THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASON LANE,
Grievant,

v. **Docket No. 2023-0109-DOT**

DIVISON OF HIGHWAYS,
Respondent.

DECISION

Grievant, Jason Lane, filed this action against his employer, Division of Highways, on or about August 10, 2022, contesting a five-day suspension. Grievant seeks back pay with interest and all benefits restored. Grievant also asks for the removal of all records of the suspension from his personnel file. This grievance was filed directly to level three. An evidentiary level three hearing was conducted before the undersigned on March 16, 2023, at the Grievance Board's Westover office. Grievant appeared *pro se*. Respondent appeared by Judy C. VanPelt, Human Resources, and by its counsel, Brian D. Maconaughey, Legal Division. This case became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law on April 27, 2023.

Synopsis

Grievant is employed as a Utility Supervisor with the Division of Highways. Grievant was disciplined, for the second time, for similar behavior that was inappropriate and a violation of policy. Respondent met its burden of proof and demonstrated by preponderance of the evidence the allegations against the Grievant. The record did not support mitigation of the imposed suspension. This grievance is denied.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant is employed as a Utility Supervisor with the Division of Highways (DOH), working in District 4, Harrison County, Bridgeport, West Virginia.

2. In November 2021, an investigation revealed conduct of an inappropriate interaction with a female subordinate resulting in an interruption of the workflow and morale in the Utilities Unit.

3. Grievant showed favoritism and special treatment to Billie Kolvalk and spent excessive and unnecessary time outside of his normal workplace with this employee.

4. Grievant was given a three-day suspension for the events uncovered through this investigation. The employee was moved to the Resurfacing Department to create a more productive outflow of both Utilities and Resurfacing Units.

5. On February 28, 2022, Pam Joliffe, Accounting Tech 3, sent an email to the Office of Human Resources about Grievant coming to see her with concerns that Billie Kolvalck's supervisor in the guardrail section was not training her properly.

6. Resurfacing Coordinator, Greg Weber, acknowledged that Grievant's intervention and involvement with Ms. Kolvalck's training after she was transferred to his department did cause disruption in the guardrail team's management decisions. Mr. Weber used a security camera in the hallway of Ms. Kalvalck's office door to monitor the number of visits by Grievant.

7. Kenneth LaChance, Transportation Technician, was tasked with training Ms. Kolvalck, as she had been transferred to the guardrail section to replace him. Grievant's interference in his training efforts with Ms. Kolvalck, including performing tasks

for her, hampered his assignment. Mr. LaChance related that while Ms. Kolvalck was in the conference room during the training session, Grievant would come in the room to check on her every fifteen minutes.

8. Larry Bush, Guardrail Coordinator, also indicated that, during his involvement with the training of Ms. Kolvalck, Grievant interfered in her training and provided different instructional guidance.

9. Judy Van Pelt, Human Resources Manager for District 4, received complaints from the above employees that Grievant was interfering with Ms. Kolvalck's training. Consequently, a meeting was held with Grievant in March 2022 over his interference with Ms. Kolvalck's training in the guardrail section.

11. A referral was made to the Legal Division's Office of Investigations and an investigation was carried out by George Sinclair.

12. Due to the Grievant being in a supervisory position, and the related first disciplinary action, the instant suspension was recommended.

13. Grievant received DOH Form RL-544 from Human Resources on July 15, 2022, setting out that a five-day suspension was being recommended as disciplinary action for misconduct and for violating policy. The recommendation sets out a violation of the Division of Highways Administrative Operating Procedures, Standards of Conduct and Work Performance. In particular, maintenance of a high standard of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors and officials. Avoidance of detrimental behavior or outside activities or employment or interests that may interfere with work performance or conduct or that may create a conflict

of interest. Respondent also pointed out to Grievant that as a supervisor he was held to a higher standard of behavior when interacting with coworkers and subordinates.

14. Grievant was notified by letter dated July 26, 2022, that the recommended five-day suspension was being imposed. Grievant filed this challenge to the suspension on August 10, 2022.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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. *Leichliter, supra*.

The first issue to be addressed is Respondent's request to have the grievance dismissed as untimely. Respondent argues that Grievant was put on notice of the disciplinary action on July 15, 2022. This action was not timely filed because Grievant did not file this grievance until August 10, 2022. Grievant argues that the suspension letter notifying Grievant of the five-day suspension is dated July 26, 2022, therefore the filing of the grievance was done in a timely manner. Grievant is correct.

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. VA. CODE § 6C-2-4(a)(1); *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

The issue of timeliness can be resolved by the undersigned by identifying the date upon which the fifteen working days in which Grievant had to initiate a grievance began to run. The undersigned agrees with Grievant that the date is July 26, 2022, when he was unequivocally informed by Ms. White that Respondent would be suspending him. Grievant filed this grievance within fifteen working days of that date.

The facts of this case establish, by a preponderance of the evidence, that Grievant's continued involvement and interference in the workplace with an employee, with whom he was having a relationship, resulting in discipline was appropriate. Ms. Kolvalck had been transferred to another department following a previous disciplinary action resulting from misconduct concerning their relationship. The continued involvement and interference disrupted Ms. Kolvalck's superiors in training her for the new position and did adversely affect morale among others within the workplace. It is important in this analysis to keep in mind that Grievant was a supervisor. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Sloan v. Dep't of Health & Human Res.*, Docket No. 00-HHR-132 (Jan. 30, 2001).

Grievant acknowledged at the hearing that his conduct was inappropriate, but that it had improved since the March 2022 meeting addressing the interaction with a subordinate employee. Accordingly, Grievant requests that the undersigned reduce the discipline to a written reprimand. 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).

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).

Grievant had already been suspended for three-days in 2021, which he did not grieve, for misconduct in the workplace concerning the relationship he was having with another employee. Rather than distance himself in the workplace from any further troubles, Grievant involved himself in the other employee's training at her new position, where she had been transferred to separate her from Grievant. He also performed tasks which had been assigned to the female co-worker as part of her training. Grievant knew his actions were wrong but showed complete disregard for the grounds of his previous suspension. As this disciplinary matter is a continuation of the circumstances upon which

the prior suspension was based, the five-day term of suspension was appropriate discipline and not excessive.

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 § 156-1-3 (2018); *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).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in misconduct in the workplace and that behavior was disruptive and continuing in nature.

3. 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).

4. 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).

5. The Grievant failed to demonstrate that the disciplinary action was clearly excessive or reflects an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.[1] Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the

[1]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 W. VA. 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.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: June 5, 2023

Ronald L. Reece
Administrative Law Judge