WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENT HAMLIN,

Grievant,

v. **Docket No. 2022-0203-DOT**

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Brent Hamlin, Grievant, filed this grievance against his employer the West Virginia Department of Transportation, Division of Highways ("DOH"), Respondent, challenging disciplinary actions taken against him. Grievant was suspended for one day. The original grievance was filed on September 12, 2021, with Grievant alleging that his due process rights were violated, and he had not done anything wrong. Grievant request that his one day of lost pay be restored and this matter be cleared from his personnel file.

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.[1] A level three hearing was held before the undersigned Administrative Law Judge on April 14, 2022, at the Grievance Board's Charleston office. Grievant appeared *pro se.*[2] Respondent appeared by and through Jonathan W. Schaffer, Human Resources and was represented by counsel Reginia L. Mayne, Division of Highways, Legal Division. At the conclusion of the level three

[1] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

[2] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258

hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law which were submitted by both parties. This matter became mature for decision on or about May 20, 2022, on receipt of the last of the submitted fact/law proposals.

Synopsis

Respondent contends Grievant, employed as a Night Shift Supervisor Manager, has demonstrated poor and unwise behavior to the point of being in violation of "Non-discriminatory Hostile Workplace Harassment." Grievant was given a one-day suspension and required to take additional supervisor training. This disciplinary measure occurred subsequent to two separate personnel incidents. Respondent and Grievant disagree upon the significance of events. Grievant contends his due process rights were violated and maintains he hasn't done anything wrong. By a preponderance of the evidence, Respondent established prohibited workplace harassment conduct. Respondent highlighted that the behavior was unacceptable for a supervisor and cites progressive disciplinary action. This grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant works at the State Capitol offices for Respondent in its Traffic Engineering Division. Grievant is the Night Shift Supervisor Manager in the Transportation Management Center.

2. Grievant manages several employees, including Jacob Kidd, a Lead Operator on the day shift, and Josh Goff, who was a temporary worker in the Transportation Management Center at the time in the events that are the subject of this grievance.

3. Ashlee Wilson is a Day Shift Supervisor Manager who was fairly new to the job in 2021.

4. Grievant's supervisors included James Lambert, Transportation Management Center Manager; Donna Hardy, Mr. Lambert's supervisor; Cindy Cramer, Director of Traffic Engineering Division; and Michelle Higginbotham, who was then the Human Resources Manager for Traffic Engineering.

5. Grievant was of the belief that temporary worker Josh Goff's arm strength was weak and, in an effort, to demonstrate the point on or about July 20, 2021, Grievant directed temporary worker Goff to sit down and arm wrestle female Day Shift Supervisor Manager Ashlee Wilson.

6. Neither Mr. Goff nor Ms. Wilson was inclined to arm wrestle each other.

7. Grievant**,** Josh Goff, and Jacob Kidd, on or about July 26, 2021, had a general conversation about COVID-19 and vaccine mandates being initiated in other states. Sometime during the conversation Grievant directly inquired whether Josh had been vaccinated.

8. Mr. Goff, a temporary worker, indicated he had not been vaccinated.

9. Grievant communicated to Josh Goff that if he [Grievant] brought the coronavirus home to his grandson and his grandson got sick, because someone who could have been vaccinated but did not, he [Grievant] would not be forgiving.

10. The exact wording of Grievant's comments vary slightly with each witness but this incident, and the memory of Grievant's threatening tone and demeanor when speaking to Mr. Goff, caused Mr. Goff to break down for a moment at the hearing.

11. Mr. Goff's version of events was affirmed by the testimony of Jacob Kidd. Mr. Kidd provided that, although the conversation on that day started out as a general discussion about COVID and the COVID vaccine, it turned ugly:

> "… and then at one point, [Grievant] started really going in on Josh about not being vaccinated, and he said at one point, if I find out that my grandson got sick and catches COVID and something happens because of you, you're going to have more than COVID to worry about. That's not a threat, that's a promise. And you could visibly tell that Josh was extremely uncomfortable. . . ."

Goff, L3 testimony

12. Jacob Kidd remembered the threatening language and tone that Grievant communicate with subordinate Josh Goff.

13. A few days later, Mr. Goff was again asked by Grievant if he had been vaccinated.

14. Respondent received complaints regarding Grievant's behavior and threatening mannerisms. The allegation of Grievant's wrongdoing were specific and identified possible violation of applicable workplace harassment policy. Respondent launched an investigation.

15. James "Jim" Lambert, Transportation Management Center Manager for DOH, testified as the level three hearing. He recalled the specifics of incidents reported to him, and the investigation he undertook, interviewing witnesses and meeting with Grievant. Allegations of threatening remarks and coercive tactics to force an arm-wrestling match was confirmed. Further, Manager Lambert clarified that the Division

Director had actually directed everyone not to ask employees about their vaccination status.

16. Transportation Management Center Manager Lambert, upon direction of his superiors, met with Grievant on August 14th or 17th to discuss the two events of July 20th and July 26th. Mr. Lambert is one of Grievant's supervisor.

17. Management personnel of Respondent communicated with each other regarding potential actions. After several meetings between Director of Traffic Engineering Division Cindy Cramer, Director of Traffic Engineering Division Human Resources Manager Higginbotham, Mr. Lambert, and eventually with the Legal Division, regarding progressive discipline, an RL-544 was issued and given to Grievant on August 24, 2021. Respondent's Exhibit 1.

18. Respondent's RL-544 is the agency standard notice to an employee. The relevant RL-544, (R Ex 1) had multiple witness statements attached.

19. The relevant RL-544, (R Ex 1) provided that compelling evidence was presented demonstrating that prohibited activities occurred in the Transportation Management Center on July 20, 2021, and July 26, 2021. Incident one, July 20, 2021, a complaint stating that an employee was singled out and pressured into arm wrestling another employee. Incident two, July 26, 2021, a complaint stating there was an open discussion of HIPPA information and there was a threat made to an employee.

20. Cindy Cramer, as an agency representative, met with Grievant on September 3, 2021. The RL-544 was available and discussed with Grievant.

21. On August 24 and on September 3, 2021, Grievant was unequivocally aware of the allegation stemming from July 20, 2021, and July 26, 2021.

22. Grievant has been provided agency EEO training in 2019, and 2020-21. Grievant has been provided training classes such as; Supervisor's Toolbox, Emotional Intelligent, Evaluating Your Employees and Think WV Privacy. R Ex 4

23. Grievant is or should be aware of the West Virginia DOT Policy 3.26, Prohibited Workplace Harassment. R Ex 7 and G Ex 1

24. WVDOT Policy 3.26, Section 3.9, defines "Non-discriminatory Hostile Workplace Harassment" as:

> A form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme, and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing their work.

This is clarified even further in Subsection 4.7:

> Nondiscriminatory Hostile Workplace Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical or emotional distress, or both. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:
>
> A. Unwarranted constant and destructive criticism,
> B. Singling out and isolating, ignoring, ostracizing, etc.,
> C. Persistently demeaning, patronizing, belittling, and ridiculing,
> D. Bullying, or
> E. Threatening, shouting at, and humiliating behavior/action particularly in front of others.

R Ex 7 and G Ex 1

25. Subsection 4.2 of Section 4.0, "Policy," clarifies that "[a]lthough some harassment may not violate existing discrimination laws, any egregious behavior can result in a tort claim for intentional infliction of emotional distress. As such, *all forms of harassment are prohibited*." (Emphasis added.) Subsection 4.2 (C) states clearly, "Any

employee found to be in violation of this policy will be subject to disciplinary action up to and including dismissal."

26. Progressive discipline was an issue specially discussed by Respondent in the discipline process of this case.

Discussion

In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *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). 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The disposition of this grievance matter is not complicated, but the totality of events is also not easily communicated. Grievant is not innocent nor is he necessarily the villain, to the degree, Respondent would have the undersigned believe.[3] Grievant demonstrated poor and unwise behavior to the point of being in violation of "Non-discriminatory Hostile Workplace Harassment." This is fact. Grievant testified in his own defense to the allegations presented. Grievant does not truly deny the events but disputes nuances of the conversations and events. The gravity of the events in discussion and the accusation being presented doesn't seem to register with Grievant.

Grievant alleges that Respondent violated his right to due process. It is difficult to understand what Grievant truly means. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. Of Educ*., Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty

[3] An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). *See also* West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). It has previously been held that a full-blown hearing is generally not required before an employee may be disciplined, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Grievant was made aware of the highlighted allegations and was provided the opportunity to respond. Grievant may have been confused but the information and allegations in contention was provided to him. *See* R Ex 1 and 3.[4] If Grievant is alleging

[4] Grievant was informed that compelling evidence was presented demonstrating that prohibited activities occurred in the Transportation Management Center on July 20, 2021, and July 26, 2021. Incident one, July 20, 2021, a complaint was received stating that an employee was singled out and pressured into arm wrestling another employee. Incident two, July 26, 2021, a complaint was received stating there was an open discussion of HIPPA information and there was a threat made to an employee.

Respondent failed to give his explanation the weight, he feels it is due, that isn't a violation of due process. It is hard to explain the degree of Grievant's failure to comprehend the gravity of the situation(s). The contention that Grievant was denied due process is inaccurate.

Grievant is employed in a supervisory position; thus, has a heighten degree of responsibility with regard to his actions and accountability to his employer. On July 20, 2021, Grievant called temporary worker Josh Goff into what was described as "the back office" to arm wrestle the day supervisor, Ashlee Wilson. Despite Grievant's representation, neither Goff nor Wilson initiated the activity. Employee Goff testified he did not want to, but "felt like [he] was forced to arm-wrestle her. I know I felt uncomfortable, and I know she did too." He reportedly did it anyway just "so Grievant can be quiet about it and nothing else will be said." Ms. Wilson testified that Grievant pulled a chair out and directed Mr. Goff to sit down and arm wrestle her.[5] The arm-wrestling match, which both Mr. Goff and Ms. Wilson (then 7 ½ months pregnant) resisted, served no purpose besides providing amusement for Grievant at Mr. Goff's expense, due to his supposed weakness. Grievant's defense that each voluntarily participated is not credible. Both Mr. Goff and Ms. Wilson were against the activity. This is a clear example of bullying, demeaning behavior. Ms. Wilson testified that once she had the standard supervisor's training, she saw that the whole incident should have been avoided,

[5] "And so, just to get it over with, we both [Ms. Wilson and Mr. Goff] kind of like, whatever, let's do it. I wanted to get out of there [at the end of her shift]. And [at] the time, I was seven-and-a-half months pregnant. And it just—it didn't seem like it was going to stop until we did what [Grievant] wanted." Wilson, L3 testimony

that “as a supervisor, it’s my job to stand my ground and say this isn’t appropriate for me, you, or him.”

Employees have the right to be free from harassment while in State government workplace, and the State has the legal obligation to ensure that such harassment does not occur, and that effective means of redress are available. R Ex 7 Prohibited Workplace Harassment. Grievant inexplicably doesn’t perceive his actions to be improper. DOT Policy 3.26, Section 3.9, defines “Non-discriminatory Hostile Workplace Harassment” as:

> A form of harassment commonly referred to as “bullying” that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing their work.

Non-discriminatory Hostile Workplace Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical or emotional distress, or both. Grievant’s conduct did not constitute any reasonable work-related activity and Grievant’s perception doesn’t recognize any wrongdoing. Respondent ordered Grievant to undergo additional supervisor training. This disciplinary measure is reasonable and proper corrective action.

The other incident in discussion is with regard to Grievant requesting vaccination information from Josh Goff and proceeding to indicate to the employee that he [Grievant] would have a real problem if his family (grandson) caught COVID because or as a result of someone, who could but doesn’t get vaccinated.

Grievant highlights, at the time in question, everyone was discussing COVID and access to an effective vaccination. Respondent highlights that Grievant was advised (directed) not to question employees regarding their vaccination status. James "Jim" Lambert, Transportation Management Center Manager for the DOH testified that a directive was sent out to DOH personnel. The directive was not put into evidence. Respondents insist that it was the implied threat and repeated coercive conduct that started the follow-up interviews.[6] Lambert, L3 testimony. Grievant is of the position his "hyperbole" is being exaggerated. Grievant maintains his words shouldn't be viewed as a threat but a conversation.

Temporary employee, Josh Goff was upset and rattled by Grievant's comments and repeated inquiries regarding his vaccination status. This is problematic. Further, there is a witness, Jacob Kidd, who provided written (attachment to RL-544, R Ex 1) and verbal accounting of the event. Employee Kidd indicated he too was uncomfortable at the time and that this was "not the first time [he] witnessed [Grievant] talk down to, bully, and belittle Josh." Grievant's explanation of the situation is plausible but not consistent with the circumstances. There is evidence that Grievant tended to find fault with then employee Goff, repeatedly. Grievant himself highlighted his perception of Goff's inconsistent use of a mask. Grievant is Mr. Goff supervisor. Being temp, entertaining the prospect of full employment, Mr. Goff at the time of relevant events was vulnerable to

[6] There were multiple discussions and meetings between DOH Human Resources personnel and the management of Traffic Engineering, and then with Human Resources and the Legal Division, to decide the appropriate disciplinary action that would send a message but not be draconian to Grievant.

Grievant's actions and attitude. Respondent had a duty to protect its employees from threatens, ridicules, or other unreasonably burdens precluding an employee from reasonably performing his or her work.

Lastly, Respondent contends progressive discipline was an issue in this case because Grievant had been disciplined in 2018 for introducing, via his cell phone, an image that was sexual and offensive in nature to another employee. He had received a written reprimand for that incident. Jonathan Schaffer, a DOH Human Resources Specialist, Senior testified that Grievant received a suspension due to the severity of his acts, and not simply because he had a written reprimand. Respondent beliefs the appropriate discipline for the instant's infraction is suspension and additional training. The undersigned does not disagree nor find the identified penalty to be excessive.

The contention that Grievant was denied due process is without merit. Grievant was informed, verbally and in writing, of the allegations against him, provided opportunity to rebut and Respondent identified the conduct for which Grievant was to be disciplined. Grievant does not think he has done anything wrong, additional supervisory training, as ordered, by Respondent is warranted. Further, the undersigned does not conclude that the one-day suspension is clearly excessive, an abuse of agency discretion, or that there exists an inherent disproportion between the offense and the personnel action. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

The following conclusions of law are appropriate in this matter:

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. *See* W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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 party bearing the burden has not met its burden. *Id.*

2. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

3. Grievant was not denied due process.

4. “[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was ‘clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug.

8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

5. Respondent established by a preponderance of the evidence justification for disciplinary action.

6. Applicable West Virginia Workplace Policy prohibits employees from exhibiting threatening, hostile, or abusive behavior, either physically or verbally against state employee. A significant violation of policy allows for disciplinary action up to and including dismissal. Employees have the right to be free from harassment while in a state government workplace, and the State has the legal obligation to ensure that such harassment does not occur and that effective means of redress are available. *See* West Virginia DOT Policy 3.26, Prohibited Workplace Harassment.

7. Respondent established by a preponderance of the evidence harassing behavior of Grievant.

8. Grievant failed to demonstrate the penalty levied was clearly excessive or reflects an inherent disproportion between the offense and the personnel action. It is not determined that Respondent abused its discretion in the circumstances of this case.

9. Respondent established by a preponderance of the evidence that Grievant violated applicable principles of West Virginia DOT Policy 3.26, Prohibited Workplace Harassment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.[7] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: July 6, 2022

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Landon R. Brown
Administrative Law Judge

[7] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.