

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**THOMAS SPENCE,
Grievant,**

v.

Docket No. 2017-1777-DOC

**DIVISION OF NATURAL RESOURCES,
Respondent.**

DECISION

Grievant, Thomas Spence, filed this action on February 27, 2017, seeking the removal of a written reprimand which was attached to one of his Employee Performance Appraisal forms. Level One and Level Two proceedings were waived by the parties. The undersigned conducted a Level Three evidentiary hearing on November 2, 2017, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Jane Charnock, Assistant Attorney General, and Colonel Jerry Jenkins, Law Enforcement Chief. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on December 11, 2017.

Synopsis

Grievant is employed by the Division of Natural Resources as a Natural Resources Police Officer. Grievant received a complaint of an overturned boat on the Ohio River, possibly as a result of an accident. Grievant contacted a co-worker who responded in a patrol boat to assist with the search. Grievant came to the conclusion that the complaint

was unfounded, and notified his co-worker that no overturned boat was visible on the river. Grievant's co-worker continued the search by patrol boat, and Grievant failed to assist his co-worker, leaving him alone in the patrol boat. Record established this is a violation of the Respondent's General Order that prohibits one man patrols. Respondent demonstrated by a preponderance of the evidence that the written reprimand issued to Grievant on February 21, 2017, was warranted and supported by the facts.

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

Findings of Fact

1. Grievant is employed by the Division of Natural Resources (DNR) as a Natural Resources Police Officer. Grievant has been employed by the DNR for approximately twenty years.

2. Captain Stephen J. Antolini indicated that the disciplinary action arose from an incident on October 21, 2016. On this day, Grievant received a complaint of an unattended boat on the Ohio River, possibly as a result of an accident. Grievant contacted a co-worker, Stephen C. Haines, who then got on a DNR boat in Brooke County to assist Grievant with the search. Captain Antolini reported that Grievant and Officer Haines agreed to meet to undertake the search.

3. Grievant contacted Officer Haines while he was traveling on the Ohio River toward the meeting point. Grievant told Officer Haines that he did not observe an overturned boat on the river, and that he was going to head to his home.

4. Captain Antolini found that the Ohio River was swift, muddy, and had floating debris on this date due to recent heavy rains.

5. Captain Antolini determined that Grievant's actions were unacceptable. He

wrote:

Your job performance and judgement during this incident are highly unacceptable. Under the circumstances you left a fellow Officer in a dangerous situation without any regard to his safety. As a Police Officer you are obligated and sworn to assist the general public and more especially fellow Officers. Your actions and or non-actions on 21 October fall well within the definitions of misconduct, incompetence, errors in judgement and failure to assist and protect another Officer as outlined in our General Orders.

6. Officer Haines stated that while on duty after investigating unrelated complaints, he received a voicemail from Grievant about a possible overturned boat in the Ohio River in the late afternoon of October 21, 2016.

7. Officer Haines then decided to take the patrol boat moored at the Brooke County Sheriff's office to undertake a river search. He intended to meet Grievant at the Steubenville Marina so that Grievant could assist in the search.

8. Officer Haines contacted Grievant and told him he was in the patrol boat. Grievant told Officer Haines that he had driven along Route 7 in Ohio and over the bridge, but did not see anything.

9. Officer Haines was told by Grievant that no overturned boat could be spotted and that he was returning home. Officer Haines was the only responder investigating the report who was in a patrol boat on the Ohio River.

10. Officer Haines continued the river search, and found an object in the river that could have appeared to have been an overturned boat. It appeared to be a fallen barge pillar, one that looked similar to the hull of an overturned boat.

11. Officer Haines realized that he was left alone on the river, which was swollen from recent rains and running fast, so he made the trip back to Brooke County to dock the

boat by himself.

12. Captain Antolini explained that while Grievant had a higher ranking than Officer Haines, Grievant was not Officer Haines' supervisor. Captain Antolini issued the written reprimand after speaking to Officer Haines and Grievant.

13. Grievant indicated that he felt that he and Officer Haines did not have an agreed upon meeting place. Grievant underwent a river search from the roadway, along Route 7 and from a bridge, and saw nothing in the river resembling an overturned boat.

14. Grievant was in contact with the Weirton Fire Department, who assisted in this search from the roadway. The Weirton Fire Department did not see an overturned boat in the river.

15. Grievant contacted Officer Haines and told him that he did not see a boat in the river and that he should head back to Brooke County with the patrol boat. Grievant indicated that Officer Haines insisted on continuing the search, against Grievant's recommendation. Grievant, being certain that no overturned boat was in the river, then went home.

16. General Order No. 2.7 defines incompetence as “. . . actions held by the courts including, but not limited to, successive errors in judgment, neglect of duty or absence without leave.”

17. General Order No. 2.8 defines misconduct as:

“. . . actions for which an employee may be disciplined and may be any behavior in violation of a rule or policy of the state, the Division of Natural Resources or the Law Enforcement Section. It can include, but is not limited to, misbehavior, neglect of duty, delinquency, lack of cooperation with others, insubordination, successive failure to report when ordered, absence without leave and falsification of records or reports and may consist of acts of commission or omission.”

18. Grievant, as a Natural Resources Police Officer, is under an obligation to assist fellow officers. General Order 1.6.6 states that “unless actually incapacitated themselves, officers shall aid, assist and protect fellow officers in time of danger and/or under conditions where danger may be present.”

19. The conditions under which Officer Haines undertook the river search could be considered dangerous in that the river was swollen and had floating debris, had a fast current and visibility from the boat may have been poor.

20. Respondent presented evidence of previous verbal warnings given to Grievant, including one for failing to hide his vehicle while an undercover operation was underway at Hillcrest Wildlife Management Area; and to issue a citation for indecent exposure when directed to do so by another officer. Respondent also presented evidence of a previous verbal warning given to Grievant, related to his presence in his marked law enforcement vehicle while an undercover operation was underway.

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 Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.”

Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). In other words, “[t]he 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).

The record of this case supports a finding that Grievant failed to abide by sections of the General Order in his actions on October 21, 2016. It would appear that Grievant failed to abide by General Order 30.1, relating to the operation of emergency vessels, by failing to join in the river search. While the General Order acknowledges that “no fixed rule can apply to every circumstance when governing emergency operations,” Grievant’s failure to assist Officer Haines in the operation of the patrol boat violated General Order No. 6.1.4, which states that “except for exigent circumstances, there shall be no one man patrols.”

Respondent has established by a preponderance of the evidence that Grievant’s conduct on October 21, 2016, amounts to misconduct within the definitions contained in General Order No. 1.2. This conclusion is based, in part, upon Grievant’s failure to recognize that Officer Haines’ safety was potentially at risk while alone on the Ohio River. As a result of Grievant’s decision to not assist with the river search, the undersigned can not disagree with Respondent that this presented a safety concern since Officer Haines was in the patrol boat in adverse weather conditions. The record also established that even if Grievant believed that Officer Haines should not have undertaken a river search by boat, his failure to assist Officer Haines when he knew he was on the river alone is a violation of General Order No. 1.6.6. Respondent demonstrated by a preponderance of the evidence that the written reprimand issued to Grievant on February 21, 2017, was warranted and supported by the facts.

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 Bd. 156 C.S.R. 1 § 3 (2008); *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. Record established that Grievant's actions on October 21, 2016, were a violation of the Respondent's General Order relating to assisting a fellow officer and the prohibition on one man patrols. Respondent demonstrated by a preponderance of the evidence that the written reprimand issued to Grievant on February 21, 2017, was warranted and supported by the facts.

Accordingly, this 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 *a/so* 156 C.S.R.
1 § 6.20 (2008).

Date: December 29, 2017

Ronald L. Reece
Administrative Law Judge