CHARLIE ADKINS, JR.,

Grievant,

v.

DOCKET NO. 01-DOH-446

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Charlie Adkins, Jr., filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH) on or about September 28, 2000, alleging he had been "assaulted" by his supervisor, and requesting as relief discipline of his supervisor, payment of medical bills, damages, and to be made whole in every way. (See footnote 1) Grievant received a level one response from Stan Meadows on October 6, 2000, denying the grievance, and level two was waived. A level three hearing was held on May 22, 2001, and a decision denying the grievance was rendered by Brenda Craig Ellis, Hearing Examiner, on June 26, 2001, and accepted by the Secretary/Commissioner of Highways by letter dated June 27, 2001. Grievant appealed to level four on July 20, 2001, and after several continuances, the parties agreed to submit the grievance on the record. This matter became mature for decision on November 30, 2001, the deadline for theparties' submission of proposed findings of fact and conclusions of law. (See footnote 2) Grievant was represented by Steve Rutledge, AFSCME, and DOH was represented by Nedra Koval, Esq.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Inspector's Daily Report, September 20, 2000.

Ex. 2 -

Williamson Memorial Hospital medical report, September 21, 2000.

LIII DOH Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of Phillip Manley, Charles Shaver, Mark Colegrove, and Eddie Harvey. DOH presented the testimony of Phillip Manley.

FINDINGS OF FACT

After a careful review of the evidence of record in this grievance, I find the following facts have been proven by a preponderance of the evidence.

1. Grievant has been employed by DOH since January 11, 1985, and at all times relevant, was classified as a Transportation Engineering Technician. Grievant is assigned to District Two Construction.

2. Grievant is a project supervisor on Corridor G, and is in charge of quality control, including monitoring safety conditions.

3. Phillip Manley is a resurfacing coordinator employed by DOH in District Two, and supervises Grievant. 4. On September 20, 2000, Grievant was working on a project on Corridor G in Mingo County.

5. That same day, an incident occurred involving a shuttle buggie which caused Grievant to have concerns regarding safety.

6. Grievant expressed these concerns to Mark Colegrove, the supervisor of Mountain Enterprises, a contractor on this job.

7. Grievant told Mr. Colegrove that if the safety matters were not corrected, he would shut him down.

8. Mr. Manley was present when Grievant made this statement, and told Grievant he could not tell a contractor he would shut them down.

9.

Mr. Manley touched Grievant on the arm when he spoke to him.

10. Mark Colegrove and Eddie Harvey, an employee of Mountain Enterprises, were both present during the entire incident between Grievant and Mr. Manley. Neither gentleman saw Mr. Manley assault Grievant.

11. Grievant did not make any allegations of injuries or report any inappropriate behavior by Mr. Manley on September 20, 2000.

12. On September 21, 2000, Grievant received medical treatment for pain in his left neck, left shoulder, and left elbow, and returned to work with his left arm in a sling. LIII G. Ex. 2.

DISCUSSION

In non-disciplinary matters the Grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant alleges he was assaulted by his supervisor, Phillip Manley, on September 20, 2000, requiring him to seek medical attention. Grievant asks that Mr. Manley be disciplined, that DOH pay for his medical bills, and to be made whole. DOH denies Mr. Manley assaulted Grievant, and denies that it is responsible for any medical bills or damages suffered by Grievant.

This grievance boils down to a determination of what exactly occurred on September 20, 2000. Grievant's story conflicts with Mr. Manley's, and with the other witnesses to the incident, Mr. Colegrove and Mr. Harvey, making a credibility determination necessary to resolve this grievance. 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). Since this grievance was submitted on the record, the undersigned did not have an opportunity to personally observe Grievant and the witnesses who testified. Nevertheless, the details of the incident were sufficiently fleshed out in the level three hearing, and the undersigned is able to conclude from a careful reading of the level three transcript that Grievant's version of the events of September 20, 2000, simply is not plausible.

Grievant filled out an Inspector's Report on September 20, 2000, stating that, after Mr. Manley told him he could not shut down the job:

> I tried to walk away & Manley came after me from behind. He grabbed my wrist & jerked my arm back spinning me around & started yelling at me your not shutting down no one.

LIII G. Ex. 1.

Grievant recounted this incident to emergency room personnel at Williamson Memorial Hospital the next day, and was advised to wear his arm in a sling, and take pain medication as needed. LIII G. Ex. 2. Grievant included a nearly identical account of this incident in his lengthy statement of grievance.

Mr. Manley testified that Grievant was talking with Eddie Harvey and Mark Colegrove, and telling them he was going to shut down the job. Mr. Manley began to discuss the matter with Grievant in front of Mr. Harvey and Mr. Colegrove, telling him not to tell the contractors that he was going to shut them down. Mr. Manley recalled he touched Grievant on the arm and asked him to move over to the truck so they could talk. Grievant jerked his arm away and told Mr. Manley not to touch him, and Mr. Manley said, “Fine.” Mr. Manley testified Grievant did not complain of any pain or injury at the time, and he remained on the job until dark. Mark Colegrove, the supervisor for Mountain Enterprises, testified that he knows Grievant and understands it is his job to see that Mountain Enterprises is conducting work in a safe manner. Mr. Colegrove also knows Mr. Manley, and would see him two to three times a week at different times of the day at the job site on Corridor G. Mr. Colegrove testified that on September 20, 2000, he was talking with Eddie Harvey, Grievant and Mr. Manley. He

believed they had talked about five to ten minutes, and Grievant was getting louder and backing toward Eddie Harvey's truck, which was about five feet from where they were standing. He testified Mr. Manley walked toward Grievant, Grievant got in his truck, and Mr. Manley stood at the driver's door talking to Grievant. Mr. Colegrove testified he was standing at his truck on the driver's side with the truck door open, that he could see Grievant and Mr. Manley, not more than five feet away, and did not see any contact where anyone could have been injured. Mr. Colegrove testified he never saw Mr. Manley touch Grievant, nor did he see Mr. Manley come up behind Grievant, as Grievant was backing away from them towards his truck. Mr. Colegrove made notes the next day when he saw Grievant with his arm in a sling.

Eddie Harvey, employed by Mountain Enterprises, was the working foreman on the job and works on different job sites. He has known Grievant for approximately thirteen years. He testified that he, Mr. Colegrove and Mr. Manley were standing and talking when Grievant walked up. He remembered Grievant saying something about shutting them down, and Mr. Manley saying, “No, you can't do that.” Grievant said, “Yes, I can”, and Mr. Manley replied, “No, Charlie, you can't do that. You can't just up and say you're shut down.” Mr. Harvey testified that Mr. Manley touched Grievant by the shirt sleeve or tappedhim on the shoulder, and they began walking away from him and Mr. Colegrove. He did not hear Grievant cry out in pain or anything of that nature.

While all the witnesses testified forthrightly, the testimony of Mr. Colegrove and Mr. Harvey stands out as most persuasive. They were in close vicinity of Grievant and Mr. Manley, heard the statements made about shutting them down, saw Grievant and Mr. Manley move towards Grievant's truck, and Mr. Harvey saw Mr. Manley maybe tap Grievant on the shoulder or shirt sleeve. Neither witness saw anything to corroborate Grievant's claim that Mr. Manley “assaulted” him, or that there was any contact which would have resulted in the injuries Grievant claims. Mr. Manley himself concedes he touched Grievant on the arm.

Grievant, on the other hand, claims Mr. Manley assaulted him, grabbed him by the wrist and spun him around, all the while yelling at him. Had this occurred, it is inconceivable that Mr. Colegrove or Mr. Harvey, standing not five feet away, would not have seen it. Grievant may have suffered some injury on September 20, 2000, however, it was not at the hand of Mr. Manley.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Grievant has failed to prove by a preponderance of the evidence that Phillip Manley assaulted him on September 20, 2000, causing injury to Grievant.

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: December 27, 2001

Footnote: 1

This Grievance Board has no authority to award monetary damages, and Grievant's request for this relief is denied.

Footnote: 2

Neither party filed written submissions.