciplinary actions. On the list of minor infractions, a first offense of horseplay merits a written reprimand or suspension from one (1) to three (3) days. The document notes, however, that the chart is to be used as a guide only.

A substantial number of witnesses called by both parties testified that Grievant and Mr. Reed engaged in ongoing horseplay, including throwing water, hitting each other on, or with, their hard hats, and wrestling. Grievant does not deny this activity, and even testified that he was attempting to give Mr. Reed a birthday spanking when the accident happened. Grievant denies grabbing Mr. Reed in the crotch area. Acknowledging that he engaged in some unacceptable behavior, Grievant requests that the discipline be mitigated to reinstatement to Transportation Crew Chief, and reduction of the suspension to ten (10) days.

Clearly, Respondent recognizes the potential harm which may be incurred during horseplay, and is making a serious attempt to curtail the activity. See DeCapio v. Div. of Highways, Docket No. 98-DOH-279 (Feb. 18, 1999); Devore/Cline v. Div. of Highways, Docket Nos. 98-DOH-277/278 (June 9, 1999); and Kimble v. Div. of Highways, Docket No. 98-DOH-405D (Aug. 6, 1999).[1] Notwithstanding these efforts, testimony from the witnesses in this case is consistent that horseplay does occur on a regular basis, perhaps

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[1]It is noted that the discipline imposed in all three of these cases was rescinded by level four grievance decisions.

in part due to the amount of "down time" these employees experience. Respondent's expectations that its supervisors not engage in this activity is also reasonable. Although it was not specifically included in Mr. Black's letter, there was also an allegation that Grievant had grabbed Mr. Reed in the crotch/inner thigh area. Certainly, grabbing another employee, at any point on the body, is never acceptable at the workplace. Therefore, Grievant's actions were improper, and warrant discipline.

An Administrative Law Judge may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Jarvis v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). In previous cases involving horseplay, mitigation was found to be appropriate when the employees had been given no prior warnings, Knuckles/Burdette v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-123/131 (Sept. 28, 1999); but no mitigation was appropriate when the employee had been given multiple warnings regarding his behavior. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999).

At hearing, Dan Sikora, District Engineer, testified that he did not believe Grievant intentionally hurt Mr. Reed, but that it was an unfortunate case of horseplay which got out

of control. Mr. Sikora further noted that the harm could have been much worse, and Grievant must be accountable for his actions as a supervisor.

Wayne Kaufman, Maintenance Engineer and Grievant's second level supervisor prior to July 1998, testified that he had told Grievant that Mr. Reed was a little slow, and afraid of the work, and asked Grievant to "take him under [his] wing", and show him the ropes, so that he would not be afraid of the equipment. Mr. Kaufman stated that he was unaware of any pattern of abusive behavior by Grievant, but had heard that he was a task master. He observed that Grievant had not been provided any training for a supervisory role, but that he had performed well until this incident.

Mark Edge, Assistant Operations Engineer and Grievant's immediate supervisor, characterized Grievant as "rough around the edges", but that he extracted good production from primarily temporary employees, and had very good performance evaluations for the past two years. Mr. Edge stated that he was not aware of the horseplay, and had heard that other events in the county had an impact on the discipline imposed upon Grievant. Mr. Edge opined that Grievant is an excellent worker, and hopes that he learned a lesson from this incident.

Consistent with Mr. Edge's understanding, Mr. Black indicated that the discipline in this matter was meant to be consistent with similar situations in Hancock County. However, the cases addressed by Mr. Black differ in that they involve employee aggression and violence, and were blatently sexual in nature. Devore, supra; Kimble, supra. The testimony of Grievant, Mr. Reed, Grievant's supervisors, and many other employees, convinces the undersigned that Grievant was not exhibiting aggression or violence with Mr. Reed. He was simply attempting, albeit in a unacceptable manner, to do what had been

asked of him, i.e., assist Mr. Reed in assimilating into the workplace.

Additionally, Grievant has maintained satisfactory performance with the exception of this incident. While the record contains some information regarding other complaints made regarding Grievant, there is no indication that he had engaged in any prior wrongdoing, other than using some inappropriate language, which was corrected when his supervisor brought it to his attention.

The allegation by Mr. Reed that Grievant grabbed him in his crotch area is troubling; however, the testimony establishes that Mr. Reed often as not initiated the horseplay, and that he particularly liked to throw water on Grievant. Certainly, Grievant could have touched or bumped Mr. Reed in the inner thigh/crotch area during their wrestling sessions without any intended sexual overtones. If Mr. Reed had been hurt, or disliked any aspect of his activities with Grievant, it would seem reasonable that he would have avoided him rather than continuing to participate.

Grievant knew, or should have known, that there was to be no horseplay; however, he was assigned an employee who was experiencing difficulty, and was specifically requested to give this individual extra attention and assistance to help him adjust to the work. Grievant obviously did not go about this in an acceptable manner, but there is no indication that he had been given any training or advice on how to deal with the situation. While unacceptable, Grievant's behavior was not violent in nature, or otherwise intending to harm the employee. There is also no evidence that Grievant had engaged in such behavior with any other employee. By all accounts, Grievant was a "hard driving" supervisor who demanded full performance from his employees, who did not always appreciate his efforts. The record also establishes that Grievant's performance had been

satisfactory prior to this incident. Because Mr. Black indicated that the discipline imposed was based upon an understanding that Grievant's treatment of the employee was intended to be harmful, or was motivated by ill-will, and conceded that the outcome may have been different had he believed Grievant was kidding around, mitigation is appropriate in this case. Further, a thirty (30) day suspension is serious discipline alone, to add an ongoing penalty of a two-step demotion is less appropriate since Grievant's misconduct did not affect his ability to do his usual day-to-day work. See Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). Therefore, the demotion should be revoked, and the one-time, thirty (30) day suspension upheld.

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

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. Respondent's Administrative Operating Procedures, Vol. IX, Chapter 12, "Disciplinary Action, Suspension and Dismissal" categorizes horseplay as a minor offense.

3. Respondent has established that Grievant acted improperly when he engaged in horseplay with a subordinate.

4. Discipline imposed by an employer may be mitigated if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the

employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Jarvis v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

5. Based upon Grievant's previous satisfactory work performance, his lack of supervisory training, that he had been asked to assist a handicapped employee in adapting to the workplace without being given any direction as to how to accomplish the task, and did not act with agression or ill will, mitigation of the discipline is appropriate in this case.

Accordingly, the grievance is **GRANTED** in part, with the demotion rescinded. Respondent is Ordered to reinstate Grievant to the classification of Transportation Crew Chief, with back pay, and all benefits to which he would be entitled. The grievance is **DENIED** regarding the thirty (30) day suspension.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: December 30, 1999

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Sue Keller
Senior Administrative Law Judge