THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JACE AARON COLLINS,
Grievant,

v. **Docket No. 2024-0688-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Jace Aaron Collins, was employed by Respondent, Department of Transportation, as a Transportation Office Coordinator. On April 17, 2024, Grievant filed this grievance directly to Level Three stating, "Wrongful termination, discrimination, and retaliation for birth of child." For relief, Grievant seeks "[c]ompensation for wrongful termination, discrimination against Hispanics, and compensation for violation of federal laws regulating paternal child care." He also requested that his access to his state email account be restored "to help fight [his] case."

A Level Three hearing was held on August 5, 2024, before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and was self-represented. Respondent appeared by Kathryn Hill and was represented by counsel, Brian D. Maconaughey. At that time, Grievant was informed that the Grievance Board does not have jurisdiction over claims of discrimination relating to the protected classes set forth in West Virginia Code § 5-11-1 *et seq.*[1] W. VA. CODE § 6C-2-2(i)(2)(B). Accordingly, the Grievance Board did not hear

[1] West Virginia Code § 5-11-1 *et seq.* was repealed by the Legislature in SB 300 on February 19, 2024, and recodified as West Virginia Code § 16B-17-1 *et seq.*

evidence on Grievant's claims of discrimination based on his Hispanic heritage. This matter became mature for decision on September 3, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.[2]

Synopsis

Grievant was employed by Respondent as a Transportation Office Coordinator. Grievant was terminated for gross misconduct in falsifying his time and payroll records. Grievant asserted that he had been discriminated against as a Hispanic person and that he had been wrongfully terminated. Because the Grievance Board does not have jurisdiction to hear claims based upon membership in a protected class, it heard only Grievant's claim of wrongful termination. At the Level Three hearing, Respondent met its burden of proof by a preponderance of the evidence that Grievant engaged in gross misconduct by falsifying his time and payroll records. 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 Office Coordinator in Respondent's Boone County office. His duties included overseeing and inputting time records for all of Respondent's Boone County employees, including himself.

[2] Respondent submitted Proposed Findings of Fact and Conclusions of Law on September 3, 2024, which was the deadline for submissions. Grievant did not submit Proposed Findings of Fact and Conclusions of Law, nor did he request an extension of the deadline.

2. Respondent conducts regular audits of each of its departments or agencies on a rotating basis. Each department or agency is audited, in turn, every three years.

3. The audits are conducted by an established procedure, which is the same for every department or agency and from one audit cycle to the next. Part of that procedure is a review of time and payroll records.

4. Respondent uses a multi-steep time and payroll record:

a. An employee's time record is recorded on a paper DOT-12 form.

b. The DOT-12 for each employee is then reviewed for accuracy and signed by that employee's crew chief or supervisor.

c. The information from the DOT-12 is then input into the electronic OASIS system by a designated employee. In the case of the Boone County headquarters, that employee was Grievant.

5. A regular audit of the Boone County office was conducted by Patricia Griffith in February 2024.

6. As part of that audit, Ms. Griffith reviewed time records for the pay period of December 30, 2023, through January 26, 2024, for each employee assigned to the Boone County office. That review included a comparison of DOT-12 forms and approved leave slips with OASIS records.

7. Ms. Griffith found a discrepancy between the approved DOT-12 forms, leave slips, and OASIS records for Grievant.

8. Pursuant to established protocol, Ms. Griffith then reviewed the time and payroll records for two more pay periods. Again, she found discrepancies regarding Grievant's time and payroll records.

9. Ms. Griffith did not find discrepancies in the time and payroll records of any other employee in those time frames.

10. All the discrepancies in the time and payroll records were in the favor of Grievant.

11. There had been no indication prior to the audit that there was any issue with time and payroll records in the Boone County office.

12. Ms. Griffith reported her findings to her supervisor, who turned the matter over to the legal office.

13. On February 29, 2024, Respondent's legal office engaged Matthew Arrowood to investigate the discrepancies.

14. Mr. Arrowood reviewed time and payroll records from the Boone County office extending back six months. He found 22 discrepancies in the time and payroll records for Grievant between July 2023 and December 2023 alone.

15. The discrepancies were such that Grievant's DOT-12s showed that he had taken leave, but the OASIS records showed that Grievant had worked during those same hours.

16. Mr. Arrowood interviewed Grievant and asked him about the discrepancies. Grievant acknowledged that he was the person responsible for entering the DOT-12 information into OASIS but did not offer a reasonable explanation for the discrepancies. Grievant offered that he must have "mistyped" the information or that he "intended to change it" later or that he assumed that his assistant, Tammy Sperry, would catch his "mistakes."

17. Grievant also offered to Mr. Arrowood that other people in the office input time records in Grievant's absence. For instance, Ms. Sperry sometimes input the information. In fact, five of the 22 records in question were entered into OASIS under Ms. Sperry's name. However, the only discrepancies occurred in the time and payroll records for Grievant.

18. Mr. Arrowood also interviewed Grievant's supervisor, Mike Stowers. Mr. Stowers was aware of the audit findings but believed there must be some reasonable explanation for the discrepancies. After Mr. Arrowood showed Mr. Stowers the evidence and relayed Grievant's explanations, Mr. Stowers expressed that he was "floored" and that the evidence "blew his theory" as to what might have happened.

19. Once Mr. Arrowood's investigation substantiated the allegations regarding the time and payroll records, the matter was referred back to the legal department and the human resources department.

20. In the criminal law realm, the substantiated allegations would have been termed "fraud" or "embezzlement."

21. Based on the results of the investigation, the decision was made to terminate Grievant's employment for "gross misconduct." Due to the serious nature of the charges of falsifying payroll records, policy did not call for progressive discipline.

22. Grievant acknowledged that he missed work frequently throughout the course of his wife's pregnancy and his child's birth.

23. Even when he was away from the office taking care of his family, Grievant often took calls from work and had to input information regarding employee leave, insurance, work schedules, etc.

24. Grievant inquired as to whether he was eligible for leave under the Family Medical Leave Act ("FMLA") but was told that he "did not need to worry about that."

25. When appropriate, FMLA leave is approved in conjunction with existing sick and annual leave, not in addition to it.

26. Grievant never formally applied for and was never approved for FMLA leave, nor was he ever granted a work-from-home accommodation.

27. Despite the unapproved absenteeism and gross misconduct, Respondent decided to offer Grievant an opportunity to resign in lieu of termination. A meeting was set up for April 26, 2024, to include Grievant, current District 1 Maintenance Manager Stefen White (stepping in for then District 1 Maintenance Manager Scott Eplin, who was absent), attorney Rebecca McDonald, and Employee Relations Manager Kathryn Hill.

28. Grievant did not show up for the meeting, and he did not answer calls from the office phone or Ms. McDonald's cell phone. He did, however, answer a call from Mr. White's cell phone. Mr. White informed Grievant that he was on speaker phone and let Grievant know who else was present for the call.

29. The opportunity to resign was extended to Grievant, but he was defiant, talking over the other participants in the call, referring to Ms. McDonald and Ms. Hill as "bitches," and arguing that Respondent could not fire him. Ms. McDonald then informed Grievant that he was terminated.

30. Grievant hung up on the call but called Mr. White's cell phone later in the afternoon and left a voicemail asking to be allowed to resign instead.

31. A letter formalizing Grievant's termination was mailed to him on April 16, 2024.[3]

32. Grievant subsequently applied for unemployment benefits but was determined to be "disqualified" based on his termination for "time theft."

33. Grievant appealed the denial of unemployment benefits. Respondent did not appear at the hearing. Accordingly, the Administrative Law Judge found that Respondent failed to meet its burden of demonstrating misconduct and found that Grievant was not "disqualified" from receiving unemployment compensation.

34. Grievant is not currently employed.

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). 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, which means 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."

[3] The letter contained a typographical error, and a second letter was sent to Grievant on May 13, 2024, correcting that error.

Sloan v. Dep't of Health & Human Res., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*); 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). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Here, Respondent terminated Grievant for falsifying his time and payroll records, which Respondent found to be "gross misconduct." "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) *(citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)).

In this case, Grievant violated multiple West Virginia Department of Transportation Standards of Work Performance and Conduct:

> Policy DOT 3.32, Section 4.2, Subsection B—Regular attendance, including promptness in reporting to work and reporting availability for work, and appropriate use of leave, meal, and break time.
>
> Policy DOT 3.10, Section 1.0—Employees are expected to maintain their normal approved work schedules. If at any time an employee is not at the assigned duty station, a leave slip or request for alternative work schedule must be completed and approved to account for those hours.

> Policy DOT 3.32, Section 4.2, Subsection E—Compliance with working rules, policies, procedures, regulations, and laws that apply to DOT employees.

Grievant was frequently absent from work. That is undisputed. Though he asserted that he often handled work matters while away from the office, he was not approved to perform his work duties remotely. Likewise, though Grievant made an inquiry as to whether he needed to apply for FMLA leave, he never formally applied for and was not approved for FMLA leave. Certainly, Grievant's failure to report to work as scheduled and failure to obtain approval for his leave shows a wanton disregard of the standards of behavior which Respondent has a right to expect of its employees.

Moreover, Grievant's acts amounted to a theft from the State. At least 22 times, Grievant presented one set of time records to his supervisor, showing the leave he had taken in each given pay period, but then entered a wholly different and inaccurate time record into the OASIS payroll system. The falsified OASIS entries resulted in a fraud against the State. The resultant theft from the State demonstrates Grievant's willful disregard of Respondent's—and the taxpayers'—interest.

Grievant offered no evidence to rebut the testimony of the witnesses or to show that the documentation provided by Respondent was inaccurate. In fact, he did not deny that the time records submitted to OASIS were falsified or that he submitted those falsified records. He simply tried to deflect from those facts, offering reasons for his frequent absence and asserting that he was not the only person entering time records. No one questions that Grievant had good reasons for being absent from work. That is not the question, though. The question is whether he properly documented his absences when he reported his time records to OASIS, and he did not.

Likewise, no one questions that other employees submitted time records to OASIS on occasion. Indeed, the record demonstrates that Ms. Sperry uploaded a handful of the records in question to OASIS. The problem is that the only time records that were falsified were those belonging to Grievant. So, while Grievant decries that he was the only person investigated and disciplined as a result of that February 2024 audit and the subsequent investigation, that is because he is the only person who was found to have been at the root of and who benefited from any fraudulent time and payroll entries.

Respondent has proven by a preponderance of the evidence that Grievant acted with gross misconduct. Respondent's action in terminating Grievant for falsifying his time and payroll records was justified and supported by policy. Accordingly, the grievance is DENIED. 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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). 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, which means 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." *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*); 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). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) *(citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)).

4. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant falsified his time and payroll records, which amounts to gross misconduct that constitutes good cause for the termination of his employment.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board

nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: October 3, 2024

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Lara K. Bissett
Administrative Law Judge