THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLEN LEE COOK,
Grievant,

v. **Docket No. 2010-0336-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Glen Cook, filed this grievance against his employer, the Division of Natural Resources, on September 17, 2009, challenging a ten-day suspension without pay. His Statement of Grievance reads as follows:

> Receiving a ten (10) day suspension, without pay, for being late for a detail and alleged gross insubordination for assisting Hardy County Sheriff's Deputies, then securing a crime scene which held a murder victim, at the direction of the incident Commander and maintaining the security and integrity of the crime scene until I was relieved by the incident Commander; then the following day, upon receiving a verbal reprimand for the above, replying to a comment made by my supervisor during the reprimand; in violation of General Orders Numbers 1-5, 1-9, 1-13, 1-14, 1-18, 1-19, 1-20, 1-21 and 13, the Fair Labor Standards Act, Federal and State Workplace Harassment Laws, Federal and State Workplace Bullying Laws, Federal and State laws relating to creating a hostile work environment and Division of Personnel Policies and Guidelines.

His relief sought reads as follows:

> Rescind the ten (10) day unpaid suspension; reimburse the Grievant for the loss of salary, plus interest; restore all the Grievant's employee rights, seniority, leave and employee benefits, plus any cost the employee incurred to maintain family health insurance coverage and life insurance coverage while on the suspension to the level as if the suspension had not occurred, and any other costs, including but not limited to attorney fees and costs, incurred as a result of these actions taken by the employer; the Respondent cease the continued harassment, discrimination and reprisals against the Grievant; disciplinary action, sanctions, compensatory and punitive damages against the Respondent, the Division of Natural Resources and any employees that aided the employer in the harassment, reprisals and

> discrimination against the Grievant; cause the employer to establish a disciplinary policy that is in compliance with Division of Personnel Guidelines, that is clear, unbiased, and non-discriminatory.

As this grievance concerned a suspension without pay, Grievant filed directly to level three following his suspension. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was conducted before the undersigned Administrative Law Judge on December 11, 2009, at the Randolph County Senior Center, Elkins, West Virginia. Grievant appeared in person and by his counsel, John F. Dascoli. Respondent appeared by its counsel, William R. Valentino. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 9, 2010.

Synopsis

Grievant received a ten-day suspension for insubordination. Respondent demonstrated that Grievant failed to report to a pre-assigned special detail, causing the cancellation of that special detail. Respondent proved Grievant's conduct constituted insubordination, and Grievant did not offer sufficient evidence in support of mitigating the suspension. This grievance is denied.

The following findings of facts are based upon the record developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Natural Resources ("DNR") Law Enforcement Section as a Conservation Officer. He is assigned to Hardy County, West Virginia.

2. Conservation Officers are employed to enforce the state wildlife laws which are found in W. VA. CODE § 20-1-1, *et seq*.

3. On June 13, 2009, the DNR had established a special detail from 4:00 p.m. to 12:00 p.m. designed to identify and apprehend people responsible for breaking and entering parked vehicles at the DNR public access sites at the South Branch of the Potomac River.

4. The detail was the product of advanced planning, and was a coordinated effort involving two officers per eight hour shift. One officer was to remain concealed and attempt to identify the subjects, and a second officer was to act as a chase vehicle to apprehend the suspects once identified. Grievant was informed through a memorandum of this detail. Cpl. David Long arrived on the scene and was in position by 4:00 p.m. on June 13, 2009.

5. At approximately 1:30 p.m., prior to the beginning of Grievant's scheduled shift for this detail, Grievant responded to scanner traffic of the sighting of a person wanted for murder. Shortly thereafter, the murder victim was discovered in a local residence occupied by the murder suspect, and multiple units replied to the scene.

6. Grievant radioed the 911 dispatch to determine if he could provide assistance and was told he could participate; however, he was not specifically requested to assist.

7. By 2:00 p.m. the murder suspect had been apprehended and was being transported by the Hardy County Sheriff's Department to the regional jail.

8. Thereafter, Grievant assisted other agencies in locating the dwelling occupied by the murder suspect. Grievant, Deputy Bryan Ward, and West Virginia State Troopers Hartman and Sherman entered the dwelling and discovered the body of a deceased woman, the victim of the murder suspect who had been captured.

9. A limited search of the home was conducted. Deputy Ward then left the scene to obtain a search warrant from the magistrate on duty. Deputy Ward requested, but did not order, Grievant to stay at the scene to secure the area.

10. Deputy Ward requested that the Troopers interview neighbors regarding any information they might have that would aid the murder investigation.

11. At approximately 3:30 p.m., Grievant requested the Hardy County 911 dispatcher contact Grievant's direct supervisor, Sargent Sam Brick, to advise him that he was on a crime scene and unavailable for his 4:00 p.m. special detail. Sgt. Brick asked whether the suspect had been apprehended, to which the 911 dispatcher replied that he had been arrested. Sgt. Brick then requested that the 911 dispatcher advise Grievant that he needed to travel to his detail for the DNR. Grievant only responded that the crime scene was secure and that he was holding it.

12. Grievant did not notify Deputy Ward that he had other DNR duties to attend, and did not request one of the Troopers on the site to secure the scene. Grievant departed the crime scene at 5:00 p.m.

13. DNR's policy is for officers to limit, to reasonable extent, their enforcement powers to game and fish laws, and Grievant has been counseled on many occasions regarding his enforcement of laws outside W. VA. CODE § 20-1-1, *et seq*. Grievant has also been counseled on numerous occasions regarding working too many hours in a given work day.

14. Prior to traveling to his special detail location, Grievant returned home to change his clothes and eat a meal. While at home, Grievant was told by his wife that a call

had come to his home regarding an injured bird. Grievant then traveled some distance to retrieve the injured bird.

15. At almost 7:00 p.m., Grievant contacted Sgt. Brick who advised that the special assignment had been canceled.

16. On the following date, Grievant met with Sgt. Brick to discuss the cancellation of the special detail. Upon questioning Grievant's failure to follow his orders, Grievant responded that Sgt. Brick would have to write him up inasmuch as Grievant needed no excuse for his failure to report.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent asserts that it has proven by a preponderance of the evidence the allegations of insubordination; the ten-day suspension was justified; and no mitigation of punishment should be imposed. Grievant counters that Respondent has not established by a preponderance of the evidence that the Grievant willfully failed or refused to obey reasonable orders of a superior and certainly has not established that Grievant engaged in a flagrant or willful disregard for implied directions of an employer, and therefore, a ten-day suspension is not an appropriate disciplinary response in regard to the facts and circumstances of this grievance.[1]

Grievant has been charged with insubordination regarding the incidents surrounding the June 13, 2009 DNR special detail and his remarks to his supervisor when questioned about his failure to report to the special detail sight. Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish 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. Higher Educ. Interim*

---

[1]No evidence was offered to prove any elements of the assertions that a violation of General Orders had occurred, that there was a violation of the Fair Labor Standards Act, Federal and State Workplace Harassment Laws, Federal and State Workplace Bullying Laws, and Federal and State laws relating to creating a hostile work environment. Those assertions in the original Statement of Grievance need not be addressed. The Grievance Board has long held that elements or allegations of the 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).

Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

Grievant does not dispute the events that occurred on June 13, 2009, and does not deny that he told his supervisor to write him up rather than provide some explanation as to his whereabouts. Grievant seems to believe there is no higher calling than his duty to the people of West Virginia to act as a law enforcement officer. Grievant continually and defiantly argues that duty outweighs his duty to his employer. In reality, Grievant's salary is paid in large part from fish and game law revenues as contained in W. VA. CODE § 20-1-1, *et seq*. Grievant continuously asserts that he is a police officer first and a DNR employee second. In any event, Grievant's supervisors have counseled him on numerous occasions regarding his misplaced enforcement of laws outside W. VA. CODE § 20-1-1, *et seq*.

After due consideration of the extensive testimony at level three, as well as the documentary evidence produced, the undersigned is not persuaded that Grievant's defiant

actions should somehow be excused in this case. On June 13, 2009, Grievant wilfully chose not to appear at his assigned duty for the DNR at 4:00 p.m. This duty was lawful and reasonable, and Grievant offered no reason which would excuse his failure to comply. Grievant volunteered to assist the other agencies in the capture of the murder suspect. Even after the suspect had been captured and the victim had been located, Grievant chose to remain on the crime scene and assist the other agencies. He was not ordered to do so by either the State Troopers or Deputy Ward.

The record of this grievance is clear that after Grievant chose to leave the murder crime scene, he took a great deal of time to travel to his home, eat a meal, travel to pick up an injured bird, and then call to make sure the detail was still active. After Grievant was notified the special detail had been canceled, the record reveals that Grievant returned to the murder crime scene to finish his eight-hour shift. As Respondent aptly points out, this demonstrates a clear indication that Grievant simply wanted to be at the murder crime scene and did not want to participate in his mandatory duty for the DNR.

On June 14, 2009, Grievant was instructed by his superior officer to explain the events of the previous day. Grievant met with Sgt. Brick to discuss the cancellation of the special detail. Upon questioning Grievant's failure to follow his orders, Grievant responded to the effect, "you will just have to write me up." Respondent's Exhibit 2. There is no question in the instant case that Respondent proved the allegations against Grievant. Grievant's conduct in this grievance represented classic insubordination to his supervisor. Hence, the Respondent has met its burden of proving the Grievant committed the alleged acts of insubordination.

The central theme to Grievant's proposals is that the ten-day suspension is not an appropriate disciplinary response to his conduct. The argument that discipline is 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).

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).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). When 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).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the suspension imposed was disproportionate to the acts of insubordination. There is no dispute in the grievance that Grievant left the murder crime scene at 5:00 p.m., but by 7:00 p.m., and some three hours after his DNR duty was to commence, he had not appeared at the sight of the special assignment. Not only did Grievant cause the cancellation of the special assignment, he returned to assist the Hardy County Sheriff's Department at the murder crime scene.

Grievant admitted that he wilfully failed to appear for his special assignment and instructed his supervisor to write him up for that failure to comply with an order. It should be noted that Grievant's captain recommended a thirty-day suspension without pay to give Grievant time to reassess his duty to the agency. In addition, Captain Schollar recommended a psychological evaluation be conducted prior to reinstatement to determine Grievant's fitness for duty. Director Jezioro, upon his review of the facts and circumstances of the matter with Colonel Murphy, concluded that a ten-day suspension was the appropriate punishment.

Grievant does not dispute that he has been counseled on many occasions about spending too much time assisting other agencies with work outside the scope of his enforcement duties. Grievant refused to perform a lawful directive by his supervisor and demonstrated disrespect to his supervisor when questioned about the incident. Under the circumstances presented, the undersigned cannot find any abuse of Respondent's

discretion. A ten-day suspension is not "so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." *Overbee*, *supra*.

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. 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).

2. In order to establish 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. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. "[M]itigation 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).

4. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate, in that he knowingly and willfully violated his employer's directive to participate in a special assignment on June 13, 2009.

5. Grievant has failed to establish that the ten-day suspension imposed for his conduct was disproportionate to the offense committed.

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: April 27, 2010

_____

Ronald L. Reece
Administrative Law Judge