WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN WILLIAMS,
Grievant,

v. **Docket No. 2010-0545-DOT**

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

DECISION

Grievant John Williams filed a grievance against his employer, Division of Highways ("DOH"), on October 29, 2009, alleging, "Termination was refusal of unsafe uniform." For relief, Grievant seeks, "To be made whole, including back pay, tenure, benefits & interest."

This grievance was filed directly to level three as permitted by W. VA. CODE § 6C-2-4(a)(4). A hearing was held at the Grievance Board's Charleston office on March 17, 2010. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America (UE), and Respondent was represented by Robert Miller, Esq. This case became mature on June 1, 2010, upon the parties' submissions of findings of facts and conclusions of law.

Synopsis

Respondent terminated Grievant for insubordination, destruction of state property, and refusal to report to work wearing the required state issued uniform items. Respondent asserts Grievant refused to wear the uniform issued by the state, thereby constituting insubordination. Respondent further avers Grievant took a cutting torch and burned a portion of a uniform t-shirt issued to him and also removed the top reflective stripe on the state issued uniform pants.

Grievant argues the uniform material, 100% polyester, is unsafe. Grievant asserts he burned the sleeve of the t-shirt issued to him to illustrate how polyester melts under heat. Grievant avers the top reflective stripe was not in compliance with Occupational Safety and Health Administration (OSHA) standards.

Respondent has met its burden of proving Grievant was insubordinate by refusing to report to work wearing the required state issued uniform and destroyed state property. Therefore, this grievance is denied.

Findings of Fact

1. Grievant was employed as a Transportation Worker at the DOH's Barboursville facility.

2. Effective July 1, 2009, Respondent issued a uniform policy mandating that employees classified as Transportation Services Supervisor; Construction Superintendent; Transportation Workers 1, 2, 3, and 4 -Bridge, Craft Worker, Equipment Operator, Laborer and Welder; Transportation Crew Supervisor 1 and 2; and Bridge Safety Inspectors 1, 2, 3, and 4 wear uniforms. These classifications were selected for uniforms because the workers spend more than 51% of their work time in traffic conditions.

3. The uniform policy specifically states that, "Employees covered by this policy who fail to comply with its requirements will be subject to disciplinary action." Respondent's Exhibit 1.

4. On May 29, 2009, prior to the effective date of the uniform policy, Respondent modified the uniforms issued to those employees in the Welder classification to include two sets of fire resistant coveralls. Management at the district level was responsible for identifying these employees.

5. The purpose of providing employees with uniforms was for their safety.

6. The uniform t-shirt is a high visibility yellow. Only 100% polyester material can hold that color for any length of time.

7. The uniforms arrived at DOH headquarters on August 28, 2009. All employees who had been issued uniforms were to begin wearing them to work on September 1, 2009.

8. On September 1, 2009, Grievant reported for work wearing the state issued uniform pants with the top reflector stripe removed, a personal t-shirt, and a jacket. Grievant was carrying his state issued t-shirt with a hole in the sleeve from a torch.

9. While off duty, Grievant burned the uniform t-shirt with a cutting torch to attempt to show the danger of the material.

10. On September 1, 2009, Grievant was told to go home and return in proper uniform attire. Grievant told his supervisor, David Wayne Harper, he did not believe the uniform was safe and he would not wear it. He then called Supervisor Harper a coward and informed him that Grievant would return each day without a uniform until he was fired.

11. Supervisor Harper explained to Grievant that any work being done with a cutting torch was done by mechanics and was not part of Grievant's job duties/responsibilities.

12. Grievant returned to work on September 2, 2009, wearing blue jeans, t-shirt, and a jacket, none of which were state issued uniform items. Grievant said he would return each day out of uniform until he was fired.

13. Supervisor Harper began paperwork recommending Grievant be suspended for five days without pay for insubordination. Supervisor Harper and Grievant reviewed this paperwork, and Grievant refused to sign it on September 3, 2009.

14. On September 3, 2009, Grievant reported for work wearing blue jeans, t-shirt, and a jacket, none of which were state issued uniform items. Once again, Grievant stated he would return each day out of uniform until he was fired.

15. Supervisor Harper told Grievant to go home without pay and not return until such time as he could return in proper uniform.

16. Supervisor Harper began paperwork recommending Grievant be suspended for ten days without pay for insubordination. Supervisor Harper and Grievant reviewed this paperwork on September 4, 2009.

17. On September 4, 2009, Grievant reported for work wearing blue jeans, and a t-shirt, none of which were state issued uniform items. Grievant was given an opportunity to go home and return to work wearing the uniform. Grievant was told that refusal to return to work on September 4, 2009, would result in a recommendation for Grievant's dismissal. Grievant left work and did not return.

18. Supervisor Harper began the paperwork recommending Grievant's dismissal.

19. Grievant appeared for work on September 8, 2009, out of uniform. He was once again sent home without pay. Grievant did not return to work after that date.

20. Grievant met with Supervisor Harper and Keith Chapman, District Manager, on September 18, 2009, to discuss the paperwork recommending Grievant's dismissal.

21. Supervisor Harper can only recommend an employee be dismissed. This recommendation is not final until it is reviewed by the Director of Human Resources and DOH's legal division.

22. On December 1, 2009, Grievant received a letter from Jeff Black, Director of Human Resources, terminating Grievant's employment due to repeated insubordination.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* 1220 (8th ed. 2007); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

Insubordination has been 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 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 that he refused to wear the uniform as required by Respondent. Grievant also does not dispute that during his off duty hours he burned the state issued uniform t-shirt with a cutting torch. Grievant asserts he did these things because the uniforms were not safe, and he attempted to show Respondent the danger.

When looking at the elements of insubordination, it is clear that Grievant refused to obey a rule by refusing to wear the state issued uniform to work. The questions then become whether this refusal was wilful and whether the policy requiring employees to wear uniforms reasonable.

"[F]or 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." *Id*. When one acts with willfulness there is purpose or design, actual or constructive. *Kelly v. Checker White Cab*, 131 W. Va. 816, 823, 50 S.E.2d 888, 893 (1948). Willfulness is not mere inattention

or heedlessness. *Id*. Willfulness implies "a conscious purpose to do wrong. Doing a thing knowingly and willfully implies not only a knowledge of the thing done, but a determination to do it with evil purpose or motive." *United States v. Ramey*, 336 F.2d 512, 515 (4th Cir. 1964).

Grievant asserts he refused to wear the uniform because it was not safe. Respondent argues Grievant was wilful in disobeying the direct order. When looking at Grievant's behavior, it is clear that he was wilful. Grievant did not attempt to resolve his concern through the proper channels, such as wearing the uniform and filing a grievance. Instead, he came to work the first day dressed in the uniform pants with the top reflector stripe missing, carrying the state issued t-shirt with a hole in the arm where he burned it with a cutting torch. This grand gesture was clearly meant to send a statement to management. Grievant then continued to show up for work without wearing any portion of the state issued uniform.

When taking his actions in conjunction with his words, it is clear Grievant was acting in a wilful manner. The first day, Grievant called Supervisor Harper a coward, and said he would continue to show up out of uniform until he was terminated. Grievant continued that mantra until his dismissal was recommended. Upon hearing he was being recommended for termination, Grievant voluntarily chose not to return to work even after District Manager Chapman made it very clear that a recommendation of dismissal did not mean the termination was effective immediately, as there is a process which must be accomplished.

Grievant asserts that 100% polyester material is dangerous because it is highly flammable. Grievant continued to profess that the state issued uniforms did not meet OSHA regulations. However, Grievant did not present any OSHA regulation on the topic. Instead, Grievant presented two newspaper articles and a study addressing the safety issues of both

flame resistant and non-flame resistant clothing. This study was done because the Standard for Electrical Safety in the Workplace ("NFPA 70E") heightened the awareness of electric arc flash hazard. Grievant is not an electrician, but did testify that he worked in close proximity of electrical currents, transformers, and electrical wires.

The summary of the study states, "The only thing safer about 100% cotton is that it does not contain a meltable component; it can ignite just as readily in an arc flash and, once ignited, will continue to burn. In fact, cotton fabrics can present a larger hazard once ignited because they burn hotter than poly/cotton and are generally worn in slightly heavier weights, which means more fuel for the fire." INDURA® ULTRA Soft® Flame Resistant NFPA 70E Daily Wear Clothing Program vs. Non-FR 100% Cotton NFPA 70E "HRC0" Daily Wear with a Task Based PPE Program, www.cintas.com/PDF/.../FRC%20White%20Paper%201.pdf.[1]

While it is certainly not the Grievant Board's position that employees be placed at risk while performing their duties, Grievant has produced no law, regulation, or rule to indicate Respondent was asking him to perform a task of questionable legal propriety or one that was unreasonable.[2]

Lastly, and perhaps the most surprising evidence presented in this case was the state issued t-shirt that Grievant took home and set fire with a cutting torch. Grievant blatantly destroyed state property in an attempt to make a point.[3] However, a more prudent employee would have simply filed a grievance to address the safety of the uniforms.

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[1]It should be noted that this document is Grievant's Exhibit 4 at Level 3. When attempting to view the document from the URL provided, the website indicates the document has either moved or is not accessible.

[2]The undersigned is not making a determination about the safety of the uniforms, as that determination would require more information than presented at this hearing.

[3]Grievant later paid for the shirt that he destroyed.

Respondent has met its burden of showing Grievant was insubordinate and engaged in destruction of state property. While Grievant did not specifically address the issue of mitigation, the undersigned believes it is appropriate to discuss. 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 agency 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). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. 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. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

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).

Grievant has been employed by DOH since 2007, and during that time he has never received a disciplinary action. While his work record is commendable, Grievant on several occasions wilfully disobeyed a directive to wear the state issued uniform. Not only did he refuse, but Grievant continued to say he would return to work each day without the uniform until terminated. Respondent tried to address the issue through progressive discipline, but Grievant continued to disregard the directive. Therefore, mitigation is not warranted in this case.

Respondent has met its burden in this matter. The grievance is DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* 1220 (8th ed. 2007); *Leichliter v. West Virginia Department of Health & Human*

Resources, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. Insubordination has been 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 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).

4. "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).

5. "[F]or 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." *Id*. When one acts with willfulness there is purpose or design, actual or constructive. *Kelly v. Checker White Cab*, 131 W. Va. 816, 823, 50 S.E.2d 888, 893 (1948). Willfulness is not mere inattention or heedlessness. *Id*. Willfulness implies "a conscious purpose to do wrong. Doing a thing knowingly and willfully implies not only a knowledge of the thing done, but a determination to do it with evil purpose or motive." *United States v. Ramey*, 336 F.2d 512, 515 (4th Cir. 1964).

6. Grievant was insubordinate by refusing to wear the state issued uniforms.

7. 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 agency 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).

8. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers*

County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

9. Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. 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. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

10. 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).

11. Grievant did not meet his burden of proof with respect to mitigation.

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: June 25, 2010

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Wendy A. Elswick
Administrative Law Judge