

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BLAIN ARNOLD BOWMAR and HARLIN WOLFE, JR.,
Grievants,**

v.

Docket No. 2022-0371-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievants, Blain Bowmar and Harlin Wolfe, Jr., filed these grievances in early July of 2021, challenging a five-day and three-day suspension without pay. Grievants seek to have the pay restored and to be made whole. This grievance proceeded directly to level three. The grievances were consolidated by order entered November 21, 2021. An evidentiary hearing was held before the undersigned on October 16, 2023. Grievants appeared in person, and by their representative, Larry Weaver. The Division of Highways appeared by its Human Resources Director Natasha White and its counsel Keith Cox. This case became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law on November 20, 2023.

Synopsis

Grievants are employed as the Preston County Administrators for the Division of Highways. Grievants allowed a fellow employee to operate a truck which they knew had an exhaust leak and other mechanical problems. As a result, the employee suffered from carbon monoxide poisoning. Both Grievants were the Administrators in Preston County and were responsible for communicating with the mechanics daily to gain the status of equipment. Grievants were suspended for violation of the West Virginia Department of Transportation Standards of Work Performance and Conduct. Respondent proved the

allegation which resulted in the suspensions by a preponderance of the evidence. This grievance is denied.

The following Findings of Fact and Conclusions of Law are based on the record.

Findings of Fact

1. Blain A. Bowman was the Preston County Administrator/Highway Engineer Associate Senior for the West Virginia Division of Highways in February of 2021 and at all times relevant to this case.

2. Harlin Wolfe was the Preston County Assistant Administrator for the West Virginia Division of Highways in February of 2021 and at all times relevant to this case.

3. On the evening of February 20, 2021, Transportation Worker II Randal Barlow reported to work at the garage in Preston County, West Virginia. Mr. Barlow has been an employee of the Division of Highways for five years and has held a Commercial Driver's License for thirty years. Mr. Barlow was assigned to go out on the roads to address snow removal and ice control in truck number 377-385 by Acting Shop Foreman Rex Arnett.

4. It was known throughout the garage that truck number 377-385 had a radiator leak and was using excessive amounts of antifreeze each time it was on assignment. When Mr. Barlow started the truck at approximately 6:00 PM, smoke came out of the dash. After making a pre-trip inspection, Mr. Barlow filled out an OE-48 form flagging the truck for certain repairs. Mechanic Devon Waybright fixed the wiring issue which was causing the smoking from the dash and filled the truck with antifreeze.

5. By 11:30, Mr. Waynewright had completed his repairs on the truck. Mr. Barlow left the grounds with the truck to begin his duties.

6. At 11:45, and about three miles from the garage, Mr. Barlow notified the garage that "so much smoke behind the truck, can't even see behind me." Mr. Barlow did not feel comfortable operating the truck. The shop foreman told him to hold on and he would call him back.

7. The shop foreman phoned Grievant Wolfe to report the situation. The shop foreman was instructed to inform Mr. Barlow to "drive the truck and quit your whining. If the truck catches fire, just walk away from it."

8. Mr. Barlow did not note the exhaust issues in his pre-trip inspection due to the exhaust system not being easily accessible and it was dark. There are many mechanical failures that are not discoverable in a pre-trip inspection and may only be noticed by vehicle usage.

9. Mr. Barlow continued to drive the truck for ten more miles when a truck tire went flat. Mr. Barlow called the shop foremen about the blowout and was informed that a mechanic would be sent to assist with the tire. Mr. Barlow rolled the driver's side window down and completed some necessary paperwork.

10. Mr. Barlow began to feel sick in the truck. Mr. Barlow passed out and regained consciousness in an ambulance covered in heat patches. Mr. Barlow was transported to Preston Memorial Hospital and then sent to Mon General Hospital where he was treated for carbon monoxide poisoning. Mr. Barlow still suffers the effects of these unfortunate events.

11. Soon after the February 20, 2021, incident, Mr. Barlow became aware that Grievants and at least three other employees were aware of the exhaust leak prior to his dangerous evening.

12. Upon receipt of notice concerning Mr. Barlow's workers' compensation claim, Respondent began an investigation as to what circumstances led to the incident.

13. On February 23, 2021, Investigator Anthony Alger began interviewing witnesses, gathering evidence and documents related to the incident.

14. Mr. Alger reported that the truck had a radiator leak that was common knowledge to the Preston County garage in advance of February 20, 2021. Mechanics were aware as early as February 16, 2021, that there was an exhaust leak under the cab of the truck and there were holes in the floor of the cab.

15. Grievant Bowmar had knowledge of the exhaust leak and was aware that parts to fix the leak had been ordered by February 19, 2021, if not earlier. Both Grievants were the Administrators in Preston County and were responsible for communicating with the mechanics daily to gain the status of equipment.

16. Director of Human Resources Natasha White signed suspension letters and was a member of the multi-disciplinary team that concluded that suspensions were appropriate.

17. Respondent determined that Grievants were in violation of the West Virginia Department of Transportation Standards of Work Performance and Conduct as outlined to Grievants.

18. After discussions concerning this violation with Grievants, Mr. Bowmar was suspended for five days. Mr. Wolfe was suspended for three days.

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 facts of this case established by a preponderance of the evidence that Grievants were responsible for the personnel and equipment for Preston County, West Virginia Division of Highways. Grievants had knowledge of the hazardous conditions involving exhaust and other issues with truck 377-385. Their inaction and lack of concern created a dangerous situation for Randy Barlow by forcing him to drive the truck. As a result, Mr. Barlow suffered from carbon monoxide poisoning which required his treatment at two hospitals and continues to suffer the effects of this damage. If Grievants had only sought assistance from Respondent, assistance which was later provided, this unfortunate incident could have been avoided.

Respondent demonstrated by a preponderance of the evidence that Grievants violated the West Virginia Department of Transportation Standards of Work Performance and Conduct. This violation created an extremely dangerous work condition that jeopardized the health of Mr. Barlow. The record clearly established that there was just cause for their suspensions. It is important in this analysis to keep in mind that Grievants were supervisors. "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).

Grievants' primary argument in response to the suspensions is that the Division of Highways provided no clear direction in when to take a vehicle out of service. Grievants also suggest that Mr. Barlow was at fault for creating this situation. Both arguments carry no weight. Grievant Bowmar had knowledge of the exhaust leak and was aware that parts to fix the leak had been ordered by February 19, 2021, if not earlier. Both Grievants were the Administrators in Preston County and were responsible for communicating with the mechanics daily to gain the status of equipment. An exhaust leak provided clear direction that the truck be taken out of service.

If Grievants had sought assistance from District 6 and Headquarters, which was later provided, it could have been provided earlier and prevented the mechanical issues which led to Mr. Barlow's carbon monoxide poisoning. This clearly meets the requirement that Grievants comply with accepted safe working practices in addition to the requirements that they provide careful and diligent use and safeguarding of all state properties. To blame Mr. Barlow for the outcome of the events of February 21, 2021, is absurd and merits no discussion. While it appears from the record that termination of their employment was considered, Respondent chose to impose suspensions and the undersigned need not question this discretion.

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 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*.

2. Respondent has proven by a preponderance of the evidence that Grievants engaged in conduct that violated the West Virginia Department of Transportation Standards of Work Performance and Conduct. Respondent proved by a preponderance of the evidence that Grievants failed to comply with accepted safe working practices.

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.

¹On 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

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

Date: January 10, 2024

Ronald L. Reece
Administrative Law Judge

appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.