THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY JOE WATTS,
Grievant,

v. **Docket No. 2009-0852-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Timothy Joe Watts, filed a grievance against his employer, Division of Highways ("DOH"), on February 8, 2008. The statement of grievance reads:

> Sept. 25, Daughter got sick and had to go home, and I sent word to my acting crew leader by a mechanic, they are wanting to suspend me.[1]

For relief, Grievant seeks "to be made whole."

A level three hearing was held on May 18, 2009, at the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by Barbara Baxter, Esq. This case became mature after the hearing, as the parties declined to file proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent asserts Grievant was suspended for fifteen working days for leaving his employment without notifying his supervisor. Respondent further asserts that this behavior has happened before, and Respondent was following its progressive discipline policy when determining the appropriate action in this instant case.

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[1]Grievant was suspended on February 11, 2008, for fifteen working days.

Grievant argues he received a call that his daughter had a very high temperature and was ill. Grievant avers because of this emergency, he left work, but asked a mechanic who worked for Respondent to notify Grievant's acting crew leader.

Respondent has met its burden in this matter. Therefore, this grievance is denied.

Findings of Fact

1. On September 25, 2007, DOH had a crew patching pot holes at Big Ugly, Lincoln County.

2. At the start of the job, there were two trucks hauling asphalt from Logan County to the job site. Grievant was driving one of the trucks.

3. Early in the workday one of the trucks broke down. That left Grievant as the only one hauling asphalt to the job.

4. Grievant's first load of asphalt was delivered around 9:00 a.m. It took approximately forty-five minutes to one hour for the workers on the job site to unload the asphalt.

5. After the workers unloaded the asphalt, Grievant was sent back after another load. This required Grievant to travel to Logan County.

6. Grievant, however, went in the opposite direction to the Harts Creek Substation to have lunch. He did not inform anyone at the job site that he was going to the Substation to eat lunch.

7. The workers on the Big Ugly job site were waiting on Grievant's return with the asphalt so as to continue working on the patching project.

8. While at the Substation, Grievant received a phone call from his wife that his daughter had a high fever, and she had no medicine to give to the child.

9. Grievant parks his personal vehicle at the Substation.

10. Upon receiving the phone call from his wife, Grievant drove his state truck back in the direction of Big Ugly,[2] leaving his personal vehicle at the Substation.

11. While en route toward Big Ugly, Grievant was stopped by a State Trooper for speeding.

12. Roger Sowards, a DOH mechanic responding to the call of a broken down truck, was on his way to the job site at Big Ugly, when he saw Grievant pulled over by the Trooper.

13. Mr. Sowards stopped, concerned Grievant was broken down in the state truck.

14. Grievant told Mr. Sowards to tell Mr. Vance, the acting crew chief, that Grievant was not coming back to work.

15. The job site had to be shut down for the day, and the workers had to be routed to another area.

16. On February 5, 2008, Grievant received a letter from Jeff Black, Human Resources Director, suspending him for fifteen days for unauthorized leave.

17. Grievant had previously been given a ten day suspension for a similar offense.

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; *Ramey v. W. Va. Dep't of Health,*

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[2]Grievant lives a few miles from the work site at Big Ugly. No testimony was ever presented explaining why Grievant took the state truck back toward the work site and his home. No one explained whether Grievant was going to the site or to his house.

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.*

This case is unique in that both sides seem to agree on the facts. Grievant was supposed to go to Logan County for a second load of asphalt. While he was gone, workers on the Big Ugly job site were waiting for him to return so they could continue patching pot holes. However, according to Grievant's testimony, he chose to travel to the Harts Substation, going the opposite direction, for lunch. It is not disconcerting that he went to the Substation to eat. It is disconcerting that he went to have lunch without telling anyone on the crew, knowing they were depending on him to bring the load of asphalt so they could resume their work.

While at the Substation for lunch, Grievant received a call that his daughter was running a high fever, and there was no medicine at the house. Because Grievant and his wife only have one vehicle, it is completely understandable that Grievant would be concerned. Yet, Grievant testified that he left his personal car at the Substation, where he was when he received the phone call, and traveled back in the direction of Big Ugly toward his house and the job site in the state truck.

From the testimony presented, it does not appear as if Grievant made any phone calls while at the Substation in an attempt to inform his supervisor of his daughter's illness. Dennis Lawson, Supervisor for the Lincoln County DOH, testified that Grievant could have called and spoken to a secretary who would have radioed the job site to inform them

Grievant would not be returning to work due to his daughter's illness. Grievant testified the radios did not work out at the Big Ugly job site.

There are a lot of unanswered questions in this case. However, it is clear from the testimony that Grievant left his work site without notifying his supervisor. Had he explained the situation, Mr. Lawson testified there were others who could have driven Grievant to his personal vehicle and then taken the truck to get a load of asphalt so the job could have continued.

From the testimony and the suspension letter, this is not the first time an incident such as this has occurred with Grievant. Keith Chapman, District 2 Manager, testified that upon learning what happened on September 25, 2007, he looked into the past indiscretion to determine what future action would be appropriate. He testified that following the progressive discipline policy, a determination was made to suspend Grievant for fifteen days.

After reviewing all the testimony, Respondent has met its burden in this matter. This Grievance is denied.

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. Respondent has met its burden by a preponderance of the evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: June5, 2009

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Wendy A. Campbell
Administrative Law Judge