STEPHEN M. SMITH,

Grievant,

v. DOCKET NO. 05-PEDTA-166

PARKWAYS, ECONOMIC DEVELOPMENT

AND TOURISM AUTHORITY,

Respondent.

DECISION

Grievant Stephen Smith filed a grievance on January 28, 2005, challenging a written warning he received for failing to report that he would miss his shift by the time his employer, Respondent Parkways, Economic Development and Tourism Authority (PEDTA) alleged he was required to do so. On April 5, 2005, and on April 15, 2005, he filed additional grievances challenging the same disciplinary action. PEDTA made a motion that the April grievances, which were still pending at the lower levels, be consolidated at level four with the present grievance. Against Mr. Smith's objection, the motion was granted and the three grievances are now consolidated under the style set forth above.

A level four hearing was held in the Grievance Board's Beckley office on July 19, 2005. Mr. Smith represented himself, and PEDTA was represented by A. David Abrams, Jr., its General Counsel. The matter became mature for decision on August 19, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

PEDTA maintains that it has a longstanding practice that amounts to a policy, which requires employees to call in not later than two hours before their shifts begin in the event the employee will miss work because of jury duty. It is undisputed that on January 18, 2005, Mr. Smith missed his shift for jury duty, and failed to call in until about one hour and twenty minutes before he was scheduled to work. PEDTA issued Mr. Smith a written warning for his failure to timely call in, and Mr. Smith does not challenge the severity of the discipline. Mr. Smith maintains that no such policy requiring him to call in two-hours before his shift exists. Mr. Smith in his latter grievances also questions whether

PEDTA had a right to correct the written warning after he filed a grievance claiming it was incorrect.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Bonnie Hall is a toll shift foreman at Barrier B where Mr. Smith works. On January 18, 2005, at 9:31 p.m., Mr. Smith called Ms. Hall and said that he had jury duty.

2. Mr. Smith's shift begins at 10:50 p.m.

3. Ms. Hall told Mr. Smith that he was supposed to give two hours notice, and Mr. Smith informed her that he knew of that requirement, but he had fallen asleep and did not wake up in time. During the level two conference for the first grievance, Mr. Smith repeated to Steve Maynard, Toll Director, that he had fallen asleep.

4. Wesley A. Roles, Interchange Supervisor for North Beckley and Barrier B, is Ms. Hall's supervisor. On or about January 18, 2005, Mr. Roles completed an“Employee Disciplinary Report” citing Mr. Smith for an “Unexcused Absence.” The disciplinary action taken was noted as a “Warning.” Mr. Smith received this warning on or about January 22.

5. The Employee Disciplinary Report cited WV Parkways Policy and Procedure Manual III-5 as authority for the requirement that “Toll Personnel must call in at least two (2) hours prior to a scheduled shift commencement.”

6. PEDTA has a policy, III-7, that addresses leaves of absences in general. Section 5 of that policy deals with “court and jury duty” and grants paid leave for such absences. This policy does not actually have a provision that specifies when an employee must call in to report an absence due to jury duty. Policy III-5, as cited in the Employee Disciplinary Report, only relates to calling in when an employee uses sick leave, and does have a two-hour notice requirement.

7. On March 29, 2005, Mr. Roles issued a “revised written warning” for the incident in question as a substitute for the first warning that cited Policy III-5. The revised warning cited that “WV Parkways Practice and Procedure for Toll Personnel requires that they call in at least two (2) hours prior to a scheduled shift commencement if they are going to be absent as a result of jury duty.” In a cover letter for that revision, Mr. Roles noted that “the two hour call-in requirement contained [in Policy III-5] was adopted many years ago as a practice and procedure in the event employees were required to miss work resulting from selection for jury duty.”

8. Mr. Smith then filed his second grievance challenging the warning, on April 5, 2005, again claiming no such requirement exists, and also challenging the fact that the revised warning was issued to “Steven” Smith, rather than “Stephen” Smith. Mr. Smithadditionally claimed the revised warning was retaliation and harassment for filing his first grievance, and that the action constitutes prohibited “double jeopardy.” He questioned whether PEDTA is “allowed to rewrite the Employee Disciplinary Report until they '*get it right*[.]'” (Emphasis in original.)

9. In response to the second grievance, Mr. Roles issued a “Corrected” Employee Disciplinary Report identical to the revised Employee Disciplinary Report, except that Mr. Smith's name was spelled correctly.

10. On April 15, 2005, Mr. Smith filed his third grievance in this matter, in which he states he received the Corrected Employee Disciplinary Report and that he “grieves the mere existence of the document” in part because “[t]here was no explanation for the Employee Disciplinary Report and Grievant is confused as to its purpose.” He again claims harassment, retaliation, and double jeopardy.

11. The requirement that an employee call in at least two hours prior to missing work for jury duty has been in place since at least 1988, and is a response to the impracticality of applying the Policy III-7 requirement of written notice of exact dates and times of jury duty to situations where the jury duty is intermittent and discontinuous.

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. (See footnote 1) "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely truethan not." *(See footnote 2)* PEDTA charges that Mr. Smith failed to call in at least two hours prior to his scheduled shift when he was going to miss work as a result of jury duty, in contravention of a requirement established through longstanding practice. There is no dispute over the operative facts: Mr. Smith did fail to call in at least two hours before missing a shift due to upcoming jury duty. What is at issue is whether the two-hour requirement exists as an enforceable unwritten policy. Mr. Smith's harassment, retaliation, and double jeopardy claims, while amusing, are clearly specious and will not be addressed. (See footnote

3)

Mr. Smith contends that “Respondent cannot remember its own unwritten rules and regulations and it takes a grievance to show they are inept in the writing, presentation and serving of Employee Discipline and a document titled WV Parkways Practice and Procedure for Toll Personnel does not in fact exist and Respondent is guessing as to the correct rule and/or policy if in fact it [sic] one does exist.” PEDTA admits there is no written policy requiring an employee to call within a certain amount of time prior to missing work for jury duty. PEDTA also it admits it has a written policy in place that addresses jury duty leave, and that it does not enforce that policy's explicit requirements.

“An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” (See footnote 4) The question then, is whether the established policy fully covers this situation, and a close reading of the language of policy III-7 shows itaddresses jury duty leave in general, but not the logistics of using it on a day-to-day basis. The need arose, therefore, to adopt a practice consistent with the use of other types of unplanned leave to maintain the mission of the agency, i.e., having enough staff on hand at the start of a shift to man the toll booths. As a logical accommodation, the two-hour notice requirement contained in the written sick leave policy was adopted as an unwritten requirement for jury duty leave.

Although not specifically stated in the written warning to Mr. Smith, the basis for the disciplinary action could be seen as Mr. Smith's failure to follow established policy such that his actions constituted insubordination. “[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *(See footnote 5)* Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. (See footnote 6) Here, it is apparent that Mr. Smith's failure to call in did not rise to the level of insubordination, because his failure to call in was inadvertent rather than an obvious disregard for the rule, and he did call in only 40 minutes later than he shouldhave. This conclusion was perhaps recognized by PEDTA when it chose what it felt was the appropriate level of punishment rather than something more severe.

PEDTA nonetheless has the authority to correct Mr. Smith's failure to abide by the call-in

requirement, and a written warning is not challenged by Mr. Smith as the appropriate level of punishment. Unlike Grievance Board decisions involving school personnel, there is no rule, statute or written policy in place that makes unwritten personnel policies unenforceable for state employees. (See footnote 7) Still, PEDTA must show that 1) the unwritten policy or practice was lawful and established through consistent past practice; 2) that the employee had actual knowledge of and understood the unwritten policy's requirements; and 3) that the employee failed to comply with the unwritten policy for reasons that were within his control.

Not only did Mr. Smith admit to Ms. Hall that he knew of the two-hour call-in requirement, all of PEDTA's witnesses testified that they knew the requirement had been adopted for cases of jury duty, and that everyone knew that was the case. Even without Mr. Smith's admission, PEDTA urges the inference can be made that Mr. Smith, who has nearly thirty years of service with PEDTA, including some supervisory experience, knew the policy existed because it is a long-standing practice. Mr. Smith creatively sought to disabuse that notion by presenting evidence that he had been rated very low on knowledge of agency policy and procedure during a recent job interview, but presented no evidence that he was ignorant of the policy. Instead, he focuses his challenge on the fact that the policy is not in writing as is the sick leave policy. Here, PEDTA has met all those elements. Mr. Smith has presented no authority prohibiting the enforcement of the unwritten policy establishing a two-hour call-in requirement for jury duty, and has not argued the requirement itself is in some way improper, arbitrary or capricious, or an abuse of his employer's discretion. Mr. Smith exercised his right not to testify in this disciplinary proceeding, but in so doing failed to rebut the testimony of Ms. Hall that Mr. Smith indicated said he knew of the two-hour call-in requirement. Lastly, Mr. Smith's failure to call in was a result of his own negligence in falling asleep and not either calling in before he did so or setting an alarm so he would wake up in time. Mr. Smith's failure to call in resulted in his having an unauthorized absence.

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. (See footnote 8) Here, there is no reason to analyze whether a written warning is the appropriate disciplinary measure, because Mr. Smith has not asserted as an affirmative defense that it is. It should be noted,

though, that the warning was the only penalty even though the absence was clearly unauthorized _ Mr. Smith was still paid for the day of jury duty and lost no personal leave. Mr. Smith was treated more than fairly in that regard.

With respect to Mr. Smith's inquiry as to whether PEDTA may keep rewriting the warning until it gets it right, the answer is an unqualified yes. Not only does it have thatpower, it has the obligation to ensure that it is “getting it right.” In essence, Mr. Smith's first two grievances are moot because he was granted the relief he requested _ removal of those particular written warnings. Mr. Smith has not been penalized multiple times, just one time correctly. As it stands now, only the final, “Corrected” warning letter is valid, as the other two have been rescinded or voided.

The following conclusions of law support this discussion:

Conclusions of Law

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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).” *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

3. “[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. HigherEducation Governing Board/Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (2002). Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. *See* Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). *Butts, supra*.

4. For a state employer to discipline an employee for failure to follow an unwritten policy or rule, the employer must show that 1) the unwritten policy or practice was lawful and established through consistent past practice; 2) that the employee had actual knowledge of and understood the unwritten policy's requirements; and 3) that the employee failed to comply with the unwritten policy without good reason.

5. Respondent has an established, but unwritten, policy requiring employees to call in to report a jury-duty related absence at least two hours prior to the start of the employee's shift.

6. Respondent met its burden of proving Grievant failed to abide by its unwritten policy on calling in before absences due to jury duty.

For the foregoing reasons, this grievance is hereby **DENIED**. (See footnote 9)

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, and such appeal must be filed within thirty days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State EmployeesGrievance 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.

August 26, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 2

Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Footnote: 3

The irony that Mr. Smith has filed three grievances over a warning for misconduct he does not deny, while claiming PEDTA is harassing him, is not lost.

Footnote: 4

Morris v. Kanawha County Bd. of Educ., Docket No. 99-20-200 (July 27, 1999), citing Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977)..

Footnote: 5

Butts v. Higher Education Governing Board/Shepherd College 212 W. Va. 209, 569 S.E.2d 456 (2002).

Footnote: 6

See Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). Butts, supra.

Footnote: 7

See Butts v. Berkeley County Bd. of Educ., Docket No. 00-02-147 (Sep. 14, 2000);Toothman v. Marion County Bd. of Educ., Docket No. 98-24-139 (Oct. 7, 1998).

Footnote: 8

Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

Footnote: 9

It would behoove Respondent to make this policy official by issuing something in writing to ensure all employees know about it.