THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE BIAS, Jr.,
Grievant,

v. **Docket No. 2008-1520-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, George Bias, Jr., filed a grievance against his employer the West Virginia Department of Transportation/Division of Highways ("DOH"), on May 2, 2008. Grievant is grieving a written reprimand issued on or about April 15, 2008, contending the reprimand was issued without good cause. Grievant requested "to be made whole, including withdrawal of reprimand."

A hearing was held at level one on May 16, 2008, and the grievance was denied at that level on May 23, 2008. Grievant appealed to level two on May 27, 2008, and a mediation session was held on January 29, 2009. An Order of Unsuccessful Mediation was entered on January 30, 2009, and Grievant appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on May 14, 2009, in the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, UE Local 170, WV Public Workers Union and Respondent was represented by counsel Barbara Baxter, Esq., DOH, Legal Division. This case became mature for decision on August 31, 2009, the extended deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Respondent issued a written reprimand to Grievant for conduct it deemed inappropriate for an employee of the Division of Highways. Sleeping on the job, among other delineated offenses, is a duly identified and sanctionable violation of agency policy. *See* West Virginia Division of Highways Administrative Operating Procedures. Grievant denies culpability of forbidden behavior. Grievant acknowledges awaiting the arrival of co-workers in a prone like position, but denies he was asleep.

Grievant's actions were ill advised. Grievant is unequivocally on notice that this type of conduct is unacceptable. Nevertheless, in the circumstances of this grievance, it was not established by a preponderance of the evidence that Grievant was in violation of an agency directive, rule or regulation.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by DOH, Respondent, as a Transportation Worker 2, Equipment Operator in District 1. The number of years that Grievant has been employed by Respondent was not established in the record.

2. On March 20, 2008, a DOH vehicle, which Grievant and Adam Barker, a temporary employee, were in possession of, was observed parked off of WV Route 17 with a pair of feet sticking out the window.[1]

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[1] Grievant did not testify at either the level one or level three hearings. However, it is acknowledged that he and Adam Barker were in prone like positions (one on front seat, the other in the rear seat) of a DOH vehicle on March 20, 2008, awaiting the arrival of the work crew.

3. Larry Harper, Boone County Administrator,[2] a supervisory personnel of Respondent was made aware of the March 20, 2008 events by one or more DOH workers.

4. Form RL 544 is used by Respondent to issue written notice to an employee regarding conduct deemed inappropriate and in violation of applicable agency rules, regulations and codes of conduct.

5. Initially, Supervisor Harper was going to write Grievant up for sleeping during working hours. Sleeping on the job is a duly recognized and specified violation of agency policy. *See* West Virginia Division of Highways Administrative Operating Procedures. However, after a conversation(s) with Grievant, Grievant denied he was asleep and the wording of the written reprimand was revised.

6. It was Respondent's belief that after altering the proposed wording of the initial written reprimand that Grievant would sign the document acknowledging his actions in violation of appropriate DOH employee conduct. An example of the initial reprimand document was not entered into the record of this grievance.

7. Subsequent to revision, Respondent issued Grievant a written reprimand on or about April 15, 2008, for conduct reportedly in violation of Agency employee conduct policy.

8. Respondent did not issue a written reprimand to Adam Barker, the other employee in the DOH vehicle on March 20, 2008.[3]

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[2] Supervisor Larry Harper, who had been employed with Respondent for approximately fifteen years, was not available to testify at the level three hearing. Mr. Harper, has been diagnosed with and suffers from a serious debilitating medical condition. Supervisor Harper testified at the May 16, 2008, level one hearing but has since retired and is no longer an employee of Respondent.

[3] Subsequent to the events of this grievance, temporary employee Adam Barker was offered and accepted permanent employment with Respondent.

9. The written reprimand document issued to Grievant on or about April 15, 2008, in relevant part, stated:

> ON MARCH 20, 2008, YOU WERE DISCOVERED LYING IN THE BACK SEAT OF A STATE VEHICLE WHILE WAITING FOR A CREW AT LOW GAP. THIS TYPE OF CONDUCT WILL NOT BE TOLERATED. FURTHER VIOLATION OF THIS OR OF SIMILAR VIOLATIONS MAY RESULT IN FURTHER DISCIPLINARY ACTION BEING TAKEN INCLUDING DISMISSAL.

10. Steve Young, Maintenance Engineer, District 1 was present during one or more meetings with Grievant and Larry Harper, where Grievant acknowledges he and a then temporary employee were in prone like positions (one on the front seat, the other in the rear seat) of a DOH vehicle on March 20, 2008, awaiting the arrival of the work crew. Grievant strongly denied being asleep.

11. The April 15, 2008, disciplinary action form was coauthored by Steve Young, Maintenance Engineer, District 1 and Larry Harper, Boone County Administrator, both supervisory personnel of Respondent.[4] Despite the alteration in the verbiage of the written reprimand to state that Grievant was "lying" in the back seat instead of "sleeping," Grievant refused to sign the document. Level One, Hearing Transcript.

12. DOH employee Joshua Barker at the level three hearing denied reporting to Supervisor Harper that Grievant was sleeping in the cab of a DOH vehicle.[5]

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[4] At the level one hearing, Supervisor Harper testified that the reprimand was based on a report "that there was two of my workers laying down... in the crew cab." (Level one transcript p. 3). When asked who was the source of the report, Harper testified that it was 'Josh Barker,' a DOH employee (Level one transcript p. 4, also see p. 16) and later confirmed by then temporary employee Adam Barker. Supervisor Young was of the opinion that lying in a state vehicle with eyes closed "could be constituted as sleeping" and further that such behavior in the circumstances of this case created a safety hazard.

[5] Temporary employee Adam Barker is not related to witness Joshua Barker.

13. Neither Joshua Barker nor any other DOH worker reported that the temporary worker or Grievant was asleep on March 20, 2008. Any claim that Grievant was sleeping in the cab of the DOH vehicle on March 20, 2008, is speculative.

14. The April 15, 2008, written reprimand did not allege the cause(s) for disciplinary action taken was because Grievant was improperly parked in traffic,[6] insubordination and/or generally that Grievant was uncooperative as an employee.

15. The level one decision dated May 23, 2008 regarding the instant grievance cites the West Virginia Division of Highways Administrative Operating Procedures, Section II, Chapter 6, Part III-B-2 as applicable law and policy to sanction Grievant.

16. West Virginia Division of Highways Administrative Operating Procedures, Section II, Chapter 6, Part III-B-2, (Resp. Ex 2, pages 4-5) states as follows:

> Written Reprimand: Examples of poor performance or misconduct that may warrant written reprimand in response to a single performance issue or instance of misconduct include but are not limited to those for which the imposition of an oral reprimand would be warranted and the following:

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[6] At one point or another, during the course of these events, it was tentatively alleged that the DOH vehicle in discussion was not completely out of the flow of traffic, constituting a safety hazard. This allegation was not specified as a cause of action for the written reprimand. When an employee is being disciplined for misconduct, the disciplinary document should reasonably cite the specifics of the incident and the charges against the employee. *See* Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981); Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 160 W.Va. 762, 238 S.E.2d 842 (1977); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). While Respondent may initially have had the option to include a safety hazard violation as an actionable cause for disciplinary action, for one reason or another, Respondent did not pursue this cause of action. The positioning of the DOH vehicle as a safety hazard violation was not raised by the written reprimand given to Grievant. This charge was not included in the written reprimand, "and will not be considered by the undersigned as Grievant was never properly placed on notice that this was one of the charges against him. *Yates v. Civil Service Comm'n*, 154 W. Va. 696, 178 S.E.2d 778 (1971)." *Frisenda v. Div. of Corr.,* Docket No. 97-CORR-373 (Mar. 24, 1998).

a. refusal to work overtime;
b. failure to report for regular or overtime duty as required;
c. failure to follow major instructions;
d. damage or neglect to equipment, materials, or property;
e. safety violations;
f. leaving assigned work area without permission;
g. horseplay;
h. chargeable accidents;
i. sleeping on the job;
j. insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language, including but not limited to sexual harassment;
k. disclosure or distribution of State, employee, or other confidential data and information without proper authorization or cause and with significant potential harm or effect;
l. major purchasing card violations;
m. any similar performance issue or misconduct.

Discussion

As this grievance involves a disciplinary matter, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

I. CREDIBILITY

An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The undersigned Administrative Law Judge finds that DOH employee, Joshua Barker testified to pulling his truck up behind Grievant's parked vehicle on the day in question. He stated that Grievant's vehicle was off the road and was not blocking traffic.[7]

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[7] The positioning of the DOH vehicle as a safety hazard violation is not a litigated *charge* of this grievance. The Grievance Board has long held that elements or allegations of a grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

Further, in response to direct and cross examination, Mr. Barker indicated that Grievant did not appear to be sleeping. Employee Barker testified that Grievant had been sitting with his feet on the floor, laying on his side, his torso lying on the seat, and that Grievant "popped up" within seconds of witness Barker's arrival. (Testimony of J. Barker, level three hearing.) It is hard to comprehend how Mr. Barker could truly know where Grievant's feet were, if, as he testified, he never approached the vehicle. However, the positioning of Grievant's feet is not a significant or crucial fact. It is more unsettling and disturbing that employee Joshua Barker testified that he never spoke to Supervisor Harper about the incident, but that Mr. Harper had merely overheard them [co-workers] talking in the garage break-room. This testimony tends to create a conflict of information between Supervisor Harper's level one testimony and witness Barker's testimony at level three.

Supervisor Larry Harper, who had been employed with Respondent for approximately fifteen years, was not available to testify at the level three hearing, thus the undersigned did not have the opportunity to observe his demeanor and/or attitude with regard to the present grievance. Supervisor Harper's testimony at level one was not concise in regard to several details of his investigation, but he did identify that certain information was presented to him by "Josh Barker," and he confirmed other facts by questioning then temporary employee Adam Barker.[8] It is conceivable that Supervisor Harper transposed or misstated what information was supplied by which employee. But,

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[8] The majority of the information presented by Supervisor Harper's testimony is verified by collaborating evidence of record including, but not limited to, the testimony of Steve Young, Stefen White, Anthony Carovillano and uncontested facts. However, it is not established to any degree of certainty as to how Supervisor Harper first became aware of the events of March 20, 2008. *See* Harper level one testimony, pp. 3-5, it was reported to Supervisor Harper that two of his workers were laying down in the crew cab.

it is perplexing how one might attribute facts to a conversation an alleged participant testifies never took place. Thus, other than it was allegedly reported to him by one or more of his workers, it is not clear how Supervisor Harper *first* became aware of the events of March 20, 2008.

At the level three hearing, witness Joshua Barker's demeanor was confident and sure. He understood the importance of the information he was conveying. His attitude during his testimony tended to indicate honesty and fostered reliance. He was on site to witness the sequence and timing of events. While witness J. Barker is a co-worker of Grievant's, he also stated he respected and considered former Supervisor Harper a friend. Witness Barker did not demonstrate any abnormal animosity toward Respondent, his employer. Several elements of his testimony were his perception of events, but his recollection and explanation of facts were consistent and plausible. Notwithstanding his *sua sponte* statements, conveniently presented as explanation(s) for others behavior, bias is not established on the part of the witness for or against one party or another. This Administrative Law Judge (ALJ) finds witness Joshua Barker's statements to be credible.[9] No other first-hand witness to the events of March 20, 2008, testified under oath during the course of this grievance.

II. Merits

While much to do has been made regarding the wording of the April 15, 2008 written reprimand, alleging "lying" in the cab versus "sleeping" on the job, Grievant tends to ignore

[9] Just as the undersigned recognized the possibility of inadvertent error on the part of Supervisor Harper, it is noted that the positioning of Grievant and the temporary employee is converse in Joshua Barker's testimony.

such fundamental considerations as context and professionalism that appears to be an indirect focal point of Respondent (public perception of DOH workers and work ethics). It is recognized that Respondent does not encourage its employees to lie down while being compensated for an honest day's labor.[10] And further, Grievant needs to acknowledge the inherent authority of an employer to control and direct the work activity of an employee. Nevertheless, this ALJ is not aware of, nor has Respondent identified, any policy or procedure stipulating the position in which employees are to await the arrival of essential personnel and/or equipment.

Supervisory personnel of Respondent strongly believed that Grievant was asleep on March 20, 2008, but lacking sufficient evidence to prove this allegation, responsible individuals met with Grievant (more than once).[11] Respondent mistakenly believed that, after altering the proposed wording of the initial written reprimand, Grievant would sign the document acknowledging his actions were in violation of appropriate DOH employee

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[10] Anthony Carovillano, District Manager for District One, testified that there has been a verbal directive from the Secretary of Transportation providing that anytime workers are not engaged in the activity that they were sent to do that they must stay busy by doing other things, such as litter pick up, and attempt to unclog culverts. However, District Manager Carovillano also noted that " it sounds like that directive is either (a) being ignored or (b) did not trickle all the way down to the employees with the emphasis that the Secretary has conveyed to the upper level managers." Further he opined that "Employees are instructed to use common sense and to be safe at all times." *See* Level one transcript pp. 26-28.

[11] District Manager Carovillano was adamantly assured by Supervisor Harper that Grievant was asleep in the DOH vehicle. Level one transcript pp. 25-27. Later, after authorization was given to proceed with disciplinary action, it became readily apparent that the sleeping allegation could not be established as fact. *See* Finding of Facts 5-7, 10-11, and 13. The option of successfully charging Grievant with alternative agency infraction(s) was considered, e.g., safety hazard. A mid-managerial decision was made to alter the disciplinary document. Ultimately, only the incontrovertible information of Grievant's admission was denoted on the written reprimand.

conduct. Paraphrasing Respondent's Counsel, "it is reasonable to assume that everyone employed by Highways realizes that lying down in a state vehicle on the side of the road during work hours violates policy and the trust that administrators place on employees to not just appear to be productive but to actually be productive." Notwithstanding these beliefs, Grievant did not acquiesce to culpability.

It is hard to accept that Grievant truly believed his actions were proper conduct.[12] However, the undersigned is mindful of the lack of a penalty employed by Respondent toward the other employee guilty of the same or similar conduct, and the incongruity with which employees were advised of prohibitions against the conduct involved.[13]

In terms of discipline, the written warning imposed is not necessarily a severe sanction, it tends to reenforce what Respondent professes to be understood by all employees, that lying down [in state vehicles] during work hours will not be tolerated. "Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations,

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[12] "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). Grievant's representative highlighted that Grievant was given a written reprimand while the other employee in the DOH vehicle was subsequently hired for a permanent position with the agency.

[13] Any verbal directive from the Secretary of Transportation applicable to the circumstances of this case should be uniformly enforced and made known to all employees at all levels of the Division of Highways.

and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). Yet, regardless of the fact that Respondent did not "throw the book" at Grievant in terms of discipline for the incident, the April 15, 2008, reprimand does not identify what, if any, agency rule or regulation Grievant is guilty of violating.

A verbal directive from the Secretary of Transportation, providing that anytime workers are not engaged in the activity that they were sent to do, that they must stay busy by doing other things, was not proven to be uniformly enforced and/or communicated to all employees at all levels of the Division of Highways.

No evidence of record established nor was it ever credibly reported that Grievant was asleep on March 20, 2008. Any claim that Grievant was sleeping in the cab of the DOH vehicle is speculative, and in direct dispute of testimony of record. West Virginia Division of Highways Administrative Operating Procedures, Section II, Chapter 6, Part III-B-2, provides examples of poor performance or misconduct that warrant a written reprimand. Among several delineated offenses, is the catch-all provision, "any similar performance issue or misconduct." It was not proffered nor presented as evidence that the mid-managerial personnel of DOH involved with this reprimand, were interpreting paragraph m of the West Virginia Division of Highways Administrative Operating Procedures. *See* Finding of Facts and level one testimony. Respondent's, after the fact, assertion that Grievant, by his own admission, is guilty of this infraction is not persuasive. Respondent did not meet its burden that Grievant is culpable of a forbidden act.

In the circumstances of this case, Respondent did not demonstrate, by a preponderance of the evidence, that Grievant violated an identifiable agency rule or regulation. This is not to say Grievant's conduct was proper. Grievant's actions were ill advised, an example of poor judgement and totally unprofessional. Grievant's conduct, when observed by the general public, fosters a negative image of the hard-working Division of Highways employee. Grievant is unequivocally on notice that this type of conduct is unacceptable. This ALJ is unaware of, and Respondent has failed to cite, an applicable policy, rule or procedure stipulating the position in which employees are to await the arrival of essential personnel and/or equipment. In the circumstances of this grievance, it was not established by a preponderance of the evidence that Grievant was in violation of any enforced agency rule or regulation.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent failed to prove by a preponderance of the evidence that Grievant violated West Virginia Division of Highways Administrative Operating Procedures, Section II, Chapter 6, Part III-B-2.

3. Grievant's actions were ill advised. However, in the circumstances of this grievance, it was not established by a preponderance of the evidence that Grievant was in violation of an agency directive, rule or regulation.

Accordingly, this grievance is **GRANTED**. The written reprimand issued to Grievant on or about April 15, 2008 is **ORDERED** to be removed from his personnel file. No other relief is granted by this Order.

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: September 22, 2009

Landon R. Brown
Administrative Law Judge