SYDNEY GOFF,

Grievant,

v.

DOCKET NO. 03-DOH-048

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Sydney Goff, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on June 26, 2002:

> The problem happened on June 18, 2002 at 7:38 A.M. Dennis Clark used verbal language real harsh towards myself. I also think my reputation is being put on the line. My employee rights have been damaged by this problem.
>
> Relief sought: To have a written reprimand in Dennis Clark's personnel files. I Sydney A. Goff to be moved into another section, not another squad.

The level one evaluator did not specifically grant or deny the grievance, but stated that Mr. Clark admitted he used loud and vulgar language, stated it would not happen again, and noted that Mr. Clark received a verbal reprimand with an admonition that another occurrence would lead to further disciplinary action. Grievant appealed to level two, and had a conference with Jim Sothen, Director of Engineering Division, on July 10, 2002. Mr. Sothen prepared a memorandum summarizing the conference for his file, and communicated his decision to Mr. Goff, but did not issue a written decision. Mr. Goff fileda Notice of Default at level four, and following a default hearing, his default

claim was denied and the matter remanded for a level three hearing. The level three hearing was held on December 9, 2002, and denied by decision dated February 7, 2003. Grievant appealed to level four on February 20, 2003, and a level four hearing was held on March 27, 2003, at which time this matter became mature for decision. Grievant represented himself, and DOH was represented by Barbara L. Baxter, Esq.

The material facts underlying this grievance are not in dispute, and are set forth in the following findings.

FINDINGS OF FACT

1. Grievant is employed by DOH in the Engineering Division as a Technician.
2. Dennis Clark is employed by DOH in the Engineering Division as an Engineer.
3. Grievant and Mr. Clark work in the same room on the fourth floor at DOH, but Mr. Clark has no supervisory authority over Grievant.
4. Grievant had volunteered in the past to make the coffee for the employees sharing the room on the fourth floor.
5. On June 18, 2002, at approximately 7:38 a.m., Grievant had not yet made the coffee.
6. Mr. Clark approached Grievant, asked if he had made coffee yet, and then yelled in a loud, abusive voice, for Grievant to make coffee, with a variety of curse words interjected into his demand.
7. This was not the first time Mr. Clark had addressed Grievant in such a manner, but it was the first time it had been brought to the attention of management.
8. Mr. Sothen learned of the incident that same day, and called Mr. Clark in for a meeting the next day. Mr. Sothen explained to Mr. Clark that his behavior was totally unprofessional and unacceptable, and issued him a verbal warning that any further incidents would result in further disciplinary action. (See footnote 1)

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

The facts in this grievance are not in dispute. Mr. Clark admitted he cursed loudly at Grievant over

making coffee, and received a verbal reprimand from Mr. Sothen for his inappropriate behavior. Grievant was not aware disciplinary action had been taken against Mr. Clark at the time he filed this grievance asking that Mr. Clark be given a written reprimand. Nevertheless, even if no action had been taken against Mr. Clark, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999); Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

Grievant also requested he be transferred to another work location. Mr. Sothen testified there is no comparable position for Grievant in another section, and even if hewere able to physically move Grievant, there is no guarantee he would not have contact with Mr. Clark in the workplace. Mr. Sothen also testified that if the situation caused Grievant to “lose sleep” and otherwise made his working environment intolerable, he would certainly do something, but he did not believe that was the case here, although sending Mr. Clark to an anger management workshop might be of benefit to all concerned. Grievant testified he was uncomfortable around Mr. Clark, which is understandable given the circumstances, but that does not rise to a level reasonably interpreted to be an intolerable working environment.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. The Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999); Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

3. Grievant has failed to establish he is entitled to the relief sought in this grievance.

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: April 7, 2003

Footnote: 1

Mr. Sothen testified at level four that Mr. Clark had recently received a written reprimand for another display of unprofessional behavior directed at another employee.