EUGENE A. HOLLAND, II,

Grievant,

v. DOCKET NO. 93-CLER-465

WEST VIRGINIA DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES,

Respondent.

D E C I S I O N

Eugene A. Holland, II (Grievant), was employed as a Wildlife Biologist with the Department of Commerce, Labor & Environmental Resources, Wildlife Division (Respondent). Grievant received a twenty-one day suspension without pay and demotion to Wildlife Manager on November 1, 1993. He filed his grievance challenging the disciplinary action at Level IV on November 9, 1993, and a hearing was held in Beckley, West Virginia on April 18, 1994. The parties submitted post-hearing briefs on or about May 31, 1994, at which time this case became mature for decision.

Background

The State of West Virginia is a participant in a $1.5 million Wild Turkey Telemetry Study, funded in part by the National Wild Turkey Federation and the United States Department of Interior, Fish and Wildlife Service. The project is a five-year study todetermine the mortality rates and flight patterns of turkeys. Select wild turkeys are captured and fitted with radio transmitters which emit a signal picked up by a receiver. Each bird has its own frequency and number, and in this manner the turkeys are tracked and plotted on maps.

Grievant was an Assistant Wildlife Biologist in District #4, which includes the Beckley area in Raleigh County, West Virginia. Grievant's job entailed listening to and watching a receiver to pick up transmissions from the turkeys and plotting the coordinates on a map. The receivers emit an audible

"beep", and use a signal light and a meter to indicate receipt of transmissions from turkeys. If a turkey has not moved for eleven hours, the receivers emit a double "beep", or mortality mode. This usually indicates a nesting or dead turkey. The trackers must locate the turkeys on mortality mode to determine it they are nesting or dead, and to retrieve the transmitter if they are dead.

Grievant and the other trackers were issued state vehicles, radio receivers and other equipment necessary to accurately track wild turkeys. The trackers were assigned different areas to track and worked in shifts. Grievant and his supervisor, Larry Berry,were assigned to the same area. In late fall of 1992, Mr. Berry began to question the accuracy of Grievant's turkey tracking. Mr. Berry noticed that birds were showing up on mortality mode on his shift immediately following Grievant's shift, yet Grievant had plotted the same birds as alive and moving. Mr. Berry found the birds dead in the field. Mr. Berry decided to investigate the matter after asking Grievant the location of a bird and finding it several miles away from the location Grievant had given him.

In December 1992, Mr. Berry found a hen which had been killed by a predator. He removed and deactivated the transmitter and took it back to the District #4 office. He decided to use this deactivated transmitter to test Grievant. Although the transmitter could not possibly emit a signal, Grievant continued to plot the dead turkey as if it were alive. Grievant also continued to erroneously plot other wild turkeys.

Mr. Berry tested the equipment and the trackers individually in February, 1993. Grievant passed the test and did not report that he was having any problems with the equipment to Mr. Berry. Soon thereafter, one of the receivers had become discharged, or inoperative. Mr. Berry, keeping the battery, gave the receiver toGrievant to track turkeys. Grievant tracked and plotted birds with the discharged receiver.

In May, 1993, one of the turkeys turned up missing, emitting no signal at all. In an attempt to locate the bird, the Division "flew for the bird", tuning an airplane monitor to the bird's frequency and flying over the area where the bird had last been plotted. The bird was never found. Some time later, the transmitter was found, apparently cut by a poacher. All the while, Grievant nonetheless continued to plot the missing bird.

Finally, on May 26, 1993, during the nesting season, Grievant was scheduled to track at night. Tracking nesting hens is an important part of the study. It is important to track at night during nesting season, as that is when the hens are on the nest. Mr. Berry drove to Grievant's home that night and

Grievant's state vehicle was at the house when Grievant should have been tracking. Grievant reported on his turkey tracking form that he had tracked that night.

In August 1993, Mr. Berry informed Bob Ross, Personnel Director for Wildlife Resources, of the findings of his investigation. Mr. Berry and Mr. Ross met with Bob Miles, Chief ofWildlife Services, and Jim Ruckel, Assistant Chief, and informed them of the situation. Mr. Berry and Mr. Ross then met with Jim Wells, Senior Personnel Specialist of the Division of Personnel, to discuss what action, if any, should be taken against Grievant. Mr. Wells suggested additional documented investigation. Col. Richard Hall, Chief, Law Enforcement Division, authorized Sgt. E. T. Wasmer, a Conservation Officer, to conduct surveillance of Grievant's home on September 8, 1993 and September 22, 1993.

Sgt. Wasmer observed Grievant's state vehicle outside Grievant's home at times when Grievant reported on his daily work product sheets that he was tracking turkeys. Sgt. Wasmer observed Grievant's state vehicle outside his home from approximately 6:00 a.m. to 6:09 p.m. on both days. Grievant reported on his Daily Motor Vehicle Report for September 1993, that he traveled 102 miles in his state vehicle on September 8, 1993, and that he traveled 98 miles in his state vehicle on September 22, 1993. Grievant submitted mileage reports for his state vehicle for both days. Respondent's Exhibit 5.

Based on the results of Sgt. Wasmer's written report (Respondent's Exhibit 3), Jim Wells was again consulted todetermine the appropriate disciplinary action. The Division of Personnel recommended dismissal. Respondent was reluctant to impose such a penalty due to Grievant's lengthy service with the Division, and decided instead to suspend Grievant for twenty-one days without pay and demote him to Wildlife Manager, with a resulting reduction in pay of approximately $2,000/year.

On October 22, 1993 and again on November 1, 1993, Bob Miles, Jim Ruckel, Bob Ross, Larry Berry and Grievant met to discuss the situation and Grievant was informed he was being considered for disciplinary action. Grievant was asked about the false turkey tracking data, the fabricated state mileage reports, and the incorrect daily work product sheets. Grievant responded that the reason his turkey tracking data was inaccurate was because he had a hearing problem and could not hear the "beep" on the receiver. Grievant testified at Level IV that he also did not see the light on the receiver. Grievant testified that he plotted turkeys every time he saw the needle on the meter move on the receiver, even though there was no corresponding "beep" or light. Several of Grievant's

witnesses testified that static would make the meter needle move on the receivers. Mr. Berry testified, however, thatthe "beep" and the light would not register unless the signal was actually from a turkey. Grievant's witnesses also testified that if they were unsure what was causing the needle to move, they would check the receiver and the signals until they were sure they were receiving transmissions from the turkeys. Based on this testimony, Grievant's explanation is not credible.

Grievant admitted that his mileage reports were not completely accurate as he would compute them at the end of each month, rather than daily. He said he knew where he had gone and would estimate the miles. He also admitted that he sometimes worked nights when he was scheduled to track during the day, and would falsely report that he had worked during the day. Grievant testified at Level IV that he did this because the Division wanted the employees to work 8:30 to 4:30. Later, when Grievant was asked why he did not track at night during the nesting season, he said that it did not matter when they tracked, as long as they did it sometime during the day scheduled. Every other witness testified that it was very important to track at night during the nesting season.

Mr. Berry and several of Grievant's witnesses, fellow turkey trackers, testified that they would sometimes track at night eventhough they had been scheduled during the day. The witnesses testified that they would report the actual time they had tracked on their turkey tracking forms. Without exception, all of the witnesses testified that during the nesting season, it is extremely important to track at night when the bird is on the nest.

Discussion

Grievant alleges that the disciplinary action taken was punitive rather than progressive, and in retaliation for a previously filed grievance. In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). When an affirmative defense is raised by a grievant in a discipline-based claim, it is grievant's burden to establish the validity of that defense. Young v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-541 (Mar. 19, 1991).

Grievant offers the West Virginia Civil Service System Employee's Handbook, Disciplinary Action and Discharge, in supportof his contention that the action taken against him was improper. Grievant's Exhibit 1. (See footnote 1) That section provides

> . . . Except in a case of gross misconduct or when the public interest is best served by other actions, an employee can expect to be subject to a system of progressively greater disciplinary actions. Disciplinary actions range from an oral or a written warning or both, to a suspension without pay or a dismissal. An initial warning to an employee should be sufficient to eliminate unacceptable practices and behavior.

Grievant contends that Respondent did not prove his conduct amounted to "gross misconduct" and therefore, some lesser form of discipline should have been implemented. The undersigned would be more inclined to agree had Grievant's only offense been erroneously tracking turkeys; perhaps Respondent could have assisted Grievant and corrected that problem. However, Grievant admitted that he falsified state mileage reports and his daily work product sheets. Grievant admitted that he did not work during the times he reported. This shows a complete disregard and lack of appreciation for the wild turkey study and the tasks which Grievant was assignedto perform. Grievant's attempts to collect mileage for September 8 and September 22, when he did not use his state vehicle, put him at risk of being criminally prosecuted pursuant to W. Va. Code § 61-3-22, which was noted in his disciplinary letter. In addition, Grievant's submission of daily work product sheets for those days indicating he was tracking turkeys when, in truth, he was not violates W. Va. Code § 12-3-13 concerning payment of salary when services have not been rendered.

The Division of Personnel Administrative Rules and Regulations of the West Virginia Civil Service System, §§ 12.04 and 13.03, Demotions and Suspension, respectively, both authorize an agency to demote and/or suspend an employee "for cause". Respondent has proven that it had "cause" to take disciplinary action against Grievant. Respondent also has proven that Grievant's actions in falsifying scientific data important to the turkey study, falsifying mileage reports and falsifying daily work product records constitutes "gross misconduct", warranting suspension without pay and demotion to a position where Grievant cannot do further damage to the turkey study. Respondent's witnessestestified that all of Grievant's work product is considered unreliable and has been thrown out of the turkey project.

Grievant also claims that Respondent disciplined him in retaliation for previously filed grievances. Grievant filed a grievance in 1991 to be reclassified as a Wildlife Biologist within the Division. The evidence presented, including Grievant's own testimony, shows that Respondent supported him in this grievance and that it was the Division of Personnel which initially refused to reclassify Grievant. He ultimately won that grievance, with the Respondent's help, and became a Wildlife Biologist.

Grievant submitted another grievance in 1991 regarding his failure to receive a 10% across-the-board pay increase which others in the Division received. Grievant had just been reclassified and received a 5% pay increase and was not eligible for the 10% across-the-board increase. More importantly, each of Respondent's witnesses were asked whether they were aware of any other grievances filed by Grievant besides the reclassification grievance. All of the witnesses testified that they were only aware of the reclassification grievance. It was not until after more than eight hours of testimony, and after Respondent'switnesses had been excused from the Level IV hearing, that Grievant's representative finally produced the mysterious "other" grievance regarding the pay increase. That grievance had only proceeded through Level II and had been withdrawn by Grievant.

The undersigned ruled at the hearing that the grievance was inadmissible, as Grievant had kept it hidden throughout the hearing until Respondent's witnesses were no longer available to respond to the evidence. More importantly, Grievant testified directly that no one had treated him any differently after he filed that grievance. The undersigned found that, inasmuch as none of the Respondent's witnesses even remembered the grievance, and Grievant himself testified that no one treated him any differently because of it, he had not met his burden of proof of retaliation with respect to that grievance. The ruling stands that the pay raise grievance is inadmissible based on the timing of its presentation and the evidence developed in the Level IV hearing.

With respect to the reclassification grievance, Grievant has also failed to meet his burden of proof, given that Respondent supported him in that ultimately successful grievance.

The following findings of fact and conclusions of law are dispositive of this grievance.

Findings of Fact

1. Grievant erroneously tracked and plotted wild turkeys to the detriment of the Wild Turkey Telemetry Study.

2. Grievant falsified his Daily Motor Vehicle Report for September 8, 1993 and September 22, 1993.

3. Grievant falsified his Turkey Tracking Forms for September 8, 1993 and September 22, 1993 regarding hours actually worked.

Conclusions of Law

1. The burden of proof, in cases dealing with disciplinary matters, rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

2. Respondent has carried its burden of proof and established by a preponderance of the evidence that Grievant's actions in falsifying mileage reports and daily work product reports amounted to gross misconduct and that he was suspended and demoted for cause.

3. When a defense is raised by a grievant in a discipline-based claim it is grievant's burden to establish the validity of that defense. Young v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-541 (Mar. 29, 1991).

4. Grievant presented no evidence to support his claim of retaliation for previously filed grievances.

Accordingly, this grievance is DENIED. Any party may appeal this decision to the Circuit Court of Raleigh County or the Circuit Court of Kanawha County, and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO ALLEN

Administrative Law Judge

Date: June 13, 1994

Footnote: 1 *The exhibit is not dated and therefore it is unclear whether that particular handbook was in effect at the time of Grievant's suspension and demotion. Inasmuch as Grievant is offering it as proof, and Respondent did not object, it will be treated as if it was in effect during the pertinent period of time.*