THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBERT VOGEL,
Grievant,

v. **Docket No. 2011-1184-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Robert Vogel, filed this grievance against his employer, Division of Highways, on February 15, 2011, challenging a 10-day suspension and seeking to be made whole, including back pay with interest and all benefits. This grievance was filed directly to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on November 29, 2011, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its attorney, Barbara L. Baxter. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on February 22, 2012.

Synopsis

Grievant was issued a 10-day unpaid suspension for insubordination. Respondent met its burden of proof and demonstrated that Grievant's actions constituted insubordination. Grievant argued that a lesser disciplinary action should have been

imposed due to existence of mitigating circumstances. The record of the grievance did not support mitigation of the punishment imposed by Respondent.

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

Findings of Fact

1. Grievant is employed as a Transportation Worker 3 by the West Virginia Division of Highways in District 4.

2. On January 12, 2011, Grievant's supervisor, Brian Canfield, was looking for employees to clear the District parking lot and other grounds of snow. Mr. Canfield assigned the task of assisting Building and Grounds with clearing the walkways of snow and ice to Grievant.

3. Grievant did not agree with this assignment. Grievant threw the snow shovel that he was holding. Grievant became argumentative and aggressive toward Mr. Canfield, using profanity during an irate confrontation. Grievant refused to do the assigned work and he left the work site.

4. Grievant admitted that he shouted at his supervisor that he would not do the work. Grievant admitted that he leaned forward aggressively and shook his finger at his supervisor. Grievant admitted he used foul and demeaning language in talking with his supervisor.

5. Mr. Canfield then consulted with his supervisor, Jeff Pifer, and informed him about what had happened. They consulted with the Administrative Services Manager for District 4, Anthony Paletta, and Director of Human Resources, Jeff Black, about the incident. District 4 administration recommended a 15-day suspension; however, Mr. Black

concluded that a 10-day suspension provided more consistency with other suspensions for this type of behavior.

6. Grievant was given the opportunity to speak with Respondent's management before the discipline became final.

7. On January 28, 2011, Grievant was given a 10-day suspension for insubordination and the refusal to perform a work assignment. A written reprimand was also given to Grievant a few days later because his refusal to work resulted in Grievant having less than a forty-hour work week. This reprimand was not grieved.

8. Grievant had been counseled on many different occasions in the past concerning his inappropriate conduct and work performance.

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 has met its burden of proof in this grievance. Most of the underlying facts are undisputed given that Grievant has admitted to them. The charge of 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 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 tried to explain his refusal to shovel snow on January 12, 2011, on the fact that he was angry that Mr. Canfield's son was working for the Respondent. Grievant complained that Mr. Canfield demonstrated favoritism toward Mr. Canfield's son, who worked briefly for Respondent as a temporary employee. Mr. Canfield was not his son's supervisor, and he did not choose his son's work assignments. Grievant's favoritism argument has no merit because there is no connection between Grievant's insubordination and the fact that the son of his supervisor was briefly employed by Respondent.

The record of this case established that Grievant had been previously counseled about his inappropriate conduct and work performance on many occasions. Grievant's refusal to perform the work he was assigned on January 12, 2011, follows in line with his past behavior of refusing assignments and leaving work because he is angry. When this most recent incident occurred, Mr. Canfield decided that the behavior required appropriate disciplinary action. Grievant's irate behavior after being asked to shovel snow was unprofessional and inappropriate. Respondent's decision to discipline Grievant was justified after his act of insubordination.

Grievant argues that a three-day suspension would be more in line with his offense since he had served no prior suspension. "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*.

The record of this case did establish that Grievant had not been suspended in the past; however, he received numerous counseling sessions and was clearly on notice that angry outbursts and questioning of work assignments would not be tolerated. The facts of this grievance did not demonstrate that the disciplinary measure was clearly disproportionate to the undisputed insubordination of the Grievant. Again, Grievant was counseled in the past for complaining about work assignments, engaging in unprofessional

conduct, and inappropriate behavior demonstrated toward his supervisors. Grievant's request that the undersigned reduce the penalty is denied.

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. 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 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. Respondent met its burden of proving Grievant's actions were insubordinate.

4. "[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).

5. Nothing in the record of this grievance established that the 10-day suspension was so clearly disproportionate to the offense that it indicates an abuse of discretion.

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: March 14, 2012

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Ronald L. Reece
Administrative Law Judge