

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ZACHARY ALLEN KING,
Grievant,**

v.

Docket No. 2021-0027-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Zachary Allen King, is employed by Respondent, Division of Highways. On July 9, 2020, Grievant filed this grievance against Respondent alleging he had been suspended without good cause. For relief, Grievant seeks back pay with interest.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on May 14, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by Joann Hullman. Respondent appeared by Administrative Services Manager Bridget Buffington and was represented by counsel, Keith A. Cox. This matter became mature for decision on June 14, 2021, upon final receipt of the Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant did not file written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Bridge Inspector IV. Grievant was suspended for failing to follow his supervisor's directive to wear a face mask pursuant to Respondent's guidelines. At the time of the suspension, Grievant provided no legitimate reason for his refusal to comply with the directive. Respondent was justified in

suspending Grievant until he agreed to comply with his supervisor's directive. 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 is employed by Respondent as a Bridge Inspector IV.
2. Grievant mostly works outdoors but does come into close contact with coworkers while sharing a vehicle and while in the office to draft reports.
3. From June 22, 2020 to June 28, 2020, Grievant was on annual leave for vacation to Myrtle Beach, South Carolina.
4. At that time, Myrtle Beach was considered a COVID-19 hotspot.
5. While Grievant was on vacation, the Department of Transportation issued *Employee Return to Work Guidelines Following: COVID-19 Exposure or Diagnosis*. In relevant part, the guidelines required that an employee "who may have had exposure to a person with COVID-19 symptoms. . .[w]ear Face Mask meeting WVDOH guidance while in [the] workplace."
6. After several of Grievant's coworkers expressed concern that Grievant had vacationed in a hotspot, on June 28, 2020, Grievant's supervisor, Michelle Weekley, texted Grievant and he confirmed he had gone to Myrtle Beach. Ms. Weekly then notified Grievant that an email had been sent requiring that temperatures be checked and masks worn when returning from vacation and to check his email. Grievant responded, "[I]m not gonna wear a maesk [sic] all day" and that he could not check his email until the next day. Ms. Weekley responded, "That's fine."

7. Grievant returned to work on June 29, 2020.
8. On June 30, 2020, some of Grievant's coworkers expressed concern to Ms. Weekley that Grievant was not wearing a mask. Ms. Weekley reminded Grievant of the guidelines that required him to wear a mask and Grievant again stated he was not going to wear a mask, this time stating that it was hard to breathe in the heat. Grievant did not state that he had any medical reason he could not wear a mask.
9. Ms. Weekley reported Grievant's refusal to her supervisor, Director Keeling Fife.
10. On July 1, 2020, Director Fife and Ms. Weekley conducted a telephone conference with Grievant regarding his refusal to wear a mask. At no time did Grievant state that his refusal to wear a mask was due to a medical reason. Grievant instead stated that he was being discriminated against and that his "civil liberties were being stripped." Grievant again stated his opposition to wearing a mask and was informed that he would not be permitted to work unless he complied with the mask requirement.
11. Grievant was verbally suspended for the remainder of the day.
12. On the same date, H. Julian Woods, Executive Director Human Resources Division, issued a letter to Grievant formalizing the oral suspension of nine hours for Grievant's refusal to wear a face covering when directed. The letter also directed Grievant to return to work on July 2, 2021, and comply with the *Employee Return to Work Guidelines Following: COVID-19 Exposure or Diagnosis* or face further suspension.
13. On the same day, Grievant obtained an excuse from his medical provider stating that Grievant would need to wear a face shield rather than a mask while working outside.

14. On July 2, 2020, Grievant returned to work with a face shield, per his medical excuse, and was permitted to work with that accommodation rather than a mask.

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.*

Grievant asserted at level three that he should not have been suspended because the guidelines were vague, he had been wearing a mask while in confined spaces, and that he could not wear a mask while outside due to the extreme heat and medical reasons. Respondent asserts that it was justified in suspending Grievant for his refusal to comply with the guidelines when directed by his supervisors.

While there was some initial confusion when Grievant first returned to work due to Ms. Weekley's initial response to Grievant's refusal to wear a mask, there was no confusion during the meeting with Director Fife. Director Fife directed Grievant to wear a mask and Grievant refused. Grievant did not explain that he had a medical condition or express concern regarding the heat; he simply refused stating that he felt he was being discriminated against and that his liberties were being infringed. When Grievant provided a doctor's excuse to use a face shield instead of a face mask Respondent immediately accommodated him and he was permitted to return to work the next day.

“Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.’ *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. See *Day v. Morgan Co. Health Dep’t*, Docket No. 07-CHD-121 (Dec. 14, 2007).” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff’d*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

Respondent issued guidelines aimed at protecting the health and safety of its employees. Grievant was provided the guidelines and was directed to wear a mask pursuant to the guidelines. While Grievant later expressed concerns regarding his own health regarding the directive, at the time of his meeting with Director Fife, he did not do so, expressing only a philosophical disagreement with the same. Respondent was justified in suspending Grievant until he agreed to comply with his supervisor’s directive.

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. “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.’ *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. See *Day v. Morgan Co. Health Dep’t*, Docket No. 07-CHD-121 (Dec. 14, 2007).” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff’d*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

3. Respondent was justified in suspending Grievant until he agreed to comply with his supervisor’s directive.

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: July 19, 2021



Billie Thacker Catlett
Chief Administrative Law Judge