THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EDWIN KENT HOLLEY,
Grievant,

v. **Docket No. 2020-0363-MU**

MARSHALL UNIVERSITY,
Respondent.

Decision

Grievant, Edwin Kent Holley, filed this action on or about September 17, 2019, asserting that he as improperly disciplined with an oral warning under Marshall University's progressive discipline policy. Grievant seeks to have the disciplinary action rescinded and expunged from his records. Grievant seeks to have alleged retaliation and harassment to cease. On October 7, 2019, a conference at level one was conducted by Respondent's conference evaluator. F. Layton Cottrill, Jr., Respondent's Senior Vice President for Executive Affairs and General Counsel, adopted the evaluator's recommendations and denied the grievance by letter dated October 11, 2019. A level two mediation session was conducted on December 18, 2019. Grievant perfected his appeal to level three on January 6, 2020. Administrative Law Judge Carrie H. LeFevre conducted an evidentiary hearing at level three on October 8, 2020. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 16, 2020. Respondent appeared by its counsel, Dawn E. George, Assistant Attorney General. Grievant appeared in person and by his counsel, John Everett Roush, American Federation of Teachers-WV, AFL-CIO. This case was reassigned for administrative reasons to the undersigned on December 22, 2020.

Synopsis

Grievant is employed by Respondent as a Supervisor of Grounds. Grievant challenges a disciplinary action in the form of an oral warning. As a result of a disagreement over where motorcycles could be parked, and with whom this decision rests, Grievant became upset. Grievant's supervisor observed the outburst. As a result of this and another incident earlier in the day, his supervisor filed the Performance Counseling Statement containing the oral warning. Grievant established a *prima facie* claim of retaliation; however, Respondent established a non-retaliatory motive. Respondent established that it was appropriate for a supervisor to intercede when an employee is using inappropriate language or is otherwise failing to properly address a tense situation. This grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as a Supervisor of Grounds. Grievant has worked for Respondent for approximately thirty-three years.

2. The month of August 2019 was a busy and stressful time for Grievant and his coworkers. Students were scheduled to return for the fall semester and Grievant's department was preparing for two separate special events.

3. Several workers in Grievant's unit had suffered injuries on the job prior to the two dates of this incident. Fatigue and stress were running high in the department.

4. On the morning of August 19, 2019, Grievant contacted his supervisor, Paul Carico, and asked him to come to the student center. Philip Rowe and Jermaine Payton

had been directed to move a large number of chairs from the student center to another location for one of the special events.

5. The chairs had been stacked too high on the vehicles to be used for the move. Mr. Rowe and Mr. Payton understandably felt this made the task both difficult and dangerous.

6. Mr. Carico arrived at the student center and listened to the concerns. Mr. Carico informed Mr. Rowe and Mr. Payton that he was going to get the chairs stacked in shorter stacks by other employees.

7. Grievant expressed his hesitation about the assignment because the student center had employees to handle the move of the chairs and his department should not be responsible for the task.

8. Grievant then left the area, without helping to address the situation, and commented that this is the "most fucked up wow (week of work) I have ever seen."

9. On the same day, Mr. Carico confronted Mr. Beheler about parking his motorcycle in the fenced area of the Physical Plant Building. Mr. Beheler was told he was not to park his personal vehicle in that lot, which was set aside for official Marshall vehicles.

10. Mr. Carico had sent out notice to all supervisors, including Grievant, that parking in that lot was not permitted for personal vehicles.

11. Mr. Beheler requested that Grievant be present when he was discussing the parking of his motorcycle with Mr. Carico. Grievant informed Mr. Beheler that Mr. Carico had no authority over university parking.

12. Grievant told Mr. Beheler that it was permissible to continue parking his motorcycle in that lot and there was no need to worry about it. Grievant was wrong.

13. Mr. Carico came to the conclusion that Grievant failed to maintain an appropriate role as a supervisor in addressing work situations and providing correct information to employees regarding regulations.

14. Grievant received an oral warning resulting from the two separate incidents occurring on August 19, 2019.

15. In November of 2018, Grievant filed an action asserting that he was entitled to an increase in compensation for performing the duties of his supervisor who was absent from work. The action was still pending at the time the current grievance was filed. The evidentiary hearing had taken place weeks before the date of the incidents in the current grievance.

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 Board 156 C.S.R. 1 § 3 (2018); *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 facts in this case are basically undisputed. Grievant does acknowledge that he, Mr. Carico, Mr. Rowe, Mr. Payton, and Mr. Beheler were all tired and nearing the end of their patience after working long days. All of the men were feeling the effects of the workload that they were carrying. In essence, all of the men could have handled the situations better and the undersigned should overlook Grievant's behavior. While this is understandable, it does not excuse the behavior and merit setting aside the minor disciplinary action.

The undersigned cannot substitute his judgment for that of the employer in the absence of evidence that the "agency's action is arbitrary or capricious" in that it "rel[ied] on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view." *Gabbert v. Boone County Bd. of Educ.*, Docket No. 2017-2029-BooED (Oct. 25, 2017). Respondent has proven by a preponderance of the evidence that the discipline imposed on Grievant was appropriate under the totality of the circumstances in the record of this case.

Grievant's primary argument in support of his case is that he was the victim of reprisal. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

A grievant alleging reprisal or retaliation in violation of WEST VIRGINIA CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g*., filing a grievance);
>
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.[1]

Grievant has established a *prima facie* case for reprisal. Grievant engaged in a protected activity in filing a previous grievance. Grievant's employer clearly had knowledge of it. An adverse action was taken against Grievant by his employer. The period of time between the time of the prior grievance and the disciplinary action were such as to infer a retaliatory motive. Nevertheless, while there may some question as to whether or not Mr. Carico's action was motivated by the past grievance, or it was just the result of timing, Respondent established a non-retaliatory motive. Grievant is a supervisory employee for Respondent and for the employees receiving direction during

[1] *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461.

the August 19, 2019, incidents. Respondent established that it was appropriate for a supervisor to intercede when an employee is using inappropriate language or is otherwise failing to properly address a tense situation.

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 Board, 156 C.S.R. 1 § 156-1-3 (2018); *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. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3. A grievant alleging reprisal or retaliation in violation of WEST VIRGINIA CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g.*, filing a grievance);
>
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. Citations omitted.

4. Respondent has proven by a preponderance of the evidence that the discipline imposed on Grievant was appropriate under the totality of the circumstances in the record of this case.

5. Grievant established a *prima facie* claim of retaliation; however, Respondent established a non-retaliatory motive for its action.

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 also* 156 C.S.R. 1 § 6.20 (2018).

Date: January 5, 2021

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Ronald L. Reece
Administrative Law Judge