THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARK BAKER,
Grievant,

v. **DOCKET NO. 2008-1659-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Mark Baker, on May 27, 2008, after he was suspended for 15 days without pay. His statement of grievance reads, "[r]eceived a 15 day suspension without just cause." The relief sought by Grievant is "[r]einstatement of all time lost, discipline removed from record, and to be made whole."

A level three hearing was held before the undersigned Administrative Law Judge on January 22, 2009, in the Grievance Board's Westover office. Grievant was represented by counsel, Matthew R. Oliver, Vital and Vital, L.C., and Respondent was represented by Jennifer Francis Alkire, Attorney, Legal Division of the Division of Highways. This matter became mature for decision at the conclusion of the hearing, as the parties declined to submit Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a supervisor, was suspended for 15 days without pay, because he sent an employee to treat a street, within the city limits of the City of Martinsburg, so that I-81 supervisor Jimmy Kees could go get another employee, Roberta Michael, and bring her to work. This street was not within any right of way owned and maintained by the Division of Highways, which was considered "off system," and it was a violation of Respondent's procedures to treat this city street. Grievant was aware that his action was a violation of procedures, but argued his action should be excused because it was common practice to help other employees get to work in adverse weather conditions. Grievant demonstrated that in other instances roadways that were within Respondent's rights of way had been treated in order to get essential personnel to work, and that another employee who lived "off system" had been picked up at her home in a state vehicle by another employee when she could not get to work, at the direction of the Berkeley County Supervisor. Grievant also demonstrated that he was not the one who decided Ms. Michael needed to come to work. However, Grievant did not have the authority to make the decision to treat an off-system road, and he knew this. Grievant did not demonstrate that the penalty imposed was clearly excessive.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant is employed by the Department of Transportation/Division of Highways ("DOH"), as a Transportation Crew Supervisor 1 in Berkeley County.

2. On February 13, 2008, a winter storm hit Berkeley County, creating hazardous driving conditions for a short period of time. For DOH, this was an SRIC event (snow removal and ice conditions).

3. Keeping Interstate 81 ("I-81") clear is a top priority during SRIC. Those employed by DOH who are assigned to maintain I-81 are in a separate organization from the rest of the Berkeley County DOH organization. Jimmy Kees is the I-81 supervisor. Grievant was Mr. Kees' supervisor before he was placed in the I-81 supervisor position, but Grievant no longer supervises Mr. Kees.

4. Roberta Michael is an Office Assistant employed by DOH in Berkeley County, and assigned to the I-81 organization. On the morning of February 13, 2008, she called in to the office to report that she could not get to work, because the street she lived on, in the City of Martinsburg, Tennessee Avenue, was covered with ice. She spoke with Grievant, and he told her she would have to talk to her supervisor, Mr. Kees.

5. Shortly thereafter, Mr. Kees asked Grievant if he had a truck available that could salt Tennessee Avenue so he could go get Ms. Michael. The County Supervisor, Darrell Parsons, had not yet reported to work.

6. This same morning, two Equipment Operators for DOH in Berkeley County, who were riding to work together, slid in the ditch on their way to work, on County Route 30. Ronnie Allen, the Foreman or day shift supervisor, told Victor DeHaven, an Equipment Operator, to treat Route 30 so these two employees could get to work, because they were needed during SRIC.

7. Before Mr. DeHaven could depart to treat Route 30, Grievant told him to treat Tennessee Avenue in front of Ms. Michael's house, before he treated Route 30. Mr.

DeHaven would be passing by Tennessee Avenue on his way to treat Route 30. Mr. DeHaven did as he was instructed.

8. Route 30 is a heavily traveled road.

9. Tennessee Avenue is a city street. DOH is not responsible for maintenance of Tennessee Avenue. It is considered "off-system," that is, outside the state's rights of way. DOH employees may not use state resources to treat roads that are off-system, except in emergency situations, that is, a declared state of emergency, or a life-threatening situation. There is a written procedure in place for obtaining proper authorization to clear an off-system road, and Grievant was aware of this procedure. Grievant is not authorized to make the decision to work off-system. Grievant did not attempt to obtain the necessary approvals to clear this off-system road, as is required by the written procedure.

10. Grievant was aware that Tennessee Avenue is off-system, and that off-system roads are not to be treated except in emergency situations.

11. After Tennessee Avenue was treated, Mr. Kees went to pick Ms. Michael up at her home to bring her to work, in a state vehicle. Mr. Kees received a verbal reprimand for doing so.

12. By letter dated May 2, 2008, Grievant was advised by Jeff Black, Director, Human Resources Division, that he was being suspended for 15 working days without pay for:

> misuse of state issued equipment and resources. You have also been previously suspended for similar conduct. More specifically:
>
> On February 13, 2008 you sent an employee under your supervision, in a state truck, to treat the roadway for ice conditions within the domain of the City of Martinsburg. The roadway treated in this instance is not part of the State Highway System. You admitted that at the time you dispatched the

truck that you knew that performing work off the State Highway System is a violation of the Division of Highways policy.

13. In February 2007, Grievant was suspended for three days without pay for misuse of state equipment and resources.

14. About seven years ago, Ronnie Allen was directed by the Berkeley County Supervisor to go pick up Nancy Minnich, an Office Assistant in Berkeley County, because she could not get to work due to road conditions. Ms. Minnich lives off-system. Mr. Allen picked up Ms. Minnich at her home in a state owned vehicle, and took her to work. Mr. Allen was not disciplined for this.

15. Virgil Evans, a Transportation Worker 2, was directed by his supervisor on one occasion to plow Joanne Pitzer's driveway, so she would have a place to park her car. Ms. Pitzer is an Equipment Operator. Mr. Evans was not disciplined for this.[1]

16. Berkeley County DOH Equipment Operators give each other rides to work, sometimes in state owned vehicles, when the weather is bad. Berkeley County DOH employees have also been dispatched by the county supervisor in the past to treat particular state roads so that Equipment Operators could get to work during SRIC. Equipment Operators are essential employees during SRIC.

---

[1] Two witnesses testified that a co-worker, Henry Walters, had been upset because the Berkeley County Supervisor, Darrell Parsons, had chewed him out when he discovered Mr. Walters had used state equipment to plow his own road. Neither witness had actually seen Mr. Walters do this, nor did they witness Mr. Parsons' discussion with Mr. Walters. Mr. Parsons testified he was not aware of any of this happening. The undersigned will not give this hearsay any weight.

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. *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 and 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*.

Grievant was suspended for misuse of state equipment and resources, that is, sending an employee to treat a road that was off-system. Grievant did not dispute that he sent Mr. DeHaven to treat a city street which was off-system. Nor did he dispute that he knew this was in violation of Respondent's policy. Rather, Grievant argued that Mr. Kees had asked him to get the street cleared, and that it was the practice in Berkeley County for the employees to help each other get to work, and he was just helping a fellow employee get to work. Respondent pointed out that Grievant made the decision to have the city street cleared. It also argued that there is a difference in helping essential personnel get to work during SRIC to relieve a shift of equipment operators, and helping an Office Assistant get to work. Likewise, there is a difference between clearing a state maintained road, which will be cleared eventually anyway to get essential personnel to work, and clearing a street that is off-system, and not the responsibility of DOH.

Leslie Staggers, DOH's Administrative Services Manager for District Five, which includes Berkeley County, conducted an investigation of this incident. Ms. Staggers testified as to what she was told by those she interviewed. She did not indicate whether she had any of those she interviewed prepare and/or sign written statements. She did not interview Glenn Oden, an Equipment Operator who was in the office when Ms. Michael called. Mr. Kees and Ms. Michael were not called to testify. Grievant also did not testify.

Ms. Staggers testified that Ms. Michael told her that when she called the office on February 13, 2008, she expected that someone would come and get her, and that they did this all the time. Ms. Staggers further stated that Ms. Michael told her the Grievant said, "he would take care of it." Ms. Staggers did not state whether Ms. Michael told her that she had also talked to Mr. Kees. Ms. Staggers testified that Mr. Kees told her that Grievant had called him at home and told him to pick Ms. Michael up after he sent the truck through. Ms. Staggers also testified that Grievant had told her it was his decision to send the truck to treat Tennessee Avenue. Ms. Staggers concluded that Grievant had made the decision to have Ms. Michael picked up, and to have her street treated, and told Mr. Kees to go pick Ms. Michael up. Ms. Staggers reported her conclusions to her superiors, who relied upon this information in making the decisions regarding disciplining Mr. Kees and Grievant.

Only one eyewitness to any of the conversations which occurred between Grievant and Ms. Michael, and Grievant and Mr. Kees, was called to testify by either party: Glenn Oden. Mr. Oden stated that he was in the office when Ms. Michael called, and he was certain Mr. Kees was also in the office at that time. Mr. Oden stated he heard Grievant say to someone on the telephone, "you'd have to talk to Jimmy," and then a few minutes later

Mr. Kees came out and asked Grievant if he could send out a truck to treat Ms. Michael's street so he could go get her.

Ms. Staggers' recollection of what she was told is hearsay. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[2] *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

Ms. Staggers relayed in her testimony her own interpretation of what she was told. Written statements attested to by Ms. Michael and Mr. Kees, and given in the course of the investigation, would have added more weight to this hearsay. Mr. Oden's first hand account of what he heard is entitled to greater weight than hearsay. Respondent did not offer any evidence to discredit Mr. Oden. The undersigned must conclude that Mr. Kees made the decision to go pick up Ms. Michael, and he asked Grievant if he could send a

---

[2]The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Dep't of Justice*, 5 MSBP 150 (1981).

truck to treat Tennessee Avenue. Even accepting that this action was taken because Mr. Kees asked if it could be done, however, Mr. Kees was not directing Grievant to do this. Grievant made the decision to send a truck to treat this street, knowing it was off-system, and he was not to use state resources on city streets without proper authorization.

Grievant believed he should not have been suspended for his decision, because it was common practice to help other employees get to work . "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).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. 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, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *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)." *Meadows, supra.*

Respondent noted that Grievant is a supervisor, responsible for setting an example, and that fact played a large part in the decision to suspend Grievant for 15 days. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988).

Respondent also noted that Grievant had previously been suspended for another instance of improper use of state resources. Mr. Black testified that he believed a 15 day suspension was appropriate because this was a serious offense, and he believed they needed to get Grievant's attention in order to correct this behavior.

Certainly, state employees may not use state resources for their personal gain, or for that of other employees. In this instance, DOH was in an SRIC situation, and Mr. Kees asked for help in getting Ms. Michael to work. Grievant did not make the decision to treat Tennessee Avenue in order to provide personal gain to himself or another employee. Mr. Kees wanted Ms. Michael at work, and Grievant was trying to get her to work to help out during SRIC. Further, Grievant was aware of other instances when roads had been treated in order to get an employee to work. Granted, almost all of these instances involved roads that were DOH's responsibility. Grievant makes a good argument that he was faced with

conflicting goals and practices; however, Grievant did not testify to explain why he took this action. Grievant knew that *he* did not have the authority to make this decision. He knew that he needed to get approval to treat this city street. While the undersigned is somewhat swayed by the circumstances here, the bottom line is that Grievant took it upon himself to make a decision he had no authority to make, and violated DOH's procedure for utilizing state resources on off-system roads.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent proved Grievant directed another employee to treat a road which was off-system, and that he knew this was not allowed by DOH procedure, except in cases of emergency, with proper approval. Grievant knew he did not have the authority to make this decision.

3. "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).

4. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. 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, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. Grievant knowingly and intentionally exceeded his authority. Grievant did not demonstrate that the penalty imposed was clearly excessive.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

_____

BRENDA L. GOULD
Administrative Law Judge

Date: February 18, 2009