HENRY HERCULES, Grievant,

v. Docket No. 97-DOH-006

WEST VIRGINIA DIVISION OF HIGHWAYS, Respondent.

DECISION

The grievant, Henry Hercules, was an employee of the West Virginia Division of Highways (hereinafter called "Employer" or "DOH"). He was dismissed from his duties as a Transportation Worker 3 - Equipment Operator primarily based upon two incidents which occurred at the Headquarters garage on August 19, 1996, and August 20, 1996. In accordance with W.Va. Code §29-6A-4(e), the case was submitted directly to Level IV challenging the dismissal. The grievant alleges, "I believe my dismissal from employment was unfair and unwarranted. As relief, I wish to be reinstated to my position, and in any other way be made whole." The dismissal was made effective December 30, 1996, and this grievance was filed on or about January 7, 1997. An evidentiary hearing in this matter was conducted on February 5, 1997. Briefs were submitted by February 21, 1997, and the grievance became mature for decision on that date.

DISCUSSION

The grievant worked out of the Ohio County Headquarters in Triadelphia, performing the duties of an endloader operator. He worked for the DOH for over twenty-six years.

By letter dated December 16, 1996, authored by Jeff Black, Director of the Human Resources Division, the grievant was notified that:

> Your District Engineer . . . has recommended that you be suspended from your duties as a Transportation Worker 3 - Equipment Operator . . . However, after reviewing the specifics of the charges it has been decided that these are serious offenses for which you should be dismissed.
>
> The offenses which have resulted in your dismissal are insubordination, threatening bodily harm to a supervisor, profanity toward others, insulting and abusive laguage (sic). More specifically:
>
>> On Tuesday, August 20, 1996 during a meeting with Ohio County Employees at approximately 7:45 a.m., you began using profane, vulgar and abusive language toward Mark Edge, Acting County

> Maintenance Assistant, and Tom Simms, County Highway Maintenance Assistant. You were instructed by Mr. Edge to discontinue using such language and you failed to do so. When Mr. Edge attempted to discuss your behavior with you after the meeting, you drew back your fist in a threatening manner.

The August 19th incident stemmed from the grievant's reported use of his endloader for personal transportation. He was reported to be taking the endloader home at night during a period of time when he was without a car. He was advised on that date by Thomas Simms, the Assistant County Supervisor, to cease this practice. This allegedly resulted in the grievant angrily making comments that same day on the two-way radio about “stealing rebar”, an apparent reference to an incident involving Mr. Simms when he had been reprimanded for removing discarded rebar to use for construction at his home. The DOH felt that this comment was slanderous and a violation of administrative procedures for the use of such radios.

The second incident, that of August 20th, is regarded as the more serious of the two, and is the only matter referred to in the dismissal letter of December 16, 1996. It is related to theconfrontation of August 19th, the day before, and transpired in the following manner.

The grievant and 10 or 12 other workers were in the DOH garage at about 7:45 a.m. waiting to begin their work assignments. Mark Edge, in his capacity as Acting County Superintendent, told them that they were leaving the work site too early in the afternoon and were arriving back at the shop around 2:45 p.m., instead of 3:30 p.m. They were to stay on the job later. There is some evidence that he also discussed taking state equipment home, the topic of the day before. The men became angry and began grumbling and complaining to each other. The grievant allegedly addressed profane and vulgar language to Mr. Edge and to Mr. Simms. Mr. Edge directed him to not use such language, but the grievant continued.

Also, both Messrs. Edge and Simms testified that the grievant was using profanity directed toward certain persons in certain offices. The grievant had beckoned toward the offices of Edge and Simms. This indicated to them that the grievant was talking about them and to them. There was also testimony that the grievant has a bad eye, and that although he may have appeared to be looking at them, that maybe he really was not.

At any rate, the grievant allegedly called them foul names and referred to them as, among other things, “them two high paid fuckers”, and those “two big pricks in the office”, and those “lazy fat

fuckers who do nothing". When the meeting was over, he walked out of the building saying, "It stinks in here because of those two shitheads." Employer's Exhibits 1 and 3, Level IV hearing. Mr. Edge followed the grievant outside to discuss his conduct and language and was told by the grievant to "get off my back". The grievant then allegedly raised his fist in a threatening manner. No blows were struck and no further activity of this type occurred. Employer's Exhibit 2, Level IV hearing.

Testimony was given on behalf of the grievant by his co-workers, all of whom were present at the meeting on August 20, 1996. They all indicated that they didn't hear the grievant say thethings that were alleged and that the grievant, like the rest of them, was just generally grumbling and complaining. They did not see or hear him direct foul language at Messrs. Edge and Simms. The implication was that those things did not happen. Another implication was that if they did, they were not comments directed to Edge and Simms, but were just general grumbling and complaints.

The grievant testified at the February 5, 1997, Level IV hearing that when Mr. Edge told the men that they were coming in from the job site too early, they became angry. They felt that these directions should be given to certain crew leaders, not present, who were the actual violators. The grievant said favoritism was making the men angry.

The grievant denied the use of the words he is alleged to have said, and testified that he would never use language of that sort. He also testified that he did not address any remarks to Mr. Edge, that he just complained in general, to nobody in particular. He further denied that he raised his fist in a threatening manner. He stated that he was upset and just shook, not raising his arm in any way.

A procedural issue raised by the grievant in his final written argument needs to be addressed first. The respondent, throughout the dismissal procedure, appeared to exceed certain time limitations contained within their Administrative Operating Procedures. The processing of the dismissal proceeding took longer than operating procedures allow.

On August 23, 1996, Mr. Edge prepared Form RL-544, a notice of disciplinary action, which was posted August 29th or 30th and delivered to the grievant by Certified Mail on September 3, 1996. He was notified of his offense and that as a result, it was being recommended that he be assessed a 15-day suspension without pay. He was further advised that if he desired, a hearing (or meeting) would be held August 27, 1996, at 3:00 p.m. Somehow, that meeting was held at the specified time although the Form RL-544 indicates that it was posted and delivered after that date. Form RL-546, which is a summary of the informal conference, indicates that the hearing took place at Ohio County

Headquarters on August 27, 1996. At that time, the grievant apologized for using profanity, vulgar and abusive language, and being out of line with his supervisor. (See second page of Employer's Exhibit 4 for a summary of remarks by the grievant.) However, he refused to sign or endorse the Verification Form containing the summary.

According to DOH Administrative Operating Procedures (See footnote 1) , the Form RL-544, and accompanying documentation are to be submitted to the Personnel Division (now known as the Human Resources Division) for their review within eight working days. It is also to be reviewed by the DOH Legal Division. The record does not disclose when the Human Resources Division received the form and documents. Employer's Exhibits 6 and 7 indicate that the Human Resources Division sent a memorandum regarding this matter to the Legal Division on or about October 3, 1996. Thereafter, a memorandum in response dated November 12, 1996, was sent by the Legal Division back to the Human Resources Division. It advised that a dismissal, not a suspension, was warranted unless mitigating factors justify the lesser penalty. (See footnote 2) This memorandum was forwarded to the District Engineer by an accompanying memo dated November 13, 1996.

The letter of dismissal from Jeff Black, Director of the Human Resource Division, recited in part above, was issued December 16, 1996, to be effective December 30, 1996. According to the Division of Highway's Personnel Operating Procedures, the letter of dismissal should have been issued within eight working days of the receipt of all information. This would have been around November 19 - 21, 1996. Establishing the time frame within which the DOH processed the grievant's dismissal is difficult. It generally appears from the records available, that it proceeded more slowly than the personnel regulations allow. All that being said, it would be difficult to establish that the grievant was prejudiced by this delay. Its only effect would be to prolong his employment, the loss of which he is grieving. It amounts to “harmless error”. These are things which happen during the course of an event, which are wrong, but have no effect on the outcome of the event. For example, in Murphy v. Mingo County Bd. of Educ., Docket No. 95-29-382 (Jan. 1, 1996), the grievant was laid off based upon her seniority. She grieved because she was not the least senior employee. However, it was determined that when the total number of lay offs needed were considered, she would been laid off anyway. Her seniority would not have prevented it. The error did not change the outcome. Also see Arbogast v. Randolph County Bd. of Educ., Docket No. 94-42-1093. In Arbogast, the grievant and another employee both applied to fill a vacant position. They were equal in seniority, thus

necessitating a tie breaking lottery. The grievant was required to be present at the drawing but could not be reached. The drawing was held without him and he lost. The ALJ determined that although the grievant was not present, that proper procedures were followed and the absence of the grievant was harmless error.

Having dealt with matters of a procedural nature, the main substantive issue needs to be addressed. It must be determined what the grievant's conduct was on August 20, 1996, and whether this conduct amounted to good cause for dismissal.

At the hearing of February 5, 1997, complete testimony was provided of the incidences of August 19 and 20 of 1996. Despite the testimony of the grievant and his co-workers, I find the testimony of Messrs. Edge and Simms to be credible and that the grievant made the alleged statements and conducted himself in a threatening manner towards his supervisor. The grievant'scontention that he was addressing his remarks to no one in particular just does not ring true. He was specific as to whom he directed his comments. It is clear that he was directing profanity and insults to Messrs. Edge and Simms, accusing them of being lazy and worthless.

Does this amount to insubordination? The case of Payne v. W.Va. Div. of Highways, Docket No. 93-DOH-454 (April 29, 1994), concerned an employee charged with gross misconduct and insubordination for addressing his supervisor with profane and insulting language. Addressing his supervisor with profanity, who was trying to counsel the grievant on another matter, was insubordination. It must be noted that the language used to insult the supervisor in Payne is remarkably similar to that in the instant case. Payne grieved his dismissal but it was denied. His language was found to be insubordination.

In Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), derogatory remarks were made to a supervisor. Among other things, he was called a “dirty bastard”, along with being referred to as a “liar”. The ALJ determined this language to be an act of insubordination.

The undersigned, therefore, concludes that the grievant's conduct was clearly insubordination. However, the disciplinary measures to be taken are not so clear. Should the grievant have been dismissed as a result of his insubordination and other offenses? The DOH's Administrative Operating Procedures provide that dismissal must be for **good cause** (emphasis added). To find “good cause”, it must be determined that the grievant's actions are of a substantial nature directly affecting the rights and interests of the public rather than trivial or inconsequential matters. (See footnote 3)

Dismissal as a disciplinary measure must be reserved for circumstances when nothing else but the removal of the employee from the work environment will do. This is also the position ofOakes v. West Virginia Department of Finance and Administration, 164 W.Va. 384, 264 S.E. 151 (1980). Oakes was the postmaster of the Capitol Post Office at the state capitol building in Charleston. He was dismissed when certain items of registered mail were not delivered. He was responsible for the operation of the Post Office, but it was actually another employee who failed to make the delivery, not Oakes. The Court ruled that he was not chargeable with the negligent acts of a subordinate unless he participated or otherwise sanctioned them. There was no prior history of negligence or inefficient conduct. This single incident was not good cause for his dismissal.

What factors should be considered in determining good cause for dismissal or on the other hand, mitigate in favor the grievant?

The work record of the grievant is not remarkable. It contains no commendations, but was lengthy, in excess of twenty-six years. In that time there was one disciplinary measure taken (see foot note 2, above). But in a career of twenty six years, that would not be considered unusual. The duration of the grievant's working career with the respondent in itself is a mitigating factor. Buskirk v. Civil Serv. Comm., 332 S.E.2d 579, W.Va. 279 (1985).

Also to be considered is the respondent's original recommendation, a fifteen day suspension. This was from the persons most affected by the grievant's actions, his direct superiors. Having been subjected to verbal abuse and the threat of physical harm, they did not recommend dismissal. Dismissal came about only after the Human Resource Division's opinion was sought. However, weight should be given to the opinions of those supervisory personnel who know and work with employees on a daily basis.

The effect of the grievant's acts must also be a factor. The record is silent as to whether the grievant's or the other employees' work was disrupted or in any way compromised. However, it is known that the grievant continued to work without incident for three months before he was notifiedof his dismissal.

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

Findings of Fact

1. The grievant had been employed by the respondent for a period of over 26 years, and was a Transportation Worker 3 - Equipment Operator at the time of his dismissal.

2. On August 19, 1996, the Assistant County Supervisor, Thomas Simms, told the grievant that he could no longer take state equipment, specifically an endloader, to his home.

3. Mr. Simms' direction was interpreted by the grievant as evidence of favoritism which made him angry because he felt that it was based on practices benefiting the supervisors.

4. Early in the morning on August 20, 1996, Mark Edge, the Acting County Superintendent, met with the grievant and others and told them they were reporting back to Headquarters too early and instructed them to stay longer at the work site.

5. The grievant became angered, as he had the day before, and directed insults, profanity and vulgar language toward Messrs. Edge and Simms in the presence of a number of other employees.

6. Mr. Edge directed the grievant to stop the profanity, but the grievant defiantly continued.

7. After the meeting broke up, Mr. Edge followed the grievant into the parking lot to discuss his conduct with him but was told by the grievant to “get off his back”.

8. The grievant also drew back his fist in a threatening manner causing Mr. Edge to back away.

9. Witnesses Mark Edge and Thomas Simms, testifying on behalf of the respondent,were credible.

10. There are several factors to consider which mitigate the grievant's dismissal including the length of the grievant's employment with only one disciplinary action, the fact that his supervisors originally recommended a suspension rather than a dismissal, and that he continued to work for the respondent for three months after the incident with no further problems.

Conclusions of Law

1. In disciplinary matters, the respondent is required to prove its case by a preponderance of the evidence. W.Va. Code §29-6A-6. Broughton v. W.Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Any delays by the respondent in the processing of the grievant's dismissal was harmless error. Murphy v. Mingo County Bd. of Educ., Docket No. 95-29-382 (Jan. 1, 1996).

3. The grievant's defiant insults and use of profanity toward his supervisor in the company of

other employees, continuing to do so after being directed to cease, were insubordination. Payne v. W.Va. Div. of Highways, Docket No. 93-DOH-454 (April 29, 1994); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (January 31, 1995).

4. After consideration of the facts of the incident of August 20, 1996 and the mitigating factors, respondent has not established good cause for the dismissal

5. The punishment imposed was clearly excessive.

Accordingly, this grievance is **GRANTED IN PART and DENIED IN PART.** Grievant's discipline is hereby reduced from dismissal to a 4 month suspension without pay, effective December 30, 1996. Grievant is hereby **ORDERED REINSTATED** to his position at the conclusion of the aforesaid 4 month suspension. 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 §18-29-7. 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JAMES D. TERRY

Administrative Law Judge

DATE: April 17, 1997

Footnote: 1

The Administrative Operating Procedures are outlined in Employer's Exhibit 8, at page 14.

Footnote: 2

There were no mitigating factors found. An examination of available records did reveal a prior disciplinary action. See Employer's Exhibit 12.

Footnote: 3

DOH Administrative Operating Procedures, §IV- E-(1), page 12.