THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ISMAIL S. LATIF,
Grievant,

v. **Docket No. 2010-0009-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed by Grievant, Ismail S. Latif, on July 2, 2009, against his employer, the Division of Highways. The statement of grievance reads:

> I was issued a written reprimand on 7/01/09. I disagree with the charges in the reprimand. The motive behind these charges is to discriminate and punish a minority employee.

As relief Grievant seeks:

> 1. This written reprimand should be removed from the personnel file. 2. I should be given compensation for the damages caused by this reprimand.

A hearing was held at level one on July 17, 2009, and the grievance was denied at that level on August 7, 2009. A level two mediation session was conducted on November 15, 2009. Appeal to level three was made on February 25, 2010, and a level three hearing was conducted before the undersigned Administrative Law Judge on April 22, 2010, at the Grievance Board's Westover office. Grievant appeared *pro se* and Respondent was represented by Jason Workman, Attorney, Legal Division. This matter became mature for decision on July 10, 2010, after confirmation that the parties did not intend on filing fact/ law proposals.

Synopsis

Grievant believes he has been discriminated against because he was issued a written reprimand for improper reporting of his work time. Grievant argues the problem was not brought to his attention prior to this reprimand, and that he was singled out by having his time monitored using security cameras at his work location. Respondent demonstrated that Grievant improperly reported his time worked resulting in a shortage for the relevant time in the amount of 17.5 hours. Grievant failed to demonstrate he was the victim of discrimination.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as the Traffic Engineer (Highway Engineer 4) in District 7, and is assigned to the District Headquarters in Weston, Lewis County, West Virginia.

2. District 7 comprises the counties of Lewis, Upshur, Barbour, Braxton, Webster, and Gilmer.

3. Grievant's job duties include supervising the District 7 Sign Shop, which is located about two miles from the District Headquarters.

4. In August 2008, District 7 management granted Grievant's request to work four 10-hour days, Mondays through Thursdays, 6:30 a.m. to 5:00 p.m. Grievant was working this schedule in February and March 2009.

5. In February and March 2009, the District 7 Maintenance Section employees were required to make an affirmative report of their time for the day worked. In the event they did not, Beth Anderson, a DOH employee who entered employees' work time, tracked employees down to get their hours for the previous day.

6. Ron Hooten, District Manager for District 7, was usually at the office well before his start time of 7:30 a.m. Mr. Hooten noticed that Grievant was often not present at the start of the work day and the light in his office was off. He believed that as a supervisor, Grievant should report to work on time and be present during scheduled working hours.

7. Melissa Jordan is classified as a Comptroller in District 7; she is in charge of the security cameras for District 7. Peggy Carpenter is classified as an Administrative Services Manager in District 7; she is responsible for handling and advising management regarding personnel matters.

8. Mr. Hooten inquired of Ms. Carpenter if it was possible to monitor Grievant's entering and exiting times on the camera recordings for District 7 Headquarters due to his concern that Grievant was engaged in a possible pattern of time reporting abuse. Ms. Jordan was also asked to monitor and document Grievant's report times and exit times from the recordings.

9. An employee could not enter through the two doors that were not monitored because one was always locked and the other could only be used from the inside. District 7 management was not aware of any other employee in District 7 that was displaying a possible pattern of time reporting abuse. Consequently, camera recordings were not checked for other employees.

10. Ms. Jordan viewed the camera recordings for the various building entrances and compiled a spreadsheet, which detailed the times at which Grievant entered and exited the building. If Ms. Jordan did not see Grievant entering or exiting the building or if he was on leave or out of town, she did not document times for that day. In those cases, she credited Grievant for the number of hours he reported as working time.

11. Both Mr. Hooten and Ron Smith, Grievant's immediate supervisor, spoke with Tyrone Campbell, Sign Shop Supervisor, asking whether Grievant stopped in the Sign Shop in the mornings. Mr. Campbell advised them that Grievant did not stop in the Sign Shop in the mornings. In addition, Grievant's work assignments did not require him to spend any significant amount of time on the way to work examining signs on I-79 or performing other such tasks.

12. Mr. Smith compared the spreadsheet compiled by Ms. Jordan with Grievant's time sheets from February 2, 2009, through March 19, 2009, and concluded that Grievant was unaccounted for 17.5 hours of the time that he had reported as worked in that period.

13. Mr. Smith prepared a Form RL-544, Notice of Disciplinary Action, dated June 16, 2009, imposing a written reprimand on Grievant for improperly reporting his time and notifying Grievant that his annual leave balance would be reduced 17.5 hours.

14. A meeting was scheduled for June 23, 2009, to allow Grievant an opportunity to respond to the charge. Grievant submitted written comments on Form RL-546 in response to the charge. His response stated:

> My supervisor Ron Smith never discussed with me about the charges in a one-on-one meeting.
>
> It is very unfair to me that my supervisor went directly to a written reprimand without having a oral conversation with me.

Bad weather was the reason for being few minutes late in winter time.

Being late for few minutes due to weather reasons was unintentional.

7-30 AM work schedule works better for me than 6-30 AM work schedule.

15. Jeff Black, Human Resources Director, indicated the conduct of Grievant violated the agency's general standards of work performance and conduct for all employees. Mr. Black went on to confirm that the written reprimand imposed on Grievant was reasonable and within agency standards.

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 contends that Grievant falsified his time by reporting more working hours than he actually worked. Accordingly, the written reprimand and deduction of time

from his annual leave balance was appropriate disciplinary action. In addition, Respondent argues that monitoring Grievant's entrance and exit times was justified because Grievant was displaying a pattern of being absent from the workplace with no plausible explanation. Respondent contends that it followed proper disciplinary procedures and Grievant was afforded due process.

Grievant does not seem to challenge the fact that he was late reporting to work during the time in question; however, he contends that Respondent discriminated against him by issuing the written reprimand for improper reporting of his work time. Grievant argues the charges are somehow wrong and that Respondent did not discuss the problem regarding his work time with him or give him an opportunity to correct the problem before taking disciplinary action. Finally, Grievant contends that he was singled out by having his time monitored using security cameras which provided evidence of when he reported to work.

The Respondent has met its burden of establishing that the written reprimand issued to Grievant was appropriate in this case. The record establishes that when the District Manager would routinely report to work by 7:00 a.m. at the District 7 Headquarters, Grievant was not present and his office light would be off. Personnel monitored Grievant's entering and exiting times from data collected on the video surveillance cameras in the building. Giving Grievant the benefit of the doubt, if he was not viewed entering or exiting the building, that day was not documented, and Grievant was credited with his reported time for that day. Grievant's work schedule for the four ten-hour days was from 6:30 a.m. to 5:00 p.m., Mondays through Thursdays. The uncontested evidence establishes that Grievant, for the entirety of the period in question, would not report to work at 6:30 a.m.,

but would report anywhere from one half hour late to forty minutes late. The record also establishes that he would leave somewhat early from work, but not as early in comparison with his late arrival. Grievant's behavior demonstrated a consistent pattern of not being at work at his reporting time and leaving work before the end of his scheduled work day.

Ms. Jordan determined that Grievant's reported hours exceeded the time she actually saw him enter and leave the building, as depicted on the tapes, by 17.5 hours over the twenty-two-day period. Mr. Smith compared the spreadsheet with Grievant's time sheets and concluded that Grievant was unaccounted for 17.5 hours of the time Grievant had reported that he had worked. Prior to the reprimand, Mr. Hooten and Mr. Smith discussed possible explanations for Grievant's failure to properly account for his time. They spoke with Tyrone Campbell, District 7 Sign Shop Supervisor who reports to Grievant, about whether or not Grievant stopped in the Sign Shop in the morning. Mr. Campbell indicated that Grievant did not.

Grievant indicated that, as a Traffic Engineer, he does office and field work which requires work outside the office. Grievant also claimed that he was late on occasion due to bad weather. These explanations fall short of accounting for the late arrivals from anywhere from twenty to sixty-four minutes for fifteen of the sixteen recorded entrances at the start of the workday. In addition, Grievant's supervisor countered that Grievant's job duties would not require that he be working outside prior to coming into the district office. Grievant would be expected to report to work and pick up his state vehicle before heading out to the field. The record of this case also reflects that management felt Grievant, as a supervisor, should be held to a higher standard with regard to reporting to work on time and being at work during scheduled working hours. The Grievance Board has agreed with

this common sense approach on numerous occasions.[1] Respondent proved by a preponderance of the evidence that Grievant improperly reported his time for the period in question.

Grievant argues that he was not given the opportunity to refute the charges because his supervisor did not speak with him about the problem when their suspicions about his attendance were raised. Management indicated that they expected Grievant to adhere to his agreed upon modified work schedule and that they should not have to talk to Grievant about following his schedule. The undersigned agrees. In addition, management followed Respondent's policy on progressive discipline by notifying Grievant of the charges, meeting with him on June 23, 2009, for an opportunity to be heard and an opportunity to explain his actions.[2] When Grievant failed to provide plausible reasons for absences, management then imposed the disciplinary action. Grievant was afforded due process in this case.

Grievant alleges that Respondent discriminated against him by taking the disciplinary action of a written reprimand. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the

---

[1]"As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for 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); *Sloan v. Dep't of Health & Human Res.*, Docket No. 00-HHR-132 (Jan. 30, 2001); *Bourne v. Div. of Veteran's Affairs,* Docket No. 2009-0437-MAPS (Aug 25, 2009).

[2]Respondent's policy indicates that "the essential elements of due process for a permanent DOH employee are appropriate notice, an appropriate opportunity to respond, and the opportunity to file a grievance." Respondent's Exhibit No. 8, Level One.

employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant alleged that he was the only employee whose time was monitored by management; however, this mere allegation alone is insufficient to establish the first criterion. Grievant was unable to offer evidence that there may be other employees whose reported time was scrutinized because District 7 management was not aware of any other employee in District 7 that was displaying a pattern of time reporting abuse. Grievant has offered no basis which would establish that he is similarly situated to other District 7 employees in terms of work time reported. Consequently, Grievant failed to prove that he has been treated differently from one or more similarly situated employee. The facts of this grievance do not support an allegation of discrimination.

Finally, Grievant believed that he should not have been issued a written reprimand for his actions. "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 demonstrated that it chose a less severe form of disciplinary action for Grievant's improper reporting of time, when the action of Grievant could have warranted more severe disciplinary action. Mr. Black indicated that Grievant's actions could have led

to a recommendation for dismissal for theft or dishonesty, based on Grievant's reporting of incorrect work time. *See generally Lemley v. Div. of Motor Vehicles,* Docket No. 99-DMV-063 (June 16, 1999). Nevertheless, Respondent exercised its discretion and followed the principles of progressive discipline by imposing the written reprimand rather than a harsher penalty. Given the undisputed facts of this case, the undersigned is not convinced that Grievant has made a showing that the disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion.

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 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).

2. Respondent has proven by a preponderance of the evidence that Grievant was unaccounted for 17.5 hours of the time that he had reported as worked February 2, 2009, through March 19, 2009.

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities

of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant has failed to establish that he was the victim of discrimination.

5. "[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).

6. Grievant has failed to establish that the written reprimand 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: August 31, 2010

Ronald L. Reece
Administrative Law Judge