THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANDREW M. FLORENCE,
Grievant,

v. **Docket No. 2023-0340-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Andrew M. Florence, was employed as a Transportation Worker IV Equipment Operator by Respondent, Division of Highways. On October 31, 2022, Grievant filed this grievance against Respondent stating,

> I was involved in a no fault accident (determined by Deputy Sheriff). No citations were issued. I have attended two meetings to explain and talk about outcomes. They terminated me. There [have] been many accidents in the department with these operators still employed. One recent occurrence another operator rolled a brand new wheel grader, and that operator is still employed. I am not accepting fault for this accident, it was that an accident. I was doing my job. I was rerouted by my superior. I was trying to complete the task to the best of my ability. I have been a loyal employee for 8 years and 4 months. I was willing to accept a lesser penalty. I offered days off without pay etc… But they went straight to termination. I want to be treated equally, fairly. I believed the result does not line up with the accident.

For relief, Grievant seeks as follows: "My career back. All legal fees, damages, losses for this and the accident. All parts, labor, and/or replacements of vehicles paid by State. Lost wages, annual time, sick time, increment pay."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 27, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant

appeared *pro se*.[1] Respondent appeared by Human Resources Manager Bridget Buffington and was represented by counsel, Brian D. Maconaughey. This matter became mature for decision on March 27, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").[2]

Synopsis

Grievant was employed by Respondent as a Transportation Worker IV Equipment Operator. Respondent terminated Grievant's employment for causing a vehicular crash on the interstate by blocking both lanes of traffic while attempting to make an illegal U turn. Respondent proved it was justified in terminating Grievant's employment. Grievant failed to prove the termination of his employment was discriminatory. Grievant failed to prove mitigation of the penalty is warranted. Accordingly, the grievance is denied.

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 was employed by Respondent as a Transportation Worker IV Equipment Operator.

2. On September 26, 2022, Grievant was involved in a vehicular crash on Interstate 77. Grievant was operating a DOH-owned tractor trailer traveling northbound and attempted to make a U turn to travel southbound by using a median crossover. While traveling in the slow lane northbound, Grievant slowed down the tractor trailer to turn left

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

[2] The Grievance Board did not receive PFFCL from Grievant. Grievance Board staff emailed Grievant to confirm that he did not intend to file PFFCL and Grievant did not respond.

across the fast lane to reach the median. A pickup truck was traveling in the fast lane when Grievant turned into the fast lane causing the pickup truck to collide with the trailer. The crash caused significant damage to the front passenger side of the pickup truck but did not result in any injuries.

3. In choosing to make a wide left turn, Grievant blocked both lanes of the interstate while turning, even though by his own admission, he saw the truck behind him.

4. Median crossovers are reserved for authorized vehicles only. Signs clearly prohibit U turns and state that only authorized vehicles are permitted in the crossover.

5. There was no emergency requiring a U-turn. Grievant decided to make a U-turn rather than travel to the next exit to turn around for convenience only.

6. Wood County Sheriff's Deputy, C. P. Nickels, investigated the crash and filed a report. As part of his report, Deputy Nichols collected statements from Grievant and the driver of the pickup truck.

7. The driver of the pickup truck asserted that Grievant had turned across both lanes while she was passing on the left side of the tractor trailer.

8. Grievant asserted that the pickup truck was several hundred yards behind him when he began the turn across the fast lane.

9. Deputy Nichols found that the statement of the pickup truck driver was more consistent with the circumstances of the accident and the evidence on the scene than Grievant’s statement. Although Deputy Nichols did not issue a citation, Deputy Nichols found Grievant to be at fault in the crash for making an improper turn and failing to yield, generally.

10. Deputy Nichols explained that he rarely issues a citation for motor vehicle collisions in which there are no injuries and that lack of citation does not mean there was no fault in the accident.

11. Vehicle crashes involving Respondent's equipment are referred to an internal investigator and reviewed by Respondent's Equipment Operator Accountability Board. The Board reviews for violations of policy and refers matters for consideration for disciplinary action.

12. Respondent's Administrative Operating Procedures Standards of Work Performance and Conduct require employees to comply with accepted safe operating practices, and to comply with working rules, policies, procedures, regulations and laws that apply to the employee.

13. Respondent Equipment Operator Accountability policy, policy number DOH 4.3, requires equipment operators to observe traffic laws and applicable policies.

14. Investigator Dan Martin conducted Respondent's investigation. Investigator Martin investigated the scene of the accident approximately 40 minutes after the accident occurred. Investigator Martin further reviewed the Deputy Nichols' report and collected written statements from the pickup truck's driver and passenger and from Grievant. In addition, Investigator Martin interviewed Grievant. During the interview, Grievant expressed that he did not believe he did anything wrong or was at fault in the accident. He stated it was a common practice to use median crossings to change direction on the interstate, that he had done it on several occasions, and that other DOH drivers did the same.

15. The Equipment Operator Accountability Bored conducted a hearing on the incident on September 29, 2022. The Board reviewed the reports of Deputy Nichols and Investigator Martin and unanimously agreed to recommend termination.

16. On October 20, 2022, Respondent issued a Form RL-546 to Grievant recommending the termination of his employment. Respondent included additional information in an attachment to the form, which described the circumstances of the crash, that Grievant was at fault, and that Grievant's actions were in violation of the West Virginia Driver's Licensing Handbook and Respondent's policies and procedures.

17. District Engineer Justin B. Smith met with Grievant regarding the recommendation of his termination on October 24, 2022. Grievant did not deny fault in the accident and only asserted that he believed it warranted a suspension rather than termination of his employment.

18. Grievant was previously involved in a similar motor vehicle accident in May 2020, for which he received a written reprimand.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Although Grievant originally denied fault in his statement of grievance, during the level three hearing he stated he no longer disputed anything about the accident and that he understood he should have been disciplined for his misconduct. Grievant only asserted that his eight years of loyal service should entitle him to suspension rather than termination and that other employees had been guilty of breaking safety rules and causing property damage but had not been terminated. Respondent asserts Grievant's misconduct warranted termination of his employment.

Respondent proved Grievant's misconduct warranted termination of his employment. Respondent proved Grievant chose to make a wide turn blocking both lanes of the interstate while attempting to make an illegal turn, which caused an accident that resulted in significant property damage. In the experience of Respondent's State Safety Officer, Shane Hudnall, this was an extremely unsafe maneuver that had a high potential of serious injuries or loss of life. During Respondent's investigation and pre-determination process, at no time did Grievant demonstrate any understanding of the seriousness of his misconduct or admit his fault. In addition, Grievant had previously received a written

reprimand for a similar accident. Given these circumstances, Respondent proved termination of employment was justified.

In defense, Grievant argues the termination of his employment was discriminatory. "'Discrimination' means any differences in the treatment of similarly situated employees unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Grievant provided no evidence other than his general testimony that other employees had been treated differently than he had been treated. Grievant did not provide any specific testimony regarding the other accidents for which he asserts employees were not terminated. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)). Grievant failed to prove the termination of his employment was discriminatory.

Grievant also argues that the penalty of termination of his employment was too harsh. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

"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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant argues termination of his employment was too harsh a penalty due to his eight years of loyal service. Grievant provided no evidence of his work history or personnel evaluations. Although eight years is a significant length of employment, length of employment alone is not enough to warrant mitigation. In this case, Grievant had already received a written reprimand for a similar accident. As discussed above, Grievant's misconduct was of a serious nature that could have had catastrophic

consequences, for which Grievant had accepted no responsibility nor demonstrated any understanding. Grievant failed to prove mitigation of the penalty is warranted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. Respondent proved Grievant's misconduct in blocking both lanes of the interstate while attempting to make an illegal turn, which caused an accident that resulted in significant property damage, warranted termination of his employment.

4. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

5. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. Grievant failed to prove the termination of his employment was discriminatory.

7. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

8. "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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

9. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

10. Grievant failed to prove mitigation of the penalty is warranted.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[3] Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its

[3] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

Administrative Law Judges is a party to such appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: May 8, 2023

Billie Thacker Catlett
Chief Administrative Law Judge