DONALD HILL,

Grievant,

v.

DOCKET NO. 01-ADMN-062

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Grievant, Donald Hill, filed this grievance directly at level four against his employer, the West Virginia Department of Administration/General Services Division ("Department"), on February 23, 2001, protesting his disciplinary demotion from Building Maintenance Supervisor II to Maintenance Worker. Grievant seeks reinstatement to his supervisor position and back pay. A level four hearing was held on August 14, 2001, and this matter became mature for decision on October 2, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Fred Tucker and Ted Hapney, UMWA-WVSEU, and the Department was represented by Heather Ann Connolly, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Department's Exhibits

Ex. 1 -

February 9, 2001 draft letter from Gregory A. Burton to Donald Hill.

Ex. 2 -

February 13, 2001 letter from Gregory A. Burton to Donald Hill.Ex. 3 -
February 13, 2001 memorandum from Timothy Lee to Greg Hubbard.

Ex. 4 -

November 29, 2000 invoice purchase order for Tim Allen Tool Kits.

Ex. 5 -

December 1, 2000 pack list for Tim Allen Tool Kits.

Ex. 6 -

Investigation Questionnaires from Danny Sizemore, Donald Jordan, Greg Hubbard, Jeff Harbour, Carles Farley, John Carter, and Jennings Ashby.

Ex. 7 -

Investigation Questionnaire from Donald Hill.

Grievant's Exhibits

None.

Testimony

The Department presented the testimony of David Pentz, Tim Lee, Greg Hubbard, Jeff Harbour, Carles Farley, Donald Jordan, Jennings Ashby, and John Carter. Grievant elected not to testify, and presented no additional witnesses.

BACKGROUND

On February 13, 2001, Gregory A. Burton, Cabinet Secretary of the Department, notified Grievant in writing of his demotion from his position as Building Maintenance Supervisor II to Maintenance Worker, and a reduction in salary from $28,620.00 to $23,688.00. Dept. Ex. 2. The reasons for the demotion as set forth in Secretary Burton's letter are “multiple violations” of Administrative and Division rules, evidencing a “lack of accountability, failure to follow established purchasing guidelines, and negligence in properly enforcing the rules and regulations.” Dept. Ex. 2.

Sometime in late November or early December 2000, some members of the grounds crew came to Tim Lee, Assistant Director, Operations and Maintenance, and reported some instances of alleged wrongdoing in the Buildings and Grounds department. Mr. Lee reported these allegations to then-Director of General Services, Raymond Prozzillo, who directed him to investigate the complaints. Mr. Lee began an investigationon or about January 12, 2001, and interviewed members of the Grounds crew as well as Grievant regarding the allegations of wrongdoing. Dept. Exs. 6, 7.

In the midst of the investigation, David Pentz replaced Mr. Prozzillo as Director of General Services. Mr. Lee had been working with the Division of Personnel ("DOP") during the investigation, and on February 9, 2001, DOP presented a draft letter to Mr. Pentz in which it was recommended that Grievant be demoted to a Custodian, and his salary reduced by nearly $11,000 to $17.472. Dept. Ex. 1. Mr. Pentz and Mr. Lee believed the discipline contained in the draft letter was too harsh, and recommended a less-severe penalty for Grievant. DOP submitted a second letter to Mr. Pentz, recommending Grievant be demoted to Maintenance Worker, with a reduction in salary of approximately $5,000, to $23,688. Mr. Pentz forwarded this letter to Secretary Burton for his acceptance and signature. Dept. Ex. 2.

On February 13, 2001, Messrs. Pentz, Lee, and James Bumpus met with Grievant to discuss the contents of the letter, and to inform him of his demotion and reduction in pay. Grievant was given an opportunity to respond to the charges in the letter, and notified of his appeal rights.

DISCUSSION

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. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30,1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

The witnesses' testimony to the incidents discussed below, which led to the charges against

Grievant, conflict with Grievant's answers to Mr. Lee's investigation questionnaire. These conflicting accounts require a determination as to which account is truthful. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47- 192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97- HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT- 011 (Aug. 29, 1997).

1.

Trailer Hitch.

Grievant was charged with assigning a subordinate employee, Donald Jordan, to manufacture, on state time, a trailer hitch for personal use. Grievant had asked Mr. Jordan to make a hitch with some tubing Grievant brought in, and with steel from the shop. Mr. Jordan testified Grievant told him the hitch was for a friend who had a Ford Ranger truck. Mr. Jordan measured his own Ford Ranger truck to get measurements for the hitch. Greg Hubbard, Jeff Harbour, and Carles Farley, testified they saw Mr. Jordan making the hitch, and that Mr. Jordan told them he was making the hitch for “Donnie”, or Grievant. They all testified the hitch would not fit on any of the state-owned vehicles in the shop. Jeff Harbour testified he saw Grievant put the hitch on his “mule”, or small tractor, and drive it into the parking garage, and that was the last time anyone saw the hitch.

Mr. Lee questioned Grievant about the trailer hitch, and Grievant completed the investigation questionnaire given to each employee by Mr. Lee. Grievant told Mr. Lee the hitch was being made for a state-owned vehicle, but that it was never finished, and was sent to surplus, where it was trashed. Dept. Ex. 7. (See footnote 1) Mr. Lee checked his records and found no record of a hitch being surplussed. He also checked with Surplus Property, and they had no record of the hitch. Mr. Lee testified that, even if a piece of equipment was going to be trashed, it would still have to be inventoried for surplus.

Based upon the evidence presented, the Department has proven by a preponderance of the evidence that Grievant ordered the hitch to be made on state time by a state employee for either his own or someone else's personal use. There simply is no other explanation for Mr. Jordan measuring a Ford Ranger pickup truck for the hitch, when no state vehicle would match those measurements.

2. Electric Heater.

Grievant was charged with allowing a subordinate employee, Greg Hubbard, to take a state-owned electric heater home for personal use. Mr. Lee testified that when he cameto work in General Services Division, he learned it was a common practice for employees to “borrow” equipment. He changed that practice, and informed all employees by memorandum dated September 24, 1999, that it would no longer be tolerated. Dept. Exs. 6, 7.

Mr. Hubbard testified that he asked Grievant for permission to take the electric heater home for a neighbor to use, and that Grievant allowed him to take it home, cautioning him not to let Carles Farley and Jeff Harbour see him. In his questionnaire, Grievant denied giving any employee, including Mr. Hubbard, permission to take a heater home. Dept. Ex. 7. Mr. Hubbard received a written warning for taking the electric heater home. Dept. Ex. 3.

Mr. Hubbard appeared forthright and truthful in his testimony, and given the fact he received a written warning over the heater incident, it is hard to imagine why he would have made up such a story. Therefore, the undersigned concludes the Department has proven this charge against Grievant.

3.

Repairs to Personal Vehicle.

Grievant was charged with using a subordinate employee, Donald Jordan, to make repairs on his personal vehicle during state time. Mr. Jordan testified he installed running lights on Grievant's vehicle on state time. John Carter testified he saw Mr. Jordan installing lights on Grievant's truck in Building 2. Grievant denied using state employees to make repairs on his personal vehicle during state time. Dept. Ex. 7.

Again, there has been no reason introduced as to why these gentlemen would invent such a story, and countered only with Grievant's denial, I find the Department has proven this charge by a preponderance of the evidence. 4. Tool Kits.

Grievant was charged with ordering “Tim Allen Tool Kits” from a vendor for which the state paid,

and then allowing his employees to take them home for their personal use. On November 11, 2000, Grievant placed an order with Joe Anderson, the sales representative for Premier Fastener Company, a vendor that supplies nuts, bolts, and other typical stock items, for 12 “Tim Allen” tool kits, a promotional item being offered by Premier, totaling $599. Dept. Ex. 4. As the total was in excess of $500, it required permission from Grievant's supervisor, according to General Services Division procurement policy. Grievant did not get his supervisor's permission to order the tool kits.

When the kits arrived, Anderson was on-site, took the kits from Inventory Control to the Grounds shop and gave them to the grounds personnel. Anderson handed out seven kits to personnel on-site, and the remaining five were placed under Grievant's desk. Grievant was not present the day the kits arrived. Anderson told the workers the seven kits handed out were a Christmas present from “us,” and they could do what they wanted with them. He told them the remaining five were purchased by the state and had to remain in the shop.

Grievant admitted purchasing the tool kits in order to cut down the time it took to locate tools, and to provide everyone with a first-aid kit. He ordered five extras just in case additional personnel were hired. Grievant claims he told the employees before delivery that the tool kits were state property, but that they took them home when they got them. When he came into the office and found out the kits had been delivered, he told the employees they had to bring them back to the shop. The five extra tool kits were later found in Grievant's locker in the shop. Donald Jordan, Greg Hubbard, Jeff Harbour, Carles Farley, John Carter, and Jennings Ashby, testified that the investigators from Protective Services, not Grievant, told them they had to bring the tool kits back into the shop. Dept. Exs. 6, 7. Danny Sizemore told Mr. Lee that Grievant told him shortly after the kits were delivered that they were to be used on state property, and not to take them home. Dept. Ex. 6.

The Department has proven by a preponderance of the evidence that Grievant violated procurement policy by ordering items in excess of $500 without prior approval of his supervisor. Further, the Department has proven by a preponderance of the evidence that Grievant did not inform all of his employees that they had to return the tool kits to the shop, and it was not until Protective Services talked to the employees that they realized the tool kits were state property and had to be returned.

As noted above, Grievant was demoted for his “lack of accountability, failure to follow established purchasing guidelines, and negligence in properly enforcing the rules and regulations” of the

Department. Grievant's conduct shows a pattern of unsatisfactory supervisory skills and lack of judgment, and it was not unreasonable for the Department to conclude that Grievant was not suited for a supervisory role.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed by the Department as Building Maintenance Supervisor until he was demoted by Cabinet Secretary Gregory Burton on February 13, 2001, to Maintenance Worker.

2. Grievant directed a subordinate employee, Donald Jordan, to make a trailer hitch on state time, and with state property, for his or someone else's personal use. 3. Grievant permitted a subordinate employee, Greg Hubbard, to borrow a state- owned electric heater for his or someone else's personal use.

4. Grievant directed a subordinate employee, Donald Jordan, to install running lights on his personal vehicle during state time.

5. Grievant failed to get prior approval for purchases exceeding $500, as required by the Department's procurement policies.

6. Grievant failed to instruct his subordinate employees to return tool kits bought by the state which they had taken home, believing they were Christmas gifts from a vendor.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary maters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

3. In assessing the credibility of witnesses, some factors to be considered . . . are the

witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the UnitedStates Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

4. The Department has proven the charges against Grievant by a preponderance of the evidence, justifying his demotion from Building Maintenance Supervisor II to Maintenance Worker.

Accordingly, this grievance is **DENIED**.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 30, 2001

Footnote: 1

Grievant chose not to testify at level four. Any representations attributed to Grievant come from his answers to Mr. Lee's questionnaire.