THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBBIE HUFFMAN,
Grievant,

v. **Docket No. 2009-0194-DOT**

DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Debbie Huffman filed a grievance against her employer, Division of Highways, on August 13, 2009. Her statement of grievance reads, "Notice of one-day suspension dated August 12, 2009."

For relief, Grievant seeks, "To be made whole, including revocation of suspension, restoration of pay and all lost benefits."

A level three hearing was held at the Grievance Board's Charleston office on November 10, 2009. 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 December 18, 2009, upon receipt of the parties' findings of fact and conclusions of law.

Synopsis

Respondent suspended Grievant for one day for reporting to work in an impaired condition. Respondent avers Grievant came to work incoherent, drowsy, unsteady and demonstrating slurred speech. Grievant was taken home, and Respondent asserts Grievant was not able to perform her job duties.

Grievant avers she has a medical condition whereby she has weakness in her lower limbs and at times presents with slurred speech. Grievant argues she was not impaired but was having an episode related to a chronic condition.

Grievant has met her burden of proof. This grievance is GRANTED.

Findings of Fact

1. Grievant is employed by Respondent as an Image Operator. She works in Building 5 at the Capitol Complex.

2. On the morning of July 16, 2008, Brian Jackson, a fellow employee, saw Grievant holding herself up by a light post.

3. Mr. Jackson approached Grievant, and she fell back into his arms.

4. Mr. Jackson and an officer from Capitol Security assisted Grievant getting into the building and to her office.

5. Fred Thomas, Director of Respondent's Finance Division, witnessed the events that took place outside Building 5. He also observed Grievant's hands trembling.

6. Mr. Thomas spoke with Phyllis Lucas, the Office Services Director, and discussed his observation of Grievant.

7. Mr. Thomas also spoke to Chuck Runyon, Executive Assistant to the Commissioner.

8. Mr. Runyon called Capitol Security and spoke with Randy Mayhew, Deputy Director of Division of Protective Services, and explained the situation. Mr. Runyon informed Security that Respondent may take some sort of action and requested assistance.

9. Mr. Runyon and Officer Mayhew then met at Grievant's office.

10. Mr. Runyon observed Grievant appear to be asleep at her desk. He spoke to her several times, but she would not speak.

11. Officer Mayhew and Officer Travis Bennett, from Capitol Security, observed Grievant have glassy eyes, appear disoriented, and have trouble walking.

12. At no time did Officer Bennett smell alcohol on Grievant's breath.

13. Upon request, Grievant willingly showed Officer Bennett the prescriptions she was taking. Grievant did, however, require Officer Bennett's assistance in removing the medication from her purse.

14. Grievant had been prescribed Loratab, and confirmed to Officer Bennett that she had taken that medication on that date.

15. Mr. Runyon contacted Jeff Black, Human Resources Director, and asked him to come to Grievant's office.

16. Mr. Black observed Grievant have slurred speech and unsteady, disjointed thoughts. Grievant appeared groggy.

17. Grievant agreed to go home for the day, as she was unable to perform the duties of her job.

18. Officer Bennett drove Grievant home.

19. Mr. Black decided to consider Grievant's absence on July 16, 2008, a suspension pursuant to Section 12.3 of the Division of Personnel's Administrative Rule, and Section II, Chapter 6 of the West Virginia Division of Highways Administrative Operating Procedures.

20. Grievant was informed of her suspension by letter dated August 12, 2008, stating she was suspended for reporting to work in an impaired condition.

21. Mr. Black determined Grievant was in an impaired condition based on his observation of her.

26. Grievant was never asked to submit to a drug and/or alcohol screen.

27. Grievant has a chronic medical condition which causes her to shake, have slurred speech, recurrent falling spells, and cold chills.

28. Grievant has been seen at the emergency room for being unable to walk and "staggers like a drunk." This has been known to last for weeks. Level 3, Grievant's Exhibit 3.

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* (6th ed. 1991); *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.*

It is uncontested that Grievant was unable to perform her job duties on July 16, 2008. Respondent contends she could not perform her duties because she was in an impaired condition. Therefore, Respondent asserts it properly suspended her.

West Virginia Division of Personnel Rules §12.3 provides authority to suspend an employee, as does West Virginia Division of Highways Administrative Operating Procedures §II, Chapter 6 "Disciplinary Action" B.3.d, which states that oral suspension may be given "if the orderly conduct of the affairs of the DOH is threatened." It goes on to specifically state that an employee reporting to work under the influence of drugs and/or alcohol qualifies as conduct which threatens the affairs of DOH. However, in this case Respondent did not know Grievant was under the influence of any drugs or alcohol. Respondent only suspected as much. There was no odor from her indicating she had been drinking, yet, she displayed characteristics of someone who had. However, Respondent did not ask Grievant to submit to drug and/or alcohol screen.

Twigg v. Hercules Corporation, 185 W. Va. 155, 406 S.E.2d 52 (1990), held that there were two times when an employer could require drug testing of an employee: the first is when

an employee's job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee's drug usage.

Given Grievant's symptoms, it would have been reasonable for Respondent to request that she undergo a drug and/or alcohol test. Yet, that was not done. Instead, Respondent assumed, based on the observations of those involved, that Grievant was impaired due to illicit behavior. That was simply not the case.

Grievant has been under a doctor's care for several years concerning a chronic condition, the symptoms of which present as if she were intoxicated.[1] Grievant's medical records are full of references to her having difficulty walking, slurred speech, and shaking. It appears as if Grievant has gone to several specialists and had several tests to determine how to correct or assist her in dealing with the condition. Yet, it appears as if these spells cannot be treated and will simply pass with time. Grievant provided medical records where she had gone to the emergency room complaining of not being able to walk and staggering "like a drunk" for two or three weeks. Level 3, Grievant's Exhibit 1. She was monitored and discharged home with directions to follow up with her regular physician. This explains why she refused medical treatment, as nothing could be done.

Grievant's medical information detailing the symptoms of her condition were not disclosed to Respondent prior to the level three hearing, even though the suspension letter provides eight calendar days for Grievant to communicate any reason the suspension was unwarranted. Had Respondent been aware of these symptoms, the undersigned believes this situation could have been cleared up prior to the level three hearing.

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[1]The specifics of the condition were never explained by anyone, except the medical records that were introduced at the hearing.

Grievant has provided information of a credible nature to explain her erratic behavior. Respondent did not establish actionable grounds. Therefore, this grievance is GRANTED.

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* (6th ed. 1991); *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. West Virginia Division of Highways Administrative Operating Procedures §II, Chapter 6 “Disciplinary Action” B.3.d, which states that oral suspension may be given “if the orderly conduct of the affairs of the DOH is threatened,” and coming to work under the influence of drugs and/or alcohol is specifically referred to as an infraction under this section.

3. *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990), held that there were two times when an employer could require drug testing of an employee: the first is when an employee’s job involves public safety and the second is when the employer had reasonable good faith objective suspicion of an employee’s drug usage.

4. Respondent has failed to prove its case by a preponderance of the evidence.

Accordingly, this grievance is **GRANTED**. Respondent is ORDERED to restore Grievant’s one day of pay, one day of tenure, and any and all benefits affected.

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: January 27, 2010

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Wendy A. Elswick
Administrative Law Judge