**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JIMMIE D. OWEN,**
**Grievant,**

**v.** **Docket No. 2021-0255-DOT**

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

## DECISION

Grievant, Jimmie D. Owen, was employed by Respondent, Division of Highways. On August 19, 2020, Grievant filed this grievance against Respondent at level one of the grievance process stating, "Standard of work performance and conduct." For relief, Grievant sought, "[r]estoration of pay and suspension time restored." On September 8, 2020, Grievant filed an amended grievance directly to level three of the grievance process. As the grievance protested a suspension, it was proper to proceed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4) and an order transferring the grievance to level three was entered on October 1, 2020.

On July 12, 2021, Respondent, by counsel, filed a motion to dismiss alleging the grievance was moot as Grievant had been terminated from employment for job abandonment and had not grieved his termination. The motion to dismiss was denied as Grievant would be entitled to recover back wages should he prevail in his grievance protesting his suspension. A level three hearing was held on July 20, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se* via telephone.[1] Respondent appeared in person by Kathleen Dempsey

[1] In his post-hearing submission, Grievant appears to allege some impropriety asserting that the grievance hearing was conducted from the "district 2 equipment shop" and that other persons were present during the hearing. This allegation is false. As was stated in

and was represented by counsel, Rebecca D. McDonald. This matter became mature for decision on August 25, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## Synopsis

Grievant was employed by Respondent as a Transportation Worker 3, Crew Chief. Grievant was suspended for three days for four separate alleged acts of misconduct. Respondent failed to prove Grievant's refusal of a directive was insubordinate as Respondent did not prove the refusal was wilful. Respondent proved Grievant committed gross misconduct for stranding a coworker during lunch at a restaurant by purposely leaving in the only vehicle without warning. Respondent was justified in suspending Grievant for three days for that act of gross misconduct. 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 Worker 3, Crew Chief.

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the March 12, 2021 *Notice of Hearing,* the level three hearing in this matter was conducted at the Grievance Board offices at 1701 5th Avenue, Charleston, West Virginia. The undersigned, Ms. Dempsey, and Ms. McDonald attended in person. Grievant was permitted to appear by telephone at his request. The only other persons present in the hearing room were admitted by Respondent proper request: a new employee, Jack Clark, and a summer intern, Molly Plante, who were permitted to observe the hearing for educational purposes. No other person was present in the room as all witnesses other than Ms. Dempsy appeared by telephone. Witnesses were located in the same facility but testified from a private room.

2. Due to circumstances unrelated to the grievance, during the time of the alleged misconduct, Grievant was not serving as a crew chief but was instead assigned to the crew of Crew Chief Kevin Mann. However, Grievant was under the direct supervision of second-level supervisor Jerry Pullen.

3. On May 20, 2020, Grievant and a co-worker, Chris Caldwell, travelled to a restaurant for lunch together in a state vehicle. Mr. Caldwell entered the restaurant while Grievant remained in the vehicle. Mr. Caldwell remained in the restaurant for ten to fifteen minutes waiting for his to-go order. While Mr. Caldwell was in the restaurant, Grievant became impatient and left the restaurant with the State vehicle without informing Mr. Caldwell of his intent to do so. As Mr. Caldwell had left his cellphone in the vehicle, he had no way to contact his employer to notify anyone of his whereabouts. Mr. Caldwell was stranded at the restaurant for approximately an hour and a half before another coworker came to retrieve him.

4. During the summer of 2020, on several occasions Grievant was instructed to weed eat a particular piece of property and refused to do so.

5. Grievant believed that the property he was instructed to weed eat was not State property but was, instead, the property of Cabell County Schools.

6. On July 2, 2020, Mr. Pullen, issued an RL-544 notice to Grievant that he was recommending Grievant be suspended for three days. Attached to the notice was an addendum listing three pages of specific incidents for which discipline was being recommended. The addendum noted continuing misconduct beginning in March 2020. Grievant was provided an opportunity to respond to the allegations in writing and in person. The addendum is not signed or sworn.

7. A predetermination conference was held between Grievant, Scott Eplin, Rob Pennington, Mr. Pullen, and Kathleen C. Dempsy, Human Resources Manager, on July 7, 2020.

8. Grievant also responded to the notice in writing on July 8, 2020. Grievant denied threatening coworkers and stated there was no proof of speeding. Grievant protested being "written up" for taking a sick day. Grievant protested that he was provided a blank copy of the form, that the copies of the complaint against him were titled "employee copy," and that he had not been provided a vehicle to get to the meeting. Grievant also complained that he had never been offered mower training.

9. On August 4, 2020, H. Julian Woods, Executive Director, Human Resources Division, suspended Grievant for three days for "violation of the Division of Highways standards of work performance and conduct." Specifically, Mr. Woods determined that Grievant failed to follow the directions of his supervisor on multiple occasions for refusing to weed eat and sitting in the crew room instead, causing coworkers to feel threatened when stating "I'm going to buy a gun," following a confrontation, screaming and cursing at a coworker, and stranding a coworker for one and one half hours. Mr. Woods did not cite any of the other alleged misconduct contained in the notice as grounds for his suspension.

## 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. 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. *Id.*

Respondent asserts that it was justified in suspending Grievant as he "violated applicable West Virginia Division of Highways Administrative Operating Procedures" Grievant admits that he refused the direction of his supervisor but asserts his refusal was justified. Grievant denies the other conduct of which he was accused.

Although Respondent presented evidence of other alleged misconduct that had been cited in the *Notice to Employee*, ultimately Grievant was only disciplined for the four specific instances of misconduct cited by Mr. Woods in his letter of suspension. Therefore, Respondent is limited to proof regarding the incidents for which Grievant was suspended and evidence submitted regarding incidents not named in the letter has been disregarded.

The evidence in this case consists mainly of conflicting testimony. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES

MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. Caldwell's demeanor was appropriate and his answers to questions were forthright. There is no allegation that he has a bias against Grievant or a motive to be untruthful in his testimony. Mr. Caldwell's testimony was appropriately detailed and he appeared to have a good memory of the event. Mr. Caldwell is credible.

Mr. Mann's demeanor was appropriate and his answers to questions were forthright, although not very detailed. Grievant appears to allege Mr. Mann may have some bias against him in that Grievant appeared to allege Mr. Mann had previously stolen his cell phone and Grievant alleges Mr. Mann lied about his classification. However, there is no evidence presented to support any assertion that Mr. Mann has bias against Grievant or that Mr. Mann would have other motive to be untruthful in his testimony. Grievant did not provide any evidence or even explanation why he believed Mr. Mann lied about his job classification. Mr. Mann is credible.

Grievant's demeanor during the hearing was appropriate although he appeared to be confused and frustrated by the process at times. However, Grievant's testimony was very brief and provided little detail. Grievant does have a monetary interest in the grievance to regain the pay lost through the suspension. Grievant's testimony is consistent with Grievant's prior statements at the predetermination meeting. Grievant testified credibly regarding his belief that the property he was instructed to weed eat was

not on State property but he did not explain why he believed this or whether he explained the same to his supervisor. Grievant's denial of wrongdoing in leaving Mr. Caldwell at the restaurant and his assertion that he returned to retrieve Mr. Caldwell is not credible compared to Mr. Caldwell's credible testimony.

The other important evidence submitted in this case regarding the alleged events was the addendum to the notice, which is hearsay. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon*

*v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

The addendum is not signed or sworn and it is unclear from the document who drafted the addendum although it is attached to the notice that was signed by Mr. Pullen. Ms. Dempsey testified that Mr. Pullen was unavailable to testify because he was on annual leave for the week. No evidence was offered that Mr. Pullen was unavailable due to an emergency. The hearing was scheduled according to the agreed dates submitted by Respondent and was noticed four months prior to the day of hearing. Respondent provided no explanation why a signed and sworn statement was not submitted in Mr. Pullen's absence. As such, the addendum is entitled to no weight.

Respondent failed to enter the "West Virginia Division of Highways Administrative Operating Procedures" Grievant was alleged to have violated into evidence. However, the conduct alleged falls within the concepts of insubordination and gross misconduct. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the [employer] or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate

disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460.

"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." *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)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

Grievant admitted that he refused the direction to weed eat but asserted he was justified in his refusal because he believed that the property he was ordered to weed eat was not State property. Mr. Mann's testimony regarding these incidents was limited but he did testify that Grievant's refusal to weed eat occurred on multiple occasions and that the disputed property was one that Respondent does weed eat. However, it appears that it was Mr. Pullen and not Mr. Mann who actually directed Grievant to weed eat. Although the direction to weed eat would customarily be a reasonable order, if Grievant was correct that the property was not State property the order would not be valid because that would be trespassing. To be wilful, "the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Without further evidence regarding the circumstances of Grievant's refusal to weed eat, given his credible

statement that he believed the property was not State property, it cannot be said that his refusal of the order was wilful.

The only evidence Respondent provided regarding Grievant's alleged threat to coworkers or Grievant allegedly screaming and cursing at a coworker is the addendum to the *Notice*. Respondent offered no witness testimony regarding these incidents. As stated above, the addendum to the *Notice* is entitled to no weight. Therefore, Respondent has failed to prove these charges.

Respondent did prove that Grievant stranded Mr. Caldwell at a restaurant for approximately an hour and a half after becoming impatient and leaving Mr. Caldwell without any warning. Grievant's action in leaving Mr. Caldwell stranded at the restaurant is completely unreasonable and troubling. If Grievant believed Mr. Caldwell was taking too long in the restaurant, the reasonable thing to do would have been to go in to the restaurant and find out why Mr. Caldwell was delayed. Instead, without any communication, Grievant took the State vehicle and left Mr. Caldwell at the restaurant without any way for Mr. Caldwell to return to work. Grievant's action caused Mr. Caldwell to be over an hour late returning from lunch and caused another employee to have to return in a State vehicle to retrieve him. All of which caused an unnecessary waste of State resources in employee productivity and fuel. Grievant's misconduct in this constitutes gross misconduct as Grievant clearly disregarded expected standards of behavior and his employer's interests. Although Respondent has proven only one of the charges against Grievant, Grievant's misconduct in that incident is severe enough to justify his three-day suspension alone.

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. 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. *Id.*

2. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460.

3. Respondent failed to prove Grievant's refusal of a directive was insubordinate as Respondent did not prove the refusal was wilful.

*4.* "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." *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)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

5. Respondent proved Grievant committed gross misconduct for stranding a coworker during lunch at a restaurant by purposely leaving in the only vehicle without warning.

6. Respondent was justified in suspending Grievant for three days for that act of gross misconduct.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: October 7, 2021**

**Billie Thacker Catlett**
**Chief Administrative Law Judge**