JAMES E. SYMNS, .

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Grievant, .

.

v. . Docket No. 94-DOH-091

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a grievance by James E. Symns (hereinafter "Grievant"), submitted directly to Level IV in accordance with W. Va. Code §29-6A-4(e), challenging his dismissal from employment with the Division of Highways (hereinafter "Employer" or "DOH") on April 1, 1994. An evidentiary hearing in this matter was conducted in the Board's office in Charleston, West Virginia, on May 2, 1994. Following receipt of timely post-hearing submissions from both parties, this case became mature for decision on May 26, 1994.

Grievant was employed by DOH as a Storekeeper II at its storage lot in Rand, West Virginia, for approximately six years. DOH initially notified Grievant, by letter dated February 2, 1994, that he was being suspended, effective February 3, 1994, for "theft of materials owned by the Division of Highways." R Ex 14. That letter cited the following specific basis for Grievant's suspension:

> On February 1, 1994 the West Virginia State Police searched your residence and found numerous items owned by the Division of Highways. Your possession of these items is considered theft.

R Ex 14. Grievant was further advised in that notice that once an investigation was concluded, "further disciplinary action, up to and including dismissal, may be taken." R Ex 14.

Following an investigation, Grievant was notified, by letter dated April 1, 1994, that he was being dismissed, effective that day, for "theft." R Ex 15. That notice further specified:

> On February 1, 1994 the West Virginia State Police searched your residence and found numerous items owned by the Division of Highways. On March 11, 1994 after an investigation by the West Virginia State Police you were arrested for grand larceny of Division of Highways materials and released on bond.

Grievant appealed both the suspension and dismissal to Level IV where these matters were consolidated without objection by DOH. The evidence supporting these charges is largely uncontradicted. Earl Boylan, a former West Virginia State Trooper employed as an Investigator in the Auditor's Office of the Division of Highways, testified regarding his investigation into this matter. This investigation was relied upon by DOH as the primary basis for dismissing Grievant.

Mr. Boylan received a call on January 31, 1994 from Trooper Toriseva with the West Virginia Department of Public Safety (DPS). Trooper Toriseva indicated that he was working on an unrelated matter involving Grievant and inquired whether DOH had any property missing from the Rand storage lot. Mr. Boylan advised Trooper Toriseva that a roll of Marafi fabric and some guardrail belongingto DOH had reportedly been seen in Grievant's yard several months earlier. The trooper indicated that they were expecting to obtain a search warrant for Grievant's property in the unrelated matter and invited Mr. Boylan to be present.

On the following day, February 1, 1994, Trooper Toriseva again called Mr. Boylan and indicated when he would be executing the warrant. Mr. Boylan went to Grievant's residence where several DPS personnel were already searching the property. They showed Mr. Boylan certain items in Grievant's yard, behind his trailer and in his garage which were suspected to be DOH property.

Mr. Boylan observed the Marafi fabric affixed to an existing chain link fence creating a "privacy fence" around three sides of Grievant's swimming pool and lining the interior of Grievant's garage. See R Ex 2-5. Various other items suspected of being DOH property were placed on a pool table in Grievant's garage. Mr. Boylan asked Grievant if he could tell which of the items on the table was DOH property and Grievant replied: "It all is. It has all been signed out to me through the storeroom." Mr. Boylan asked Grievant about some other items including a roll of right-of-way fence, a kerosene

heater and a mop bucket with ringer. Grievant verified that these items were also DOH property. Grievant told Mr. Boylan that he was keeping this property at his residence to prevent it from being stolen from the Rand lot.

Grievant similarly told his immediate supervisor, Norma Peck, that he had taken these items home to protect them from theft. Ms. Peck had previously discovered a cordless drill missing from theRand lot during a June 1993 inventory. At that time, Ms. Peck called Grievant at home while he was on sick leave. Grievant acknowledged taking the drill home, explaining that he was trying to keep the drill from being stolen. Although similar drills had been stolen in two previous break-ins at the Rand storage lot, Ms. Peck specifically told Grievant not to keep the drill at home or in his car.

Mr. Boylan subsequently prepared an inventory of items allegedly belonging to DOH with assistance from Tom Myers, the District 1 Comptroller, and a Storekeeper from the District 1 Storeroom, to include the cost of the items found. That inventory listed the following "property recovered:"

(1) One Men Working sign (SYM) (019-021-022102)	$39.02
(1) Everglow Kerosene Heater	80.00
(1) Rubbermaid 5 gallon water cooler	14.49
(1) 5 gallon pressurized gas can	43.00
(4) Four qts SAE 30 Motor Oil	2.40
(1) One mop bucket with wringer	50.90
(1) One push broom	6.22
(6) Six cans spray paint	9.00
(2) Two cans Bug Barrier	6.00
(1) One can Ajax	.40
(2) Two cans Airkem Odor Counteractent	3.90
(1) Roll Toilet Paper	1.98
(1) One 18" pipe wrench	21.65

(1) One 16" pry bar 2.02

(1) One hatchet 11.32

(1) One tube grease .60

(1) One utility flashlight 1.85

(4) Four floating lanterns 6.64

(5) Five 6 volt batteries 5.80

(4) Four cans Inverted Marker
Paint 5.52

(1) One Black and Decker Power
Pack 54.33

(2) Two cans spray disinfectant 2.00

(1) One can Ant and Roach spray 3.00

(1) One can Wasp and Hornet spray 2.19

(2) Two wire brushes NAPA 5.06

(1) One pair tin snips 10.04

(6) Six assorted paint brushes 18.24

(6) Six paint roller refills 6.95

(1) One paint roller .79

(3) Three hard hat liners 6.00

(1) One pair safety glasses 2.18

(1) One roll duct tape 3.85

(1) Black and Decker rechargeable
drill with charger Model 98038
Ser. No.457035
(025-030-000041) 129.05

(3) Three rain jackets S-M-XL 11.04

(1) One utility rain pouch 5.00

(1) One 50' extension cord 14.84

(28) Twenty-eight pair leather
work gloves 25.20

(11) Eleven pair brown jersey
gloves 7.15

(1) One 30" bolt cutter 72.00

(1) One round nose shovel
(025-019-000003) 26.35

(1) One 5 drawer file cabinet 99.72

(1) One 5'09" round G/R post
(012-003-000010) 10.10

(13) Thirteen pieces used guardrail
(012-001-000004) 175.50

(4) Four 2x6x16 treated
(017-002-020216) 40.79

(1) One roll R/W fence
(029-002-00021) 162.66

(4) Four piece of rolls of R/W
fence approx 25' in each 49.29

(5) Five G/R plates 12"
(012-007-000004) 2.83

(2) Two steel grates 298.09

(1) One roll Marafi fabric
(030-004-000001) 259.20

(4) Four R/W fence post
(029-002-000003) 89.43

(2) Two rolls gabion basket tie
wire (no cost)

(5) Five 5x7x10 oak timbers used 57.25

Total $1,969.67

Except for the cordless drill and file cabinet, these items are "expendable" property issued to DOH personnel for official usein the due course of business. Mr. Boylan suggested that some of these

items, such as thirty-nine pair of gloves and three sizes of rain jackets, were excess to Grievant's needs. However, there was no evidence that these items had been issued to Grievant in other than the normal course of business. Ms. Peck indicated that most items on the inventory were proper for Grievant's use at the Rand lot but agreed with Mr. Boylan that some items, such as the rain jackets, gloves, water cooler and paint roller refills, appeared to be excessive to his needs. Ms. Peck indicated that the water cooler was questionable since Grievant was supplied with Tyler Mountain Water at his work area.

Ms. Peck further testified that there was no reason for Grievant to have any of these items at his residence. Likewise, Mr. Myers stated that he saw no reason for Grievant to have any of the items on the inventory at his residence. Mr. Myers indicated that a 5400 square foot roll of black Marafi fabric was missing during the most recent inventory of the Rand lot. In response to a phone call from an unidentified source, possibly one of Grievant's neighbors, Mr. Myers and Ms. Peck drove by Grievant's residence sometime one to three months earlier and observed a roll of the Marafi fabric on a saw horse in Grievant's garage and draped over the swimming pool fence. They reported their observations back to Mr. Boylan and nothing further transpired until the State Police searched the property on February 1.

The cordless drill contained markings (a decal) indicating that it was DOH property. This item was on a property inventory ofequipment issued for use at the Rand storage lot. The kerosene heater had "DOH" written on it in black magic marker. The filing cabinet appeared to have had a label or tag removed from the point where DOH normally affixes their inventory marking device. Otherwise, the items recovered were not specifically marked as DOH property. For example, the wire brushes had a NAPA sticker on them indicating that they had been purchased from a commercial establishment. There was testimony that the spray paint, toilet paper and air freshener were not commercial brands readily available on the retail market but no witness indicated that these items were manufactured exclusively for DOH.

Grievant had been issued a Form DOH-6 for 13 pieces of guard rail and 30 five-by-seven inch timbers in conjunction with an approved Construction Sediment Control Plan. Lyle Bennett with the West Virginia Department of Environmental Protection signed the authorization section of the DOH-6 on October 25, 1993. (See footnote 1) Mr. Boylan testified that thirty five-by-seven inch timbers and thirteen pieces of guardrail depicted in two photos had been used for erosion control. See R Ex 7 & 8.

Therefore, these items were not removed from Grievant's property. Mr. Boylan indicated that the timbers and guardrail reflected on the inventory which were removed from Grievant's property were excess to that contained in the permit, and were not being employed for erosion control in accordance with the permit.

The Rand storage lot is primarily used for storage of pipe, lumber, guardrail and other materials used in construction. It consists of a one and one-half to two acre area enclosed on three sides by a fence. The fourth side backs up to an active railroad and is not enclosed. There are two buildings on the lot. Most of the items stored at the lot cannot be carried off without the use of heavy equipment. Nonetheless, large items such as pipe and lumber have been reported missing from the Rand lot, including items that were taken before Grievant started working there.

Consistent with his right under W. Va. Code §29-6A-6, Grievant did not testify at the Level IV hearing. Mr. Myers recalled that the Rand lot had experienced two or three break-ins and the building had been destroyed by fire on another occasion. Grievant called Henry Hess, the Building Maintenance Supervisor for District 1, as a witness. Mr. Hess indicated that there had been several break-ins at the Rand lot over the past fourteen years, including three occasions in the last two years when the doors were broken in. Mr. Hess indicated that such incidents were not restricted to the Rand lot but were common throughout the District.

In disciplinary matters, W. Va. Code §29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interest of the public, rather than upon trivial or inconsequential matters, ormere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W. Va. 1965).

In evaluating the available evidence, the undersigned finds that the testimony of the Employer's witnesses was substantially consistent. Moreover, their demeanor and responses under cross-examination revealed no particular animosity toward Grievant, so as to cause them to fabricate or embellish their statements. Respondent's witnesses established that Grievant was in possession of a considerable variety of DOH property at his residence. In addition to the DOH markings on the

cordless drill and kerosene heater, Grievant's verbal acknowledgements, to both Mr. Boylan and Ms. Peck, that the items in question were DOH property, established that this was not Grievant's personal property. Any glimmer of plausibility to Grievant's defense that he was keeping the property at his residence to prevent its being stolen from the Rand lot is belied by Grievant's conversion of the Marafi fabric for his personal use. Moreover, Ms. Peck's conversation with Grievant in June 1993, after tracing the missing cordless drill to his residence, established that Grievant was on notice that he could not take DOH property home, even for purposes of "safekeeping." Accordingly, the undersigned finds that the Employer proved the theft charge alleged in Grievant's notices of suspension and dismissal by a preponderance of the evidence.

This Board has recognized that larceny is a form of gross misconduct which may warrant dismissal of a state employee. Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993). See Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan 22, 1990). Addendum B to DOH's Administrative Operating Procedures regarding "Disciplinary Action, Suspension and Dismissal" includes theft among offenses that may form a basis for dismissal of an employee for a first offense. R Ex 16 at 22.

The public has a significant interest in insuring that property and materials procured for use by DOH are not diverted to personal use. Thus, DOH demonstrated that Grievant's misconduct was of a substantial nature affecting the rights and interests of the public. The West Virginia Supreme Court of Appeals has recognized that "the work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 585 (W. Va. 1985). However, given the quantity and value of DOH property taken by Grievant here, and considering that Grievant was a Storekeeper entrusted with safeguarding state property, DOH has established that discharge is an appropriate penalty, notwithstanding that this was Grievant's first offense after more than six years of employment.

Likewise, the fact that property valued at over $1,000 was taken distinguishes Grievant's case from the petty theft of donatedused clothing addressed in Blake v. Civil Service Commission, 310 S.E.2d 472 (W. Va. 1983). Even though some of the timbers and guardrail were being "recycled" from other jobs, all of the recovered property appeared to be in usable condition. Indeed, the rain jackets were still in their original packaging and the gloves and some of the tools were apparently

unused. Thus, this theft was substantially more egregious than the taking in Blake.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant was employed by the Division of Highways (DOH) as a Storekeeper II.

2. Grievant worked at the Rand storage lot, a facility primarily used for storing bulk materials employed in construction such as guardrail, timbers and pipe.

3. On February 1, 1994, officers of the West Virginia Department of Public Safety executed a search warrant on Grievant's property in an unrelated matter.

4. Various items suspected of being DOH property were found on Grievant's premises, in and around his garage. Grievant told Earl Boylan, a DOH investigator who had been invited to the scene by the State Police, that these items belonged to DOH, that it was all signed out to him and that he was keeping it there to prevent it being stolen from the Rand lot.

5. A 5400 square foot roll of black Marafi fabric was noted missing during the most recent inventory of the Rand lot. Subsequently, Tom Myers, the District 1 Comptroller, and Norma Peck, Grievant's immediate supervisor, drove by Grievant's residence and observed a roll of Marafi fabric in Grievant's garage and Marafi fabric draped over a fence around three sides of Grievant's swimming pool. On February 1, 1994, Mr. Boylan observed Marafi fabric affixed to the interior walls of Grievant's garage, as well as over the fence around the swimming pool.

6. During an inventory of the Rand lot in June 1993, Ms. Peck was unable to locate a cordless drill. Ms. Peck contacted Grievant at home on sick leave and learned that he had the drill, ostensibly to prevent it from being stolen from the Rand lot.

7. Two cordless drills were stolen during break-ins at the Rand lot and at least one other break-in occurred in the past two years. Ms. Peck nonetheless instructed Grievant that he was not authorized to take the cordless drill home.

8. A cordless drill, bearing a decal identifying it as DOH property, was included among the various tools and supplies found at Grievant's residence on February 1, 1994.

9. The total estimated value of the items recovered from Grievant's residence was $1,969.67.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code §29-6A-6. Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

2. Dismissal of a civil service employee must be for "good cause, which means misconduct of a substantial nature affecting rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985).

3. Respondent DOH demonstrated by a preponderance of the evidence that Grievant engaged in the theft of various items belonging to DOH.

4. Under the circumstances, Grievant's theft of DOH property constitutes gross misconduct, providing an appropriate basis for his dismissal from employment. See Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," 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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LEWIS G. BREWER

Administrative Law Judge

Dated: July 7, 1994

Footnote: 1Mr. Bennett was not called as a witness at the Level IV hearing by either party.