WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRY TANNER,
Grievant,

v. **Docket No. 2012-0668-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

D E C I S I O N

Grievant, Terry Tanner, filed this grievance against his employer the West Virginia Division of Motor Vehicles, Respondent, at level three of the grievance procedure on December 21, 2011. Grievant protests and challenges a 3-day suspension as being "without good cause in hostile work environment." As relief Grievant seeks, "back pay with interest plus benefits restored."

A level three hearing was held before the undersigned Administrative Law Judge on May 16, 2012, at the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Charli Fulton, Senior Assistant Attorney General. In addition, Jerry L. Conrad, Transportation Systems Director II, was present as a representative of the Respondent throughout the hearing. The Division of Motor Vehicles presented testimony by Monica Price, Human Resources Manager, and Terry Casto, Purchasing and Warehouse Supervisor. Respondent also introduced into evidence Exhibits 1-9. Grievant's representative cross-examined Respondent's witnesses; Grievant did not provide testimony or enter any exhibits into evidence.

This case became mature for decision on June 13, 2012, the deadline for the submission of parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant was issued a 3-day suspension. Grievant has disciplinary history relevant to the instant matter and has been issued several verbal and written warnings concerning unauthorized leave. Respondent maintains Grievant's attendance practices and use of leave is detrimental to the operation(s) of Respondent's work force. Respondent met its burden of proof and demonstrated cause for disciplinary action. Grievant did not establish a hostile work environment. The determination to suspend Grievant was within the discretionary authority of Respondent. Accordingly this Grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. On October 1, 2010, Grievant was hired and employed by Respondent as a Driver I. In this position, Grievant was responsible for delivering supplies, equipment and mail from the warehouse at 1317 Hansford Street, Charleston to the Capitol Complex and to the Kanawha Mall Service Center; helping to stock supplies at the warehouse; preventive maintenance and cleanliness of the vehicles used by the warehouse; and delivering supplies outside the Charleston area, if necessary. Grievant was the only employee in this position.

2. An employee performance appraisal was performed with regard to Grievant and his performance of job duties on January 24, 2011 (3-month employee performance appraisal). (R. Ex. 6.) Job duties and expectations were discussed with Grievant in a meeting with his supervisor, Terri Casto. Among other items Grievant was informed that Respondent encouraged its employees to carry a vacation and sick leave balance of 40 hours each.[1]

3. At Grievant's 6-month employee performance appraisal, on April 5, 2011, Grievant again met with his supervisor in person. Ms. Casto completed a written performance appraisal form. (R. Ex. 7.) In the section for Performance Development Needs, she wrote, in pertinent part, "Employee works in a small unit where attendance is important and sick leave should be taken only when absolutely necessary." (R. Ex. 7.)

4. Because of the small size of the work unit, when Grievant was absent, other employees had to be pulled from their jobs in order to perform Grievant's duties.

5. On the same day as the 6-month performance appraisal, April 5, 2011, Ms. Casto issued Grievant a written reprimand regarding sick leave abuse. (R. Ex. 1, RL-544, dated April 4, 2011, but signed April 5, 2011.)

6. The reprimand form stated that Grievant had received a prior verbal warning on January 10, 2011, that he needed to improve his leave balance. Ms. Casto further wrote, "TERRY'S EMPLOYMENT DATE IS 10-01-10. SINCE THAT TIME HE HAS MISSED 37.5 hours of Sick Leave. . . . The appearance of a pattern has developed that

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[1] It is noted with interest that while Respondent may want and actively encourages employees to accrue and maintain an identified balance of sick and annual leave, Respondent does not have a duly promulgated policy mandating that an employee is required to maintain a minimum leave balance.

Terry is calling in sick on Friday and Monday. He will be placed on leave restriction per the attached letter." (R. Ex. 1)

7. Grievant signed the RL-546 form indicating that he had received the written reprimand. Grievant did not add any statement, explanation or objection to the disciplinary action on the form. (R. Ex. 1, RL-546, dated April 5, 2011.)

8. An attached letter informed Grievant that he was placed on restricted leave, effective April 11, 2011. (R. Ex. 1, Terri Casto Memo to Grievant) Grievant was required to present a doctor's excuse for all future sick leave and to have all annual leave approved 48 hours in advance.

> a. The memo informed Grievant that his failure to follow the required procedures would result in Grievant being "charged with unauthorized leave without pay and possible disciplinary action up to and including termination of employment." (*Id.)*
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> b. The restrictions were to continue in effect until October 2011, and would be lifted then if the Grievant had followed the procedures. (*Id.*)
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> c. A chart showing all the dates and days of the week on which Grievant had taken sick leave or annual leave was also attached. (R. Ex. 1, Terry Tanner Leave Record chart.) The chart indicated that 8 of the 12 days when Grievant took leave were either Friday or Monday.

9. Grievant's leave balance at the time he was placed under the initial leave restriction is unclear. Grievant had used a total of 37.5 hours sick leave and 15.75 annual leave in a period of four months. As a new employee, Grievant accrued 10 hours of annual leave and 12 hours of sick leave per month.

10. On May 17, 2011, Ms. Casto charged Grievant with unauthorized leave for an absence on May 12, for which he did not provide a doctor's excuse. (R. Ex. 8, RL-544, dated May 17, 2011.) Grievant signed the form indicating that he had received the notice of the disciplinary action without any further written statement or explanation.

11. Grievant called into work on August 1, 2011, reported that he was having car trouble, and arrived at work 2.75 hours late.

12. On August 1, 2011, Ms. Casto charged Grievant with unauthorized leave. The notice to employee for this absence reminded Grievant that all annual leave had to be approved in advance. (R. Ex. 9, RL-544, dated August 1, 2011.) Further, Ms. Casto provided, "This is the 2d violation of the leave restriction, the next violation will result in a suspension without pay." Grievant signed the form indicating that he had received the notice of the disciplinary action and did not include any further written statement or explanation. (R. Ex. 1, RL-546, dated August 1, 2011.)

13. Grievant called into work on September 29, stating that he had overslept, and arrived at work 1.5 hours late.

14. On September 30, 2011, Ms. Casto charged Grievant with unauthorized leave. Grievant was informed in a written format by Ms. Casto that, "This is the 3rd instance of unauthorized leave during your leave restriction. You have shown no sign of improvement with your attendance and dependability. Because of this you are being recommended for a 3 day suspension without pay. Continuation of this behavior will lead to further disciplinary action, according to the rules and procedures of the Division of Personnel, up to and including dismissal from your current position." (R. Ex. 1, RL-544, dated September 30, 2011.)

15. Grievant signed the form indicating that he had received the notice of the disciplinary action. He did not add any statement or explanation to the form. (R. Ex. 1, RL-546, dated October 3, 2011.)

16. Grievant received a 1-day suspension. Grievant's supervisor, Terri Casto, had recommended a 3-day suspension.

17. Monica Price, the DMV Human Resources Manager, is an employee who, among other duties, performs a principle role in disciplinary actions at DMV. When disciplinary action is proposed, it is presented to the employee in a pre-determination conference. The supervisor completes a Form RL-544, Notice to Employee form, and gives it to the employee at the meeting. The employee is given a chance to respond in writing within 5 days. After that period expires, the Form RL-544 is submitted to Ms. Price for processing. She prepares the letters that the DMV Commissioner signs in connection with employee suspensions and dismissals.

18. Monica Price changed the recommendation on the September 30, 2011, disciplinary action from a 3-day suspension to a 1-day suspension.[2]

19. On October 7, 2011, Karen Lane, Terri Casto's supervisor, informed Grievant by memo that his leave restriction would remain in effect for six additional months, extending the period to April 12, 2012. (R. Ex. 3, October 7, 2011 memo from Karen Lane to Grievant.) The restrictions on Grievant's leave did not end in October 2011 because his attendance and dependability had not improved.

20. On October 14, 2011, the DMV Commissioner informed Grievant that he would receive a 1-day suspension without pay on October 25, 2011, as the discipline for his September 29, 2011, tardiness. (R. Ex. 2, October 14, 2011 letter.)

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[2] Reportedly, Ms Price altered the length of the suspension to conform with her interpretation of progressive discipline guidelines of the Department of Personnel.

21. Grievant called into work on December 16, stating that he was running late. Grievant later admitted that he had overslept, and arrived at work half an hour late.

22. On December 16, 2011, Ms. Lane completed and issued a RL-544 form, Notice to Employee regarding Grievant tardiness, identifying the time as unauthorized leave. (R. Ex. 4, RL-544, dated December 16, 2011.) Respondent charged Grievant with thirty minutes of unauthorized leave.

23. Ms. Lane provided that, "Because this is the 4th instance of you being placed on [un]authorized leave during leave restriction and previously being suspended for 1 day, it is recommended that you be suspended for 3 days without pay. Continuation of this behavior will result in further disciplinary action, in accordance with the WV DOP Rules and Regulation; up to and including dismissal." (*Id.)*

24. Grievant declined the opportunity to meet with a superior agency representative, regarding this disciplinary action. (R. Ex. 4, RL-546, dated December 16, 2011).

25. The DMV Commissioner suspended Grievant for 3 days, in accordance with Ms. Lane's recommendation, from January 10 through January 12, 2012. (R. Ex. 5, January 5, 2011, letter.)

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The record of this case established that Grievant had been counseled about his attendance (use of leave) and dependability to perform his assigned duties. When Grievant was absent from the workforce, other employees had to be pulled from their jobs in order to perform Grievant's duties. This can be disruptive to the operations of a small work unit. Respondent has a legitimate interest in the efficient operations of its various working units.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as

arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

While Respondent encourages employees to accrue and maintain balances of 40 hours of sick leave and annual leave, Respondent does not have a formal policy mandating an employee to maintain a minimum leave balance. Grievant was not suspended for carrying a low leave balance. In the circumstances of this matter, Grievant's lack of dependability created a burden for others. Grievant was specifically counseled regarding job duties and the ramifications of tardiness and his calling off practices. It is one of the primary duties of a good supervisor to effectively manage personnel and administration of duties performed by subordinates. Respondent perceived Grievant's use of leave to be problematic. Respondent made it very clear that Grievant was expected to come to work. Respondent sought to follow progressive discipline methods to improve Grievant's dependability. Respondent's actions are not found to be arbitrary, capricious or unreasonable in the circumstances of this case.

Grievant is of the opinion that Respondent unlawfully targeted him and created, for him, a hostile work environment. Nondiscriminatory Hostile Workplace Harassment is defined in the Division of Personnel's Prohibited Workplace Harassment Interpretive Bulletin as:

> Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee(s) from reasonably performing her or his work.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris, supra* at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 30, 2006).

Mindful of the aforegoing information regarding a hostile work environment, the undersigned does not find such a state to be evident in the facts of this matter. Grievant did not contest any of the absences or late arrivals for which he was disciplined. Grievant claims that there was not good cause for the discipline. This assertion is without merit. Respondent established cause. Nevertheless, Grievant's contention, in part, is an argument that the punishment for the conduct, the facts of which are not disputed, is excessive given the facts of the offense. "The argument that . . . [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).

"Whether 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). "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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Respondent established that Grievant's absences caused inconvenience to his employer and to the employees who had to be reassigned to cover Grievant's duties in addition to their own when he was absent from work. Respondent attempted to correct Grievant's conduct with the use of lesser forms of disciplinary action (verbal warnings, written reprimands, docking of pay for unauthorized absences, and a 1-day suspension without pay). The lack of substantial improvement demonstrated by Grievant in response to these lesser forms of disciplinary action, reasonably motivated Respondent to increase the disciplinary sanction. Respondent's action in imposing a 3-day suspension on Grievant is not necessarily disproportionate, excessive, arbitrary, or capricious to Grievant's conduct *en totem*. Grievant's request that the undersigned reduce the disciplinary action levied is denied. Mitigation is not found to be appropriate given the totality of the circumstances.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for*

the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

3. Given the totality of the circumstances, Respondent established by a preponderance of the evidence the charges against Grievant and cause for administering disciplinary action.

4. 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).

5. The record of this grievance matter does not establish that the 3-day suspension levied was clearly a disproportionate sanction and/or was an abuse of discretion. Given the totality of the circumstances mitigation is not appropriate.

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: November 30, 2012

Landon R. Brown
Administrative Law Judge