THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELTON COBB,

Grievant,

v. **Docket No. 2012-0604-CONS**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Melton Cobb, filed two expedited Level Three grievances against his employer, Respondent, Division of Highways ("DOH"), challenging disciplinary actions taken against him. The first grievance is dated December 1, 2011, and states as follows: "[d]enied representation in meeting with District Manager on 11/30/11; issued 3 day suspension." As relief sought, Grievant requested "[t]o be made whole, including removal of any discipline with back wages, interest & benefits restored." The second grievance is dated December 6, 2011, and states as follows: "[s]uspended on 12/5/2011 for 5 days without good cause fie (sic) 'insubordination' over a predetermination meeting involving the suspension grieved on 12/1/11." As relief sought, the Grievant requests "[t]o be made whole including lost wages with interest & benefits restored."[1] The two grievances were consolidated by Order entered December 16, 2011.

A Level Three hearing was held on May 9, 2012, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person, and with his Representative, Gordon Simmons,

[1] It is noted that the five-day suspension was later reduced to a written reprimand by someone at the DOH central office.

UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Jason C. Workman, Esquire.

This matter became mature for decision on June 12, 2012, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was charged with violating the DOH Standards of Work Performance and Conduct by withholding information about the cause of a workplace accident, and was suspended for three days without pay. Grievant denied the charges against him, and asserted that he was wrongfully denied the right to have his union representative present with him during the disciplinary meeting. Respondent also charged Grievant with insubordination for the use of profanity and inappropriate conduct during the same disciplinary meeting. Grievant denied the charge of insubordination as well. Respondent failed to meet its burden of proving the charges against Grievant by a preponderance of the evidence. Respondent wrongfully denied Grievant his right to have a union representative present during a disciplinary meeting. However, given the facts of this case, and in this very limited situation, Respondent's denial was harmless error. Accordingly, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Melton Cobb, is employed by Respondent as a Transportation Worker 2 in DOH District 1.

2. On February 23, 2011, Grievant was a passenger in a truck that was involved in an accident that resulted in another DOH employee being seriously injured. Jack Happney was the driver of the vehicle. Grievant was riding in the front passenger seat at the time of the accident, talking to another worker on the radio. George Williams was sitting in the back seat directly behind Mr. Happney.

3. At the time of the accident, Grievant and his crew were patching a road. The truck in which Grievant was a passenger was following a truck pulling a hot box. The truck in which Grievant was a passenger struck John Robertson, who was working on the road, and pinned him against the hot box.

4. Grievant looked up from the radio just in time to see the truck strike John Robertson. Upon seeing what was going to happen, Grievant yelled for Mr. Happney to stop.

5. Mr. Happney did not stop the truck in time to avoid hitting Mr. Robertson. After the vehicle struck Mr. Robertson, Grievant got out and went to his aid. Mr. Robertson sustained serious injuries as a result of the accident.

6. DOH conducted an investigation into the accident. Mr. Happney and the passengers in his vehicle were asked to prepare written statements about what had occurred.

7. Mr. Happney wrote in his statement that his foot slipped off the brake, causing his truck to strike Mr. Robertson, pinning him between the two vehicles. *See*, Grievant's Exhibit 1.

8. Grievant prepared a written statement regarding the accident and submitted the same to DOH. However, neither party offered it as evidence during the Level Three hearing.

9. At the conclusion of the DOH investigation, no one in Mr. Happney's vehicle was disciplined as a result of the accident on February 23, 2011.

10. On November 4, 2011, months after the accident and the end of the DOH investigation, Jack Happney gave a second written statement concerning the accident to Margie Withrow, Mr. McBrayer's assistant. In this second statement, Mr. Happney asserted that his foot had slipped off the brake because the person sitting behind him in the truck had placed a rope around his neck and pulled it tight, causing him to choke to near unconsciousness. *See*, Grievant's Exhibit 2.

11. Mr. Happney's second statement reads, in part, "I don't recall what Melton Cobb was doing during (sic) this, due to the fact I was being choked by George Williams. As far as I can recall Mr. Cobb was still talking on (sic) radio. I do recall Mr. Cobb saying to halt or stop and that I hit John." *See*, Grievant's Exhibit 2.

12. Although not mentioned in his second written statement, Mr. Happney apparently told management that following the accident he, Grievant, and Mr. Williams decided to keep the information about the choking, or horseplay, incident from the investigators.

13. No one who had previously submitted statements about the accident was re-interviewed as a result of Mr. Happney's second statement.

14. On November 30, 2011, Grievant's supervisor, Kenny Miller, told Grievant to attend a meeting with District 1 Administrator, John McBrayer, at Mr. McBrayer's

office in Charleston, West Virginia. Grievant advised Mr. Miller that he would be taking his union steward, Carlos Shafer, with him to the meeting.

15. When Grievant and Mr. Shafer arrived at Mr. McBrayer's office, Grievant was directed to a conference room for the meeting. Margie Withrow was present in the conference room when Grievant arrived.

16. When Mr. Shafer started to enter the room with Grievant, Mr. McBrayer told Grievant that Mr. Shafer was not needed. Mr. McBrayer then closed the door, keeping Mr. Shafer out of the room.

17. The purpose of this meeting was for Mr. McBrayer to inform Grievant that he was recommending that Grievant be suspended without pay for three days for "failure to properly and completely report an incident of horseplay causing serious bodily injury to John Robinson on February 23, 2011."[2] Mr. McBrayer noted on the written recommendation for disciplinary action that such conduct is considered "failure to meet expected work conduct."[3]

18. Mr. McBrayer told Grievant that he did not need a representative at the meeting because they were just informing him of disciplinary action to be taken.

19. Once in the conference room, Grievant was provided a copy of the written recommendation for suspension, the RL-544 "Notice to Employee" form, and the same was read aloud to Grievant.

20. The RL-544 form notified Grievant that he was being given an opportunity to respond, either in writing or in person, to the charges contained therein, and that a meeting with Mr. McBrayer had been scheduled for him on December 7, 2011, at 9:30

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[2] *See*, Respondent's Exhibit 1, RL-544 form.
[3] *See*, *Id.*

a.m. Grievant was provided an RL-546 form to complete and tender at that meeting as his response. Mr. McBrayer informed Grievant that he could bring his union representative with him to that meeting.

21. Upon hearing the charges against him and the recommended discipline, Grievant became upset and stated that the charges stated in the RL-544 were "bullshit." Grievant then told Mr. McBrayer and Ms. Withrow his account of what he witnessed on February 23, 2011, and that he did not see Mr. Happney being choked prior to the accident. Grievant continued to ask for his union representative.

22. Mr. McBrayer informed Grievant that he did not believe Grievant's account of the events of February 23, 2011. This, as well as the fact that Mr. McBrayer did not allow Mr. Shafer to attend the meeting, further upset Grievant. Grievant replied something to the effect of "[d]on't you call me no damn liar."

23. Mr. McBrayer eventually allowed Mr. Shafer into the conference room. Thereafter, Grievant opted to address the RL-546 that day instead of waiting until the December appointment.

24. As a result of Grievant's conduct and use of profanity at the November 30, 2011, meeting, Mr. McBrayer issued another RL-544 on December 5, 2011, recommending that Grievant be suspended without pay for five additional days.

25. By letter dated February 13, 2012, Human Resources Manager, Kathleen Dempsey, informed Grievant that he was being suspended from work without pay for failing to fully cooperate with the investigations of DOH and the Kanawha County Sheriff's Department into the February 23, 2011, accident, and for "withholding

information about the situation in the vehicle leading up to the accident." *See*, Respondent's Exhibit 4.

26. By the same letter, Grievant was informed that Mr. McBrayer's request for the second suspension was not being granted. Instead, Ms. Dempsey reduced the recommended discipline to a written reprimand. *See*, Respondent's Exhibit 4.

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); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "The 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, the employer has not met its burden. *Id.*

Grievant argues that he was wrongly suspended from work, wrongfully reprimanded, and that he was improperly denied representation at his disciplinary meeting. Further, Grievant contends that because he was wrongfully denied the opportunity to have his union representative present at the disciplinary meeting, all discipline arising from that meeting is legally invalid. Respondent denies Grievant's allegations and asserts that the discipline it imposed on Grievant was proper and warranted.

It is undisputed that Mr. McBrayer did not initially allow Grievant's union steward to attend the meeting held on November 30, 2011. The purpose of this meeting was for Mr. McBrayer to inform Grievant that he would be recommending Grievant's three-day suspension without pay. Despite the fact that the whole purpose of the meeting was to discuss disciplinary action, Respondent claims that this was not a disciplinary meeting. Respondent asserts that it was only an "informative" meeting. Respondent, therefore, asserts that it did not have to allow Grievant's union steward to be present. Respondent argues that the next meeting, at which the completed RL-546 form was to be tendered, would have been the disciplinary meeting and Grievant's union representative would have been permitted to attend the same.

WEST VIRGINIA CODE § 6C-2-3(g)(1) states as follows: "[a]n employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. VA. CODE § 6C-2-3(g)(1). Accordingly, Mr. Brayer should have initially allowed Mr. Shafer to attend the November 30, 2011, meeting with Grievant because Mr. McBrayer was discussing his intent to take disciplinary action against Grievant. Grievant repeatedly requested the presence of his union steward. Only after Grievant became angry did Mr. McBrayer allow Mr. Shafer into the room. At that point, Grievant apparently consented to respond to the charges against him, and tendered a completed RL-546 form to Mr. McBrayer, instead of waiting until the December 7, 2011, meeting. Even though Mr. McBrayer initially improperly denied Grievant's request to have his union steward at the meeting, moments later he relented and allowed Mr. Shafer into the meeting. As such, Grievant had the benefit of having

his union representative present when he responded to the charges levied against him. Given the facts of this case, and in this very limited situation, the undersigned concludes that although improper, Mr. McBrayer's initial refusal to allow Grievant's union representative to be present at the RL-544 meeting was harmless error.

Next, the undersigned must examine whether the Respondent proved the charges against the Grievant by a preponderance of the evidence. Respondent asserts that Grievant, a witness to the February 23, 2011, accident, withheld information about the cause of the accident from investigators. Specifically, Respondent asserts that Grievant knew the accident resulted from an incident of horseplay occurring inside the vehicle, but failed to report the same. Respondent bases its assertions on the two statements of Jack Happney, the driver of the vehicle. Grievant disputes Mr. Happney's claims. Grievant contends that he did not witness any horseplay in the vehicle, and did not see, or know of, Mr. Happney being choked by Mr. Williams. Grievant asserts that he reported what he witnessed, and that he did not withhold any information from the investigators.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1993). The Grievance Board has applied the following factors to

assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

Soon after the February 23, 2011, accident, Mr. Happney drafted a written statement concerning the cause of the accident and provided it to investigators. Months later, on November 4, 2011, Mr. Happney submitted a second written statement in which he gave a different account of the events leading to the accident. Respondent had accepted Mr. Happney's first statement as true. Respondent then accepted Mr. Happney's second statement as true, without re-opening its investigation and without re-interviewing the other witnesses. In his second statement, Mr. Happney admits to being untruthful in his first statement. The two statements are inconsistent. Mr. Happney's only explanation for giving the second statement is that he wanted to clear his conscience.[4] Mr. Happney testified that the only person he told about the choking incident before submitting his second written statement was Mr. Robertson. However, no one called Mr. Robertson to testify at the Level Three hearing.

It is Respondent's burden to prove that Grievant violated the DOH Standard of Work Performance and Conduct by withholding information about the cause of the

[4] Grievant alleged that Mr. Happney was motivated to invent the choking story so that he would be allowed to again operate equipment at work. However, Grievant offered no direct evidence to support this claim. Therefore, this allegation is being given no weight.

accident from the investigators. Neither in his second statement nor in his testimony at the Level Three hearing, did Mr. Happney state that Grievant saw the alleged choking incident. Instead, Mr. Happney assumes that Grievant witnessed such because Grievant was sitting in the front seat near him. Mr. Happney and Grievant, however, agree that Grievant was engaged in a conversation with another DOH employee on the CB radio just prior to the accident. Respondent makes the same assumption as Mr. Happney and has also opted to believe his account of events, despite his obvious credibility issues. Respondent presented no direct evidence to support its claims that Grievant witnessed the alleged choking incident and withheld information of such from the investigators.

Further, there is no mention of a "cover-up" in Mr. Happney's second written statement. Mr. Happney alleged at the Level Three hearing that someone in his vehicle, although he could not identify who specifically, suggested that they all "keep their mouths shut" about the choking incident. Grievant denies Mr. Happney's "cover-up" allegations. The only other person in the vehicle at the time in question was George Williams, who was reportedly terminated as a result of Mr. Happney's second written statement, and he was not called as a witness at Level Three. Again, there are credibility issues with Mr. Happney. Grievant's statements have remained consistent throughout. Mr. Happney's have not. Respondent has failed to prove by a preponderance of the evidence that Grievant withheld any information about the cause of the accident from the investigators.

Lastly, as a result of his behavior on November 30, 2011, when he was improperly denied his union representative at the RL-544 disciplinary meeting, Grievant

was issued a written reprimand for insubordination. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)).

Moreover, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,* Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain

standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

Grievant does not deny that he used some profanity when Mr. McBrayer denied his request for Mr. Shafer to be present during the meeting. Grievant does not deny that he was upset and raised his voice to Mr. McBrayer and in the presence of Ms. Withrow. However, let us not forget why Grievant became upset: he was being improperly denied his right to have a union representative present during a meeting at which disciplinary action against him was being discussed or considered. Grievant should not have acted as he did. However, Mr. McBrayer should not have denied Grievant's request for his union representative. Given the totality of the circumstances, Mr. McBrayer's unclean hands, and in this very limited situation, the undersigned cannot conclude that Grievant was insubordinate.

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); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. "An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. VA. CODE § 6C-2-3(g)(1).

3. Grievant was entitled to have his union representative with him at the RL-544 meeting held on November 30, 2011. Given the totality of the circumstances, and in this very limited situation, Mr. McBrayer's initial refusal to allow Grievant's union representative to attend the RL-544 meeting was harmless error.

4. Respondent failed to meet its burden of proving by a preponderance of the evidence that Grievant violated the DOH Standard of Work Performance and Conduct by withholding information about the cause of the February 23, 2011, accident from investigators.

5. For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall*

Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)).

6. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,* Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986) (*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

7. Respondent failed to prove that Grievant engaged in an act of insubordination toward Mr. McBrayer and Ms. Withrow.

Accordingly, this Grievance is **GRANTED**.

The three-day suspension is **ORDERED REMOVED** from Grievant's record. Respondent is also **ORDERED** to pay Grievant three days of back pay, with interest, and to restore all other benefits which Grievant lost as a result of the three-day suspension, including leave and retirement benefits. Further, the written reprimand is **ORDERED REMOVED** from Grievant's record.

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 (eff. July 7, 2008).

DATE: November 16, 2012.

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Carrie H. LeFevre
Administrative Law Judge