THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK JORDAN and JOHN WEST,
Grievant,

v. **Docket No. 2010-0812-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants Mark Jordan and John West filed grievances separately on December 14, 2009. Their statements of grievance were identical and read:

> I believe I have been wrongfully accused of, and did not commit a gross dereliction of duty. I believe the 15 day suspension issued to me is in violation of Section 12.3 of the State Division of Personnel Administrative Rule and Section II, Chapter 6 of the Division of Highways Administrative Operating Procedures.

For relief, Grievants seek, "I request payment for the 15 days I've been suspended. I request reinstatement of 21 days of tenure. I request reinstatement of leave time accrual during my suspension."

Since these grievances concern disciplinary action, they were filed directly to level three and were consolidated on December 30, 2009. A hearing was held at the Grievance Board's Charleston office on March 3, 2010. Grievants appeared *pro se*, and Respondent was represented by Robert Miller, Esq. The case was originally set for maturity on April 9, 2010. However, Mr. Miller requested an extension that was granted, over Grievants' objection. Therefore, this case became mature for decision on April 15, 2010, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants are bridge inspectors who were suspended for 15 days due to gross dereliction of duty. Respondent asserts Grievants submitted two incomplete and inaccurate bridge inspection reports which put the public at risk and seriously compromised the integrity of Respondent's bridge inspection program.

Grievants argue after conducting an inspection, they informed the District Bridge Engineer that the bridge was in poor condition and needed replaced immediately. Grievants aver their initial report was essentially the same as the report conducted by subsequent bridge inspectors.

Respondent has met its burden of proving Grievants engaged in gross dereliction of duty in this case. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievants are employed by Respondent as Bridge Inspectors.

2. As part of their duties, Grievants were asked to inspect Trace Fork Bridge No. 2 located in Logan County, West Virginia.

3. Steve Runyon, Bridge Engineer, received Grievants' initial report on or around June 4, 2009. The 8 page report explained the procedure Grievants used for inspecting the bridge as:

> The inspection consisted of visually observing the entire structure from arms' length. A scaffold or hook ladder was not necessary for a complete inspection of the floor system and underside of the deck. Due to the proximity of the floor system to the stream bed (36" to 40"), the lack of accessibility prevented proper cleaning and documentation of observed rusting and section loss. Waders were used to gain access to the structure.

Respondent's Exhibit 1.

4. The report also contained photographs of the bridge. Mr. Runyon was concerned because the textual portion of the report stated Grievants were unable to gain access under the bridge to properly clean and document rusting and section loss, yet a photograph showed an inspector under the bridge. This inconsistency led Mr. Runyon to believe a proper inspection could be made.

5. Mr. Runyon returned the report to Grievants and requested they make a second inspection of the bridge and document section loss.

6. Grievants then provided Mr. Runyon with a 16 page report with data from the second bridge inspection.

7. This report detailed the procedure as follows:

> The inspection consisted of visually observing the entire structure from arms' length. A scaffold or hook ladder was not necessary for a complete inspection of the floor system and underside of the deck. Due to the proximity of the floor system to the stream bed (36" to 40"), the lack of accessibility prevented proper cleaning and documentation of observed rusting and section loss. Two random areas were cleaned and documented and these are included in this report.

Respondent's Exhibit 2.

8. Mr. Runyon did not feel this subsequent report was satisfactory.

9. Mr. Runyon called Frank Liss from Bridge Inspection & Evaluation, and requested that Fred Mullins, a senior bridge inspector from that office come and inspect the bridge with Mr. Runyon. On September 3, 2009, Mr. Runyon and Mr. Mullins looked at the bridge and determined it was not properly inspected.

10. After observing the bridge, Mr. Mullins sent an email to Mr. Liss which stated:

> At the request of D2 Bridge Engineer Steve Runyon, I assisted in a field review of Bridge No. 23-5/1-0.89 over Trace Fork near Chapmanville.

> The purpose of our visit was to compare section loss data obtained during two prior inspections by a D2 bridge inspection crew against existing conditions. Our findings were as follows:
>
> 1. Losses were not documented for Stringer One during either visit, despite significant deterioration in evidence.
> 2. Location of the loss that was documented for Stringer Four was not specific. The abutment (Abt. Two) is skewed 45 degrees, and the location not given as to which side of the beam it was taken from. This skew yields different locations depending along which side of the beam measurements are taken due to the skewed reference point.
> 3. Losses for Stringer Four was implied as "typical" for all stringers, which it is not. Additionally, the substantial losses in the bottom flange were noted as typical for the entire length of the beam, which it is not.
> 4. The report states that losses could not be obtained due to the low clearance between superstructure and stream channel. The clearance is admittedly low, but the 38" to 42" [sic] still well within what an inspector can reasonably work within. A photo of a Tyvek suit clad inspector beneath the span also refutes this claim.
> 5. The bridge engineer and I agreed in principal that the work performed is too "general" in nature and substantially incomplete as a proper stress analysis cannot be performed with the data provided.

Respondent's Exhibit 4.

11. To document section loss, the inspector has to clear away the rusted portion of the steel so the inspector can actually see the condition of the metal structure that is left. This is best done by striking the metal repeatedly with a ball peen hammer.

12. Two other inspectors were sent out to inspect the bridge. Ronald Nottingham and Roderick (Roddy) Hughes went to the bridge. On or about September 11, 2009, they presented Mr. Runyon with a 51 page report. In that report, they detailed their procedure for inspection by stating:

> The inspection consisted of a complete hand's on inspection. The floorsystem [sic] of the structure was inspected within arms' length. A scaffold or hook ladder was not necessary for a complete inspection of the floor system and underside of the deck. Hammers (various types), pneumatic tools and air compressor were used to remove rust scaled on the steel stringers. Waders were used to gain access to the underside of the structure. This bridge has no fracture critical members.

Respondent's Exhibit 3.

13. Mr. Runyon uses the Bridge Inspectors' reports to provide a basis for the safe load capacity of bridges throughout the state.

14. Because Grievants determined Stringer No. 3 was the controlling rating member, had Mr. Runyon relied on Grievants' reports, he could have reported the bridge safe for 18 tons of weight.

15. After reviewing the report completed by Mr. Nottingham and Mr. Hughes, Mr. Runyon discovered the bridge had a maximum load capacity of one ton, as the correct controlling rating member was Stringer No. 4.

16. The minimum weight limit posting is three tons. Based on the inspection conducted by Mr. Nottingham and Mr. Hughes, the weight capacity for the Trace Fork Bridge was one ton. The bridge was unsafe.

17. Because the weight limit for the bridge was less than the minimum weight limit posting of three tons, Respondent had to put a diversion across the land of an adjacent land owner so as to repair the bridge.

18. Mr. Runyon brought Grievants' two incomplete reports to Keith E. Chapman's attention. Mr. Chapman is the District Manager for District 2. Because Mr. Chapman is not an engineer, he called together a group of engineers from the Charleston office to discuss this situation. Included in that discussion was Marvin Murphy, the State Highway Engineer, Kyle Stallings, the Director of the Maintenance Division, and Mr. Liss. The gentlemen also consulted with Jeff Black, Director of Human Resources.

19. It was decided to suspend Grievants for 15 days without pay.

20. On October 22, 2009, Mr. Chapman completed the Form RL-544, placing in writing he was recommending Grievants receive a 15 day suspension. This was also discussed with Grievants, and each signed the form presented to them. Both Grievants were given an opportunity to remark on Mr. Chapman's recommendations. Both Grievants indicated that they strongly disagreed with the recommended suspensions.

21. Mr. Black approved Mr. Chapman's recommendations for both Grievants, and on December 1, 2009, Mr. Black issued letters to Grievants suspending them for 15 days for gross dereliction of duty.

22. Grievant Jordan was issued a Record of Significant Occurrence on November 19, 2008, noting a decline in performance. It reads:

> Mark Jordan, Inspection Team Leader, conducted a periodic inspection on 10/25/07 for the Chauncey Girder Bridge. Wendell Parson and Roderick Hughes inspected Chauncey Girder in 2008, Wendell notified the Action Bridge Engineer about the current condition of the superstructure during a routine inspection. He phoned in and told DBE that the stringers had failed, the floor beams showed significant loss, and he wanted to close bridge. DBE reviewed the previous inspection reports from 2000 to 2006, every report stated insignificant section loss, less than 10%, even the Oct. 2007 report, less than one year from this scheduled inspection. DBE and Bridge Design Engineer visited the site at the request of Inspection Team Leader; DBE agreed with Wendell's conclusions and immediately posted the bridge for 3 Tons. Based on the information contained in the previous inspection reports, this bridge had not been properly inspected in the previous years.

Respondent's Exhibit 10.

23. Grievant Jordan was not the only one who received a Record of Significant Occurrence, everyone who had inspected the bridge during the time noted received one.

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.*

Respondent suspended Grievants for gross dereliction of duty. Respondent must prove Grievants were willfully or grossly negligent in failing to perform assigned duties. *Black's Law Dictionary* 475 (8th ed. 2007). Gross negligence goes beyond a mere mistake. It is failure to exercise even that care which a careless person would use. *Id*. at 1062.

The Grievance Board has addressed issues such as this in the confines of dismissals for wilful neglect of duty. These cases have held that the employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical

violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievants were asked to inspect the bridge at Trace Fork. When Mr. Runyon reviewed their report, he noticed that the text portion of the report stating it was not possible to inspect the underside of the bridge did not match with the picture of an inspector standing under the bridge. Understandably, this raised his concern, and he requested Grievants inspect the bridge a second time. Even after the report from the second inspection, Mr. Runyon had continued concern that Grievants still had not performed the inspection as required.

Mr. Runyon and Mr. Mullins went out to compare the Grievants' reports to their observations of the bridge. After visually inspecting the bridge, Mr. Runyon and Mr. Mullins determined Grievants' two reports were "too general in nature and substantially incomplete as a proper stress analysis cannot be performed with the data provided." Respondent's Exhibit 4.

Two other inspectors went out and inspected the bridge. Mr. Nottingham, who inspected the bridge after Grievants, testified that based on his inspection, the bridge was rated to be in poor condition because of section loss. In conducting his inspection, he and Mr. Hughes beat rust off of the beams and measured them so as to determine the places

with the worst amount of section loss. This, Mr. Nottingham testified, was done on each and every beam.

When asked about Grievants' two reports, Mr. Nottingham testified the first report did not indicate a complete report by his standards because the beams were not cleaned and no section loss was taken. He was then asked about his opinion of Grievants' second report, and Mr. Nottingham testified that, based on the data in the report, he did not believe it was a complete inspection because all the beams were not cleaned and checked. He also testified that when he and Mr. Hughes went to the bridge, there was debris on abutments, and in order to do a complete inspection, debris must be cleared so the inspector can view the abutments.

Grievants' initial report was only 8 pages, and their second report was 16 pages. Mr. Nottingham and Mr. Hughes drafted a report that was 51 pages in length, detailing the specifics of the bridge.

Grievants argue they reached the same conclusion as Mr. Nottingham and Mr. Hughes, and as a result, the bridge was closed and repaired. However, there was testimony from numerous people that Mr. Runyon is the one who analyzes the data from the bridge inspectors to determine what course of action to take with the bridge.

Had Mr. Runyon based his decision on Grievants' reports, he could have replaced three beams and not posted a weight limit or he could have posted the bridge as having a weight limit of seven tons. Either of these decisions would have been incorrect because based on Grievants' report Stringer No. 3 was the controlling rating member. In reality, though, the controlling rating member was Stringer No. 4. Based on the correct information, Mr. Runyon determined the bridge weight limit was only one ton. Because the

minimum weight limit posting is three tons, the bridge had to be closed and a by-pass constructed while the bridge was repaired.

Grievants made assumptions, and therefore, the section loss that was documented did not control the bridge's rating. The undersigned does not believe Grievants did this maliciously. Unfortunately, Grievants believed that the ultimate conclusion on the bridge's safety was the more important aspect of the inspection. When, in actuality, Mr. Runyon's determination of what to do with the bridge encompass many more considerations than Grievants were aware, and therefore, it is important for Mr. Runyon to be given complete and accurate information. The assumptions made by Grievants clearly created a serious situation, as the public drives across bridges everyday, and while most of us take for granted bridges' safety, Respondent is the agency charged with ensuring the safety.

While the Grievants did not specifically address the issue of mitigation, the undersigned feels that it is appropriate to discuss the facts surrounding the length of the suspension.[1]

The argument that discipline is excessive given the facts of the situation is an affirmative defense and Grievants bear 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

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[1]Grievants appeared *pro se*, and as such the undersigned feels it appropriate to address mitigation given the tenor of the questions posed to Respondent's witnesses.

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 gross dereliction of duty. The group of individuals assembled by Mr. Chapman discussed various options concerning the appropriate discipline, including termination. However, Mr. Black felt suspension was the appropriate discipline given Grievants' length

of service with the agency. The discussion then turned to the length of time for the suspension. In making this decision, the three reports were compared. The two reports completed by the Grievants were neither accurate nor adequate for the situation. It was decided 15 days suspension without pay would be sufficient. The undersigned agrees.

Respondent has met its burden. This 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. When asserting an employee has engaged in gross dereliction of duty, Respondent must prove Grievants were willfully or grossly negligent in failing to perform assigned duties. Gross negligence goes beyond a mere mistake. It is failure to exercise even that care which a careless person would use. *Black's Law Dictionary* (8th ed. 2007).

3. Respondent has met its burden of proving Grievants engaged in gross dereliction of duty.

4. The argument that discipline is excessive given the facts of the situation is an affirmative defense and Grievants bear 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).

5. 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).

6. 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).

7. Grievants did not meet the burden of proving mitigation was appropriate in this situation.

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: May 24, 2010

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Wendy A. Elswick

Administrative Law Judge