TERRY HUNTER,

Grievant,

v.

Docket No. 03-DOH-409

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

DECISION

The grievant, Terry Hunter ("Hunter"), challenges a disciplinary action by his employer, respondent West Virginia Department of Transportation/Division of Highways ("DOH"). The grievance was appealed to Level IV on December 24, 2003, after having been denied at all lower levels. A Level IV hearing was conducted on August 27, 2004, at the hearing room of the West Virginia Education and State Employees Grievance Board in Charleston. At the Level IV hearing, Hunter was represented by Joe Hill, a fellow DOH employee. DOH was represented by Barbara Baxter, Esquire. This grievance matured for decision on August 27, 2004, at the conclusion of the Level IV hearing.

In the grievance form used to initiate his grievance, Hunter asserted that he "was wrongfully disciplined without cause." He also claimed that he "became aware of disciplinary action after receiving a copy of [his] personnel file." For relief, Hunter asks "to be made whole in every way, including but not limited to, rescind disciplinary action and removal from . . . [his] personnel file."

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Hunter is employed by DOH as a Transportation Worker II/ Mechanic working out of the Crawley facility in Division Nine.

2 2. Hunter's immediate supervisor is Jerry Manspile, Lead Mechanic.

3 3. Next in the supervisory hierarchy, during the pertinent time period, was William Hoover, Transportation Crew Supervisor ("Supervisor Hoover"). (See footnote 1)

4 4. This grievance arose out of a written reprimand issued to Hunter on April 22, 2003, involving the faulty replacement of oil filters in DOH vehicles.

5 5. The written reprimand, which was drafted and signed by Supervisor Hoover, explains the basis for the disciplinary action as follows:

> Terry [Hunter] continually leaves oil filters loose and also leaves old gaskets under new filters he is installing. This has happened at least three times to my knowledge. I have warned him verbally so I have decided that this is the appropriate action to take.

6 6. If an old gasket is left in place when a new gasket and oil filter are installed, it creates a weak place. The end result is that a gasket blows and oil leaks into the engine.

7 7. There were three occasions when gaskets blew and oil leaked into the engines of DOH vehicles as the result of such improper installation. These problems occurred on vehicles that had been assigned to Hunter for oil filter changes.

8 8. Although Hunter may not always do the work himself on the vehicles assigned to him, he is responsible for seeing that the work is done properly. Some of the workers he supervised were inmates and some were other DOH employees.

9 9. DOH utilizes a policy of progressive discipline.

10 10. Prior to the written reprimand, Hunter and his direct supervisor, Jerry Manspile, had been called into Supervisor Hoover's office on at least two occasions to discuss the problems with oil filters that had been installed by Hunter or installed under Hunter's supervision.

11 11. There were further incidents of faulty oil filter replacement work after Hunter had been orally warned by Supervisor Hoover, leading Supervisor Hoover to issue the written reprimand.

12 12. The written reprimand was approved by James M. Lagos, District Engineer of District Nine, as reflected by his signature on that document.

13 13. Hunter was provided with a copy of the written reprimand but refused to sign it. (See footnote 2)

14 14. Hunter was formerly a coal miner.

15 15. Jim Childers, Highway Administrator of Greenbrier County, ("Administrator Childers") did not participate in the decision to issue the written reprimand to Hunter. Supervisor Hoover did make Administrator Childers aware of the action.

16 16. Administrator Childers is the son of a coal miner.

17 17. Michael Wicks is employed by DOH as a Transportation Worker II Equipment Operator assigned to the Greenbrier County Headquarters and has had a number of accidents. Some of the accidents occurred during his training. Others have taken place during snow and ice removal operations.

DISCUSSION

This grievance arises out of a disciplinary action. Therefore, DOH bears the burden of substantiating, by a preponderance of the evidence, the basis for the discipline. *Oiler v. Dep't of Health and Human Res./Bureau for Child Support and Enforcement*, Docket No. 02-HHR-074 (Aug. 28, 2002) ("In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence.")

There is no question that oil filters were improperly installed in several DOH vehicles for which Hunter was the responsible mechanic. The improper installation resulted in down time for the vehicles and potential damage to expensive equipment. Despite having been reprimanded verbally on two occasions, the faulty installation was repeated. Supervisor Hoover then felt compelled to take stronger disciplinary steps to curb this problem. As a result, the written reprimand was issued. (See footnote 3)

Hunter has argued that he may not have personally installed the oil filters in question. Nonetheless, they were installed under his supervision on vehicles that were assigned to him. The responsibility for proper installation rested on Hunter.

DOH proved, by a preponderance, that there was a proper predicate for the disciplinary action. A written reprimand was reasonable and appropriate to the circumstances. It also comported with DOH's progressive discipline policy.

Hunter claims that the disciplinary action taken against him is discriminatory. In this case,

Hunter's assertion of discriminatory treatment is in the nature of an affirmative defense. Accordingly, he must prove, by a preponderance of the evidence, that 1) he issimilarly situated in a pertinent way to another employee, 2) that DOH has treated Hunter differently than the other employee in a significant respect, to the detriment of Hunter, 3) the differences in treatment were unrelated to their respective job responsibilities and were not agreed to in writing. *McGraw v. Dep't of Transp.*, Docket No. 03-DOH-079 (Aug. 22, 2003); *Wilson v. West Virginia Bureau of Employment Programs*, Docket No. 02-BEP-241 (Apr. 22, 2003).

Proof of the foregoing elements would establish a *prima facie* case. *Jacobs v. West Virginia Univ.*, Docket No. 02-HE-001 (July 15, 2004). DOH would then have the opportunity to try to prove that there were legitimate, non-discriminatory reasons for the offending differences in treatment. If DOH were successful in this effort, Hunter could still prevail on the discrimination claim by establishing that DOH's reasons were merely pretextual. *Oiler v. Dep't of Health and Human Res./Bureau for Child Support and Enforcement*, Docket No. 02-HHR-074 (Aug. 28, 2002). However, it is not necessary to reach these steps in the analysis.

Hunter has failed to establish the initial element of discrimination in that he is not similarly situated to Michael Wicks ("Wicks"), the fellow DOH employee with whom Hunter attempts to compare himself. Wicks is a truck driver. There does not seem to be any dispute that Wicks has been involved in a number of accidents with DOH vehicles. However, it should be noted that, while engaged in snow removal and the like, Wicks operates a DOH vehicle under inherently hazardous conditions.

By contrast, Hunter executes his responsibilities within the relatively safe confines of a maintenance garage. It is his responsibility to maintain the vehicles in safe, reliableoperating condition. Given the divergence in the conditions under which they perform their duties, Hunter cannot establish that he and Wicks are similarly situated. This is an essential prerequisite for proving that he has been treated in a discriminatory fashion. Therefore, Hunter has failed to meet the burden of proving a *prima facie* case of discrimination.

Hunter also attempts to argue that he was subjected to discipline because Administrator Childers has a bias against coal miners. This argument lacks merit because the decision to discipline Hunter was made by Supervisor Hoover and approved by the District Engineer. The question of whether Administrator Childers may have been biased, either against Hunter in particular or coal miners in general, is irrelevant to the disposition of this grievance and will not be be addressed further. (See

footnote 4)

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1.

"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)." *McGraw v. Dep't of Transp*., Docket No. 03-DOH-079 (Aug. 22, 2003).

2 2. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered inopposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

3 3.

DOH proved, by a preponderance of the credible evidence, that Hunter failed in his responsibility to either perform or oversee the proper installation of new oil filters in DOH vehicles and thus met its burden of establishing a proper factual predicate for the disciplinary action.

4 4. Discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code 29-6A-2(d).

5 5. In the context of a disciplinary action, discriminatory treatment is in the nature of an affirmative defense that must be proven by the grieving employee by a preponderance of the evidence. *McGraw v. Dep't of Transportation*, Docket No. 03-DOH- 079 (Aug. 22, 2003); *Wilson v. West Virginia Bureau of Employment Programs*, Docket No. 02-BEP-241 (April 22, 2003).

6 6. Hunter failed to establish a *prima facie* case of discrimination because he was unable to prove that he was similarly situated to the other employee with whom Hunter compared himself.

Accordingly, this grievance is **DENIED** . Any party 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). Neitherthe 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 West Virginia Code section 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: September 30, 2004 _____

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

By the time of the Level IV hearing, Supervisor Hoover was in a different position in DOH.

Footnote: 2

This controverts Hunter's assertion in his statement of grievance that he "became aware of disciplinary action after receiving a copy of [his] personnel file."

Footnote: 3

Happily, there have been no recurrences of the problem since the written reprimand was issued.

Footnote: 4

This should not be construed as a finding that Administrator Childers exhibited a bias against anyone.