JOHN GEORGE

v. Docket No. 91-BOT-421

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, John George, employed at West Virginia University (WVU or Respondent) as a refrigerator technician at the Robert C. Byrd Health Science Center, advanced a grievance to level four on October 11, 1991, in which he complained that he had been given a fifteen (15) day suspension without pay for leaving work without approval, a charge he denies. The grievance had previously been denied by his immediate supervisor at level one and by President Neil S. Bucklew at level two. An evidentiary hearing was conducted at level four on June 11 and August 10, 1993; the matter became mature for decision when proposed findings of fact and conclusions of law were filed by both parties on October 12, 1993. (See footnote 1) Manager of Health Science Center Maintenance, Guy Varchetto testified that he imposed a fifteen day suspension, effective August 12 through August 30, 1991, after determining that Grievant had left the Health Science Center during work hours without his supervisor's approval. Mr. Varchetto stated that he became aware of Grievant's absence at approximately 10:30 a.m. on August 7, 1991, when Gary Miller, Director of Maintenance, advised him that Grievant had been seen leaving the complex. (See footnote 2) The Manager noted that Grievant's work schedule is from 7:00 a.m. to 3:00 p.m. with lunch from 11:00 until 11:30 a.m. and ten minute breaks at 9:00 a.m. and 1:30 p.m. Because he had previously received reports that Grievant was leaving the Health Science Center during his work day, Mr. Varchetto located two security guards and proceeded to Grievant's residence on Apollo Drive. (See footnote 3)

As he approached Apollo Drive Mr. Varchetto observed Grievant drive by in a yellow Subaru. He observed Grievant make a left turn towards Sabraton and attempted to follow; however, due to traffic he lost visual contact and was unable to continue the pursuit. At this point Mr. Varchetto returned to the Health Science Center after calling to havethe two main entrances watched for the yellow Subaru. Upon his arrival at the parking lot at approximately 1:15 p.m., Mr. Varchetto began checking

to ascertain whether anyone was aware of Grievant's location. Guards and neither of the two main entrances had detected the car. (See footnote 4) At 1:30 p.m. the administrator paged Grievant. Grievant returned the call within one minute and advised Mr. Varchetto that he was working at Student Health. He then proceeded to that area to inquire how long Grievant had been there and was told by an employee that she only knew that Grievant had just come in from the back to use the telephone. (See footnote 5) Mr. Varchetto stated that after checking with Human Resources and legal counsel, he explained the situation to Grievant and asked for a response, but gone none. He recalled that Grievant did indicate that he was experiencing marital problems and needed to talk; however, when David Skidmore, Trade Supervisor, was called back into the room to serve as a witness, Grievant declined to engage in any further discussion.

Upon the advice of counsel, Mr. Varchetto held a second meeting with Grievant on August 8. At this time he again explained to Grievant that he was attempting to find outwhat had happened so that he could determine what course of action was to be taken. He recalled that Grievant stated that he did not understand what was going on. Mr. Varchetto checked with Mr. Skidmore, who again was present, and Mr. Skidmore indicated that he believed Mr. Varchetto had clearly stated the situation to Grievant. Based upon the information available to him, Mr. Varchetto hand delivered a Memorandum to Grievant on August 9, 1991, notifying him that a fifteen (15) day suspension, without pay, had been imposed as a result of his willful and flagrant act of job abandonment. At the same time Grievant handed Mr. Varchetto a number of letters from employees who had observed him at work on August 7.

Mr. Skidmore testified at level four that a co-worker had complained to him previously that Grievant was leaving the Center during work hours. He had also received a call from one of Grievant's neighbors who inquired as to whether Grievant was still working at the University since he always seem to be at home. Mr. Skidmore stated that he had authorized Grievant to leave work for brief periods of time in the past to do banking or visit a patient in the hospital, but that he had not granted any request from Grievant to leave on August 7.

Lieutenant Arthur Mathess, Assistant Director of the WVU Department of Public Safety, stated that he accompanied Mr. Varchetto on August 7. As they approached the intersection of Apollo Drive he heard Mr. Varchetto state"there he is now" and observed a yellow Subaru passing in front of them. Mr. Mathess recalled that he looked through the back window of the Subaru and saw a sandy-

colored, brown-haired man driving. He did not note the license number of the car. Sergeant Hoxter, the second security officer with Mr. Varchetto, did not testify at either the level two or level four hearings.

Tom Livengood, Mechanical Equipment Worker, testified that he encountered Grievant near the Ruby Memorial Hospital Gift Shop at approximately 9:00 to 9:15 a.m. on August 7, 1991, where they engaged in small talk. He could not positively recall, but believed that Grievant told him that he was in the hospital to visit his father. He then observed Grievant exit the building and get into a yellow Subaru driven by a woman. Mr. Livengood returned to work and commented on the incident to a co-worker, Gary Everly. He stated the reason he mentioned the matter was because he had noted Grievant leaving work during the day as frequently as two or three times a week. Mr. Everly in turn stated that he advised Mr. Miller that Grievant had been seen leaving work again. Mr. Miller then brought the matter to Mr. Varchetto's attention. Both Mr. Everly and Mr. Miller stated that they were familiar with rumors that Grievant frequently left work during the day.

Grievant denies that he left work without authorization on August 7 and recounts the events of the day as follows. He clocked in at 6:55 a.m. and proceeded to the shop. At7:00 a.m. he checked his equipment and began working on a freezer. At 8:55 his pager beeped; however, he took a five minute break and went to the cafeteria for coffee. He then checked the call and found that it came from Student Health. After giving the malfunctioning air conditioner an initial examination he returned to the shop to get the tools needed. After dismantling the air conditioner he found a belt was not working properly and that a coil had frozen. He retrieved a heat gun from the shop and worked on thawing the frozen coil until 11:00 a.m. when he took his lunch break. After lunch he was in the shop again working on the freezer until 11:45 when he returned to Student Health. He had just concluded the repair of the air conditioner when he was paged. He immediately went to the front desk and returned Mr. Varchetto's call. He then continued to work until 4:03 p.m. when he clocked out.

Grievant asserts that Mr. Livengood's testimony is patently untrue. He denies that he either met or spoke with Mr. Livengood at Ruby Memorial Hospital on the day in question and asserts that they have not spoken for years due to personal animosity generated when Grievant was promoted and to a disagreement about the labor unions. Neither does Grievant converse with Mr. Everly due to a feeling of ill will he states was created after the two were involved in two accidents after which Mr. Everly vowed never to work with Grievant again. Grievant states that he drives a gray Ford Tauras

and that his wife drives a yellow Subaru, one of many in the Morgantown area. He opines that the length and color of his hair is very similar to his wife's and that Mr. Varchetto mistakenly identified Mrs. George as the Grievant through the car's tinted windows. Grievant acknowledged that he had asked for and received permission to leave work in the past and would have done so on August 7, if needed. Grievant claims that he had no knowledge of the incident to which Mr. Varchetto referred in their meetings of August 7 and 8, and asserts that Mr. Varchetto misunderstood him to say that he was experiencing martial problems when he actually stated that the charge could cause him marital problems.

To substantiate his activities on August 7, Grievant offered the testimony of several employees. Johnnie Ray Newbrough, a custodian at the Center, stated that he had lunch with Grievant on August 7 between 11:00 and 11:30 a.m. At level two David Kasten, a custodian, testified that he also had lunch with Grievant in the vending room. He recalled this fact because Grievant was joking about having some sort of problems with his soup. Kathy Kelly, Mary Ann Morgan and June Straight, all assigned to Student Health, testified regarding their interaction with Grievant on August 7. Ms. Kelly stated that she noticed the air conditioning was not working when she reported to work. At approximately 8:45 a.m. she called the Physical Plant and requested that Grievant be sent up to check the coolingunit. She recalled specifically requesting Grievant by name because "he was always the one who came down to fix it." (See footnote 6) According to Ms. Kelly Grievant arrived at 9:15 or 9:20 a.m. She did not observe him leave the area since she was at lunch from 12:15 to 1:15 p.m. Ms. Morgan also testified that the air conditioning was not working on the morning of August 7. She recalled that Grievant came to the front desk at about 1:00 p.m. to use the phone after he was paged. Ms. Straight testified that she spoke with Grievant sometime between 12:30 and 1:00. at which time he was beeped and used the telephone to respond.

Judith George, Grievant's spouse, testified that she was driving their 1984 yellow Subaru on August 7. Ms. George stated that she was working at a local day care center at that time but that she had left work sometime before noon to go home and check on her son who was ill. After checking in at home, Ms. George recollected that she proceeded to an auto parts store located on the Greenbag Road and then proceeded to a supermarket in the Sabraton area.

Respondent argues that it has met its burden of proving the suspension was reasonable and appropriate given that the evidence shows that Grievant was scheduled to be workingboth times he

was sighted on August 7; i.e. when he was observed leaving the Health Science Center by Mr. Livengood at approximately 9:15 a.m. and when he was observed by Mr. Varchetto driving near his home at 12:49 p.m. Furthermore, even though Lieutenant Mathess could not positively identify Grievant as the person driving the yellow Subaru on August 7, 1991, he was able to provide a general description of the person which was not inconsistent with Grievant's looks at the time of the level four hearing. Respondent asserts that while Grievant successfully evaded apprehension he did not deny leaving work when questioned later that day, again the following day, or even on August 9 when presented with the suspension letter.

Respondent notes that in addition to outside reports, Mr. Livengood observed Grievant leave work during regular work hours on many occasions, on average two or three times a week and that it was commonly believed by other employees at the Health Science Center that Grievant was leaving the job site during work hours without authorization. The fact that Grievant engaged in a practice of parking in various locations from day to day rather than in one standard area is also apparently offered as proof of the alleged behavior.

Respondent argues that the outcome of this case is controlled by the credibility of the witnesses. Grievant, Respondent asserts, offered testimony regarding his conversations with Mr. Varchetto on August 7, 8, and 9, at level four which was inconsistent with that previously givenat the level two hearing, while Mr. Varchetto's testimony was consistent with that provided by Mr. Skidmore, both of which were consistent with Grievant's earlier testimony. Respondent cites the testimony of both Mr. Varchetto and Mr. Skidmore that when confronted on August 7, Grievant commented that he was having marital problems, to support its conclusion that Grievant made the statement "as a prelude to an attempt to justify or explain the unauthorized trip from work." Respondent opines that this theory also provides a basis for why the Grievant would later deny making the statement.

Respondent further urges that the testimony of Lt. Mathess corroborates Mr. Varchetto's account and that the testimony of Mr. Livengood and Mr. Everly is important because they have shared the same work site with Grievant for years and knew what was going on. Grievant asserts that he has established his presence in the Health Science Center on August 7 and that the testimony of Respondent's witnesses was either tainted by personal animosity or was inconclusive and did not prove him to be away from his work area.

Because this grievance involves a disciplinary action the employer bears the burden of proving

the charges against the employee by a preponderance of the evidence. W.Va. Code §18-29-7. A review of the record in its entirety does not support a conclusion that Respondent has proven by a preponderance of the evidence that that Grievant abandoned his job . First, only Mr. Livengood allegedly observedGrievant exit from the Ruby Memorial Hospital lobby and get into a yellow Subaru driven by a woman "between nine and nine fifteen." This testimony must be compared to that of Ms. Kelly who stated that Grievant arrived at Student Health to repair the air conditioner at 9:15 or 9:20. Clearly, Grievant could not be at Student Health if he had left the premises. While the relationship between Grievant and Mr. Livengood is in dispute, it appears that there is no implication whatsoever that Ms. Kelly had any personal or close working relationship with Grievant or had any interest in the outcome of the events of August 7. Further, there is some question as to whether Mr. Livengood had a clear and unobstructed view from his position at the Gift Shop. Finally, the fact that Mr. Livengood observed Grievant leaving work two to three times a week without comment raises a question of why he suddenly reported the incident of August 7 and then referred to prior incidents. In consideration of these factors Ms. Kelly's testimony will be accorded more credibility than that given by Mr. Livengood.

Second, two witnesses were capable of placing Grievant at a location other than his work area during regular work hours. The testimony offered by Lt. Mathess at the level four hearing fails to establish that Grievant was driving the yellow Subaru on Apollo Drive at mid-day on August 7:

Q: Okay, Okay, so as a result then of going with Mr. Varchetto, did you drive out to the Apollo Drive area?

A: Right. We drove out and as we rounded his house area, the area wherever his house was, Mr. Varchetto said: 'Well, there he is now.'

Q: And when he said that, what, if anything, did you observe?

A: At the time he said that and I looked, all I could see was a yellow Subaru with a brown-haired person driving it.

Q: Was it a man or a woman?

A: It looked to be a man to me.

Lt. Mathess stated that he first saw Grievant face to face on June 11, 1993, at the level four hearing. At that point Respondent's counsel inquired:

Q: ...would the observation you made back then [on August 7] in any way be inconsistent with him

being the person you saw even though you can't identify him?

A: No, but then again, all I seen [sic] was the color of the hair.

Clearly, Mr. Mathess' testimony does not establish that Grievant was away from his work area.

Under direct examination Mr. Varchetto was first questioned by counsel as follows:

Q: (Referring to a photograph) Is that the road that you were on at the time that you made the observation of the yellow Subaru that the Grievant was driving on August the 7th, 1991?

A: Yes.

Level Four Transcript, p. 17.

Although Mr. Varchetto later stated independently that he observed Grievant driving the Subaru, no further inquiry was made as to how he made the identification. On cross examination Mr. Varchetto revealed that at the time of the sighting he was driving toward Apollo Drive; he had not stopped or parked when the Subaru passed in front of him. He did not recall if the window was open or if the windows were tinted; however, he did recall that he had anunobstructed view of the driver through the windshield "as he came around the turn, and then a side profile through the side" and "positively believe[d] that [he] identified John George driving that yellow Subaru that day at twelve fifty- nine." Level Four Transcript, p. 69. Mr. Varchetto's integrity is unquestioned and his belief that he saw Grievant at the stated time and place is apparent. However, several factors create the possibility of an error in the identification. Mr. Varchetto was driving and had not stopped his own vehicle. This activity necessarily caused some distraction for him. The yellow Subaru was also moving; therefore, the point of focus was not stable. It is further noted from the observation of the undersigned the Grievant and Mrs. George have hair remarkably similar in color and relatively similar in length. The fleeting opportunity to see the person in the car, the similarity in looks, plus the fact that he expected to see Mr. George, makes it entirely possible that Mr. Varchetto mistakenly identified Mrs. George for Grievant.

While no positive identification was made of Grievant outside his work area, five individuals placed him at work during the relevant times. Further, Mrs. George's itinerary was not shown to be inaccurate or misleading and places her in the vicinity where she could have been observed by Mr. Varchetto. Therefore, based upon the record in its entirety, it cannot be determined that Respondent has provenby a preponderance of the evidence that Grievant left work without authorization on August 7, 1991.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant has been employed at West Virginia University since 1978 and was assigned as a refrigeration technician at the Health Science Center's Maintenance Engineering Department on August 7, 1991.

2. Grievant was suspended for fifteen days in August 1991 for "job abandonment" after a co-worker reported that he observed Grievant enter a yellow Subaru driven by a woman and leave the center and the Manager of the Maintenance Engineering Department purportedly saw him driving the same vehicle near his residence.

3. Two officers from Respondent's Department of Public Safety were unable to identify the driver of the Subaru although one noted that the driver had brown hair.

4. Five Health Science Center employees testified that they observed Grievant at the center during the relevant times.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code §18-29-7, the burden of proof in disciplinary or discharge actions rests with the employer and the employer must meet that burden of proving the charges against an employee by a preponderance of the evidence.

2. Respondent failed to prove that Grievant left his assigned work area on August 7, 1991.

Accordingly, the grievance is GRANTED. Respondent is Ordered to remove the letter of suspension from Grievant's personnel file and to provide him the compensation and any other benefits lost due to the suspension.

March 25, 1994 MARY BETH ANGOTTI-HARE

ALJ

Footnote: 1

Upon appeal Grievant requested that the matter be decided based upon the lower-level proceedings; however, the

Respondent indicated that a hearing would be necessary to place additional evidence into the record. The grievance was scheduled for hearing on December 3, 1991, and several times thereafter; each hearing being continued at the request of one or both parties and for good cause shown.

Footnote: 2

The Health Science Center consists of the Health Science Building, the Cancer Center, Ruby Memorial Hospital, and the Physicians' Office Center.

Footnote: 3

The record contains numerous references to specific reports of Grievant being away from his work area during the day; however, these alleged incidents were not the basis for the suspension and will not be considered herein.

Footnote: 4

Apparently, there are two additional entrances through tunnels but these routes would have required additional time for Grievant to have returned to his work area.

Footnote: 5

It is undisputed that the air conditioning unit was in the back area of Student Health Services and that access to other regions of the complex was available from there making it unnecessary for Grievant to continually pass through the reception/office area.

Footnote: 6

The record establishes that written work orders are to be completed for each maintenance call and that none could be found for this incident. Because three separate employees testified that the air conditioning was malfunctioning and there appears to be no reason to question Ms. Kelly's veracity, it is accepted that she did call and for unknown reasons no written work order was completed in this case.