

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SCOTT BOLEN,**  
**Grievant,**

**v.**

**Docket No. 2016-1198-CONS**

**DIVISION OF HIGHWAYS,**  
**Respondent.**

## **DECISION**

Grievant, Scott Bolen, is an employee of Respondent, Division of Highways (“DOH”), in the Transportation Worker 3 (“TW3”) classification as an equipment operator. He works out of the DOH facility in Raleigh County. Mr. Bolen filed a level one grievance form dated January 12, 2016, alleging, “Reprimand without good cause/retaliation.” As specific relief he seeks, “removal of discipline & cessation of retaliatory treatment.” Mr. Bolen filed a second grievance form dated January 22, 2016, alleging, “Verbal warning & threat of ‘further discipline’ without good cause.” As specific relief in this grievance he seeks, “removal of warning [and] any further discipline.” An Order was entered at level one on February 4, 2016, consolidating the grievances with the above-styled docket number since they both arose from the same series of events.

A level one conference was held and both grievances were treated as consolidated on February 3, 2016.<sup>1</sup> A level one decision denying the grievance was issued on February 22, 2016. Grievant appealed to level three on March 5, 2016, and that appeal was dismissed and transferred to level two by Order of the Chief Administrative Law Judge

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<sup>1</sup> The written order of consolidation, entered the next day reflects the Hearing Examiner’s oral ruling at the hearing.

("ALJ") dated March 14, 2016. After several continuances, a mediation session was held on November 1, 2016. Grievant appealed to level three on November 2, 2016, and a level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on February 13, 2017. Grievant appeared personally and was represented by Gordon Simmons, UE Local 170, WV Public Workers Union. Respondent was represented by Jesseca R. Church, Esquire, DOH legal Division. This matter became mature for decision on March 13, 2017, upon receipt of the parties Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Respondent gave Grievant a "verbal warning" after he received five parking tickets while operating a State vehicle on State business and did not take any action to address them until they were the subject of a memorandum from the director of the DOH Equipment Division more than seven months later. Respondent found this action to be more egregious because Grievant was a supervisor at the time of these incidents.<sup>2</sup> Grievant argues that he paid the fines when they were brought to his attention and therefore should not be disciplined. Respondent avers that it is not only the non-payment of the tickets that is the problem but that Grievant ignored them for seven months and would have continued to do so had they not been brought to his attention by his supervisors.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

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<sup>2</sup> Grievant has since voluntarily left his Crew Leader position for a Transportation Worker 3 position.

### **Findings of Fact**

1. Grievant, Scott Bolen, is employed by Respondent as a TW3 Equipment Operator. He has been working for the DOT for eight years out of the Raleigh County facility.

2. On May 7, 2015, Grievant was classified as a Crew Leader. As part of those duties he was required to attend a training in Building 5 at the State Capitol Complex in Charleston. This was the first time Grievant had been required to travel to attend a training. Grievant was assigned a state vehicle, and his gasoline and turnpike tolls were paid by the agency.

3. Grievant parked at a parking meter in a State parking lot and initially put money in the meter. However, the paid time expired while Grievant was still in the training session and the vehicle received several tickets for parking violation.

4. On May 12, 2015, Grievant was again required to attend a training in Charleston at the Capitol Complex. He inquired about parking and was told by someone in District Ten to park on a back lot. Nonetheless, Grievant received a ticket for parking on a State lot without a permit.

5. All of the tickets were issued by the Department of Administration's Real Estate Division, Parking Section. Grievant did not pay any of the tickets or turn them in to his supervisor for direction on how they should be paid.

6. Two letters dated December 12, 2015, were sent by the Fleet Management Office of the Department of Administration to the DOH Buckhannon Facility and received

on December 21, 2015. The first was a notice that the vehicle Grievant had driven<sup>3</sup> had received four parking tickets on May 7, 2015, and a total of \$40.00 was owed for them. (Respondent Exhibit 1). The second notified the DOT that the same vehicle had received a ticket on May 12, 2015, and \$20.00 was owed on that violation. Both letters contain the following sentence which explains why the fines are higher than usual.

As payment for the above citation(s) were not received within the allotted ten (10) days of the ticket date, a late fee has been automatically assessed. Payment in full must be received, or a payment agreement arranged within (10) business days.<sup>4</sup>

7. On December 28, 2015, the letters were sent along with a memorandum from The Director of the Equipment Division, to the District 10 Engineer/Manager in Princeton, where it was received on January 5, 2016. Among other things the memorandum stated:

As outlined in the West Virginia Division of Highways, Administrative Operating Procedures Section IV, and Chapter 3; Equipment Operator Accountability it clearly states under Paragraph 11. A. "Standard Applicable to All Employees Operating Transportation or Rolling Equipment . . . Must be fully responsible for any parking or traffic violations incurred while operating state-owned equipment,"

The payment remitting instruction is listed on the attached notice.

Please submit proof of payment to this office by January 15, 2016. (Emphasis in Original).

From Princeton, the memorandum was forwarded to DOH Raleigh County Administrator, Johnny Vass. Mr. Vass is Grievant's supervisor.

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<sup>3</sup> The vehicle was eventually identified as the one Grievant had driven by the license number. The log was checked to see who was assigned the vehicle on the days in question.

<sup>4</sup> Respondent Exhibits 1 & 2.

8. Upon receiving the memoranda with attached letters, Administrator Vass called Grievant to his office to discuss the tickets. Assistant District 10 Engineer, Alan Reed was present at the meeting.<sup>5</sup> The meeting was held on Thursday, January 7, 2016.<sup>6</sup>

9. At the meeting, Mr. Vass and Mr. Reed told Grievant he was required to pay the tickets and he needed to do so right away. Grievant said the agency should have paid for his parking because he was on agency business. Mr. Vass read Grievant the DOH Administrative Operating Procedure, Section IV, Chapter 3, *Equipment Operator Accountability*, which states that the equipment operator must obey all traffic laws and “[m]ust be fully responsible for all parking and traffic violations incurred while operating State-owned equipment.” *Id*, Section II, Subsection A., Paragraph 4.

10. Grievant asked what would happen if he did not pay the tickets and Mr. Alan told him he was not sure, but the amount of the fines might be deducted from his paycheck. Grievant stated that he was not going to pay the tickets and left the meeting.

11. After Grievant left the meeting, Mr. Vass and Mr. Reed decided that discipline was appropriate for Grievant and began completing the forms necessary to recommend that some action be taken.

12. Mr. Vass prepared a Form RL-544 which is a DOH form that notifies an employee that disciplinary action is being recommended and gives the employee an opportunity to give an explanation before discipline takes place. The title of the Form RL-

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<sup>5</sup> When the level three hearing was held, Mr. Reed was serving as Acting District Engineer for District 10.

<sup>6</sup> Mr. Vass testified that the meeting took place on January 8, 2016, but Grievant testified that it took place on Thursday, January 7, 2016, because he was off work on that day and paid the tickets. The Grievant’s version seems to fit better with the facts, so it is found to be the most likely date of the two. However, in the final analysis the exact date is not dispositive of this matter.

544 is "NOTICE TO EMPLOYEE." After consulting with the district office, Mr. Vass notified Grievant of a pending Verbal Warning stating the reason to be:

On 5/7/15 & 5/12/15, you received parking tickets while operating a state vehicle. As of date, the tickets have not been paid. Per the WV DOH, Admin. Operating Procedures Sect. IV, Chapter 4: Standard Applicable to All Employees Operating Transportation and Rolling Equipment [m]ust be fully responsible for any parking or traffic violations incurred while operating state-owned equipment. A signed copy of the WV DOH Policy Acknowledgement statement is attached. Please provide proof of payment by 1/22/16 to avoid further disciplinary action being taken. *Id.*

The RL-544 contains a "note" after the section which describes the alleged offense which gives the employee an opportunity to respond in writing within five days of receipt of the notice, or in person at a pre-scheduled meeting with the "Agency Representative." (Respondent Exhibit 5).

13. Grievant paid all the parking fines and late fees on Friday, January 8, 2016, while he was off work. He did not tell his employer he was going to do so.

14. Grievant was called to a meeting with Mr. Vass on Monday, January 11, 2016. Mr. Vass told Grievant that he was giving him a verbal warning and gave him the Form RL-544 notice.

15. Grievant gave Mr. Vass his written reply by writing on the Form RL-544 "This is a bunch of crap. Tickets all paid." (Respondent Exhibit 5). Grievant also provided Mr. Vass with receipts showing that he had paid the parking fines, including the late fees. Grievant did not make any further written response and did not attend the optional meeting in Princeton which had been scheduled.

16. Mr. Bolen filed the two grievances involved herein on January 12 and 22, 2016.

## Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

*W. Va. Dep’t of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent asserts that Grievant was given a verbal warning because he did not pay his parking tickets within ten days of receiving them. Grievant’s supervisors, Mr. Vass and Mr. Reed, point to the Department of Administration Parking Section letter which provides that payment must be “received within the allotted ten (10) days of the ticket date” or a late fee is automatically assessed. The letter goes on to state that “Payment must be received, or a payment agreement arranged, within (10) business days.” They note that Grievant was a supervisor at the time he received the tickets and was therefore held to a higher standard of conduct than other employees. The Grievance Board has

upheld this concept by noting that “A supervisor is expected to set an example of appropriate behavior for subordinates and may be held to a higher standard of conduct.” *See Cobb v. Dep’t of Admin./General Services Div.*, Docket No. 97-ADMN-404/455 (May 26, 1999). Grievant simply ignored the tickets until the fines were brought to the agency’s attention over seven months after he received them.

Grievant argues that he paid the tickets when they were brought to his attention. Further, nothing in the DOH General Operating Procedures requires that tickets be paid within a specific time frame. The ten-day rule is within of the Parking Section’s authority. Grievant argues that his obligation under the DOH operating procedures is to pay the tickets, when they are paid is between him and Parking Section. Grievant further notes that the memorandum from the DOH Equipment Division Director requires the tickets to be paid by January 15, 2016, and the Form RL-544 giving him notice of the verbal warning requires proof of payment before January 22, 2016. He paid the fines before both of those days so he feels that discipline is unnecessary.

What Grievant fails to see is that the verbal warning is not for simply getting the parking tickets. The discipline is because Grievant received the tickets while operating a State vehicle on State business and did nothing about it until it was brought to his attention by his supervisor because of a memorandum from the Equipment Division Director. It is understandable that Grievant might not initially know who was to pay the tickets. The DOH had assumed all other expenses for his training and this was his first occasion to attend such a training.<sup>7</sup> However, it would be simple and prudent to ask a supervisor or

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<sup>7</sup> Notwithstanding the fact that Grievant had signed a verification that he had received all the DOH General Operating Procedures, it is unrealistic to believe that all employees commit these policies and procedures to memory and have total recall of them years later.



look up the answer in the DOH General Operating Procedures. Simply ignoring them is not an acceptable alternative, especially for a supervisor who is expected to ensure that subordinates follow the rules. *Cobb v. Dep't of Admin./General Services Div.*, *supra*. The verbal warning was for failing to take any timely action regarding the tickets. Additional discipline may have been taken had Grievant failed to pay the tickets once the obligation was brought to his attention by his supervisors. Respondent proved the reasons for giving<sup>8</sup> Grievant a verbal warning by a preponderance of the evidence. Accordingly, the grievance is DENIED.

### **Conclusions of Law**

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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<sup>8</sup> The undersigned is concerned that no evidence was produced that Grievant received a Form RL-546 which is the DOH verification of disciplinary action. This form is typically given to an employee after he or she has received a Form RL-544 notice and given an opportunity to respond. The nature and the relationship of these two forms has been consistently presented in testimony of DOH officials taken under oath at numerous grievance hearings and has been set out in findings of facts in the decisions rendered in those cases. See *e.g.*, *Clagg and James v. Div. of Highways*, Docket No. 2015-1631-CONS (Feb. 10, 2016); *Rinehart v. Div. of Highways*, Docket No. 2014-0984-DOT (March 25, 2015); *Cobb v. Div. of Highways*, Docket No. 2012-0604-CONS (Nov. 16, 2012); *Keaton v. Div. of Highways*, Docket No. 2011-0188-DOT (May 9, 2011); *Loudermilk v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2010-0558-DOT (Oct. 8, 2010). However, this issue was not raised or addressed by either party so it will not be addressed herein.

2. “A supervisor is expected to set an example of appropriate behavior for subordinates and may be held to a higher standard of conduct.” See *Cobb v. Dep’t of Admin./General Services Div.*, Docket No. 97-ADMN-404/455 (May 26, 1999).

3. Respondent proved by a preponderance of the evidence that the verbal warning was appropriate under the circumstances.

Accordingly, the grievance is DENIED.

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 (2008).

**DATE: APRIL 14, 2016.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**