DANIEL BOOTH and SAMUEL BLOSSER,

Grievants,

v. **Docket No. 00-DOH-167**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION

Daniel Booth and Samuel Blosser ("Grievants") initiated this proceeding on November 15, 1999, alleging the written reprimands they received on November 5, 1999, were improper. They seek removal of the reprimands from their personnel records, and Grievant Booth seeks to have his supervisor, Lowell Moore, "stop his retaliation against me." The grievances were denied at levels one and two. A level three hearing was held before Brenda Craig Ellis on March 28, 2000. Although Ms. Ellis granted the grievance in a recommended decision dated May 19, 2000, the Division of Highways' "Grievance Review Panel" and Assistant Commissioner Thomas Badgett disagreed with that decision, and denied the grievance on May 26, 2000. (See footnote 1) Grievants appealed to level four on June 5, 2000. A level four hearing was held in the Grievance Board's office in Elkins, WestVirginia, on November 1, 2000. Grievants represented themselves, and Respondent was represented by counsel, Nedra Koval. This matter became mature for consideration upon receipt of the parties' fact/law proposals on November 29, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed by Respondent Division of Highways ("DOH") as Transportation Worker IIs/Equipment Operators in District Eight, Tucker County.

2. Grievants' normally scheduled work hours are from 7:30 a.m. to 4:00 p.m.

3. During the winter months, Grievants' supervisor, Lowell Moore, prepares a schedule

showing which employees will be required to work “emergency” overtime on each shift. This unscheduled overtime for treatment of roads in bad weather is known as SRIC-- Snow Removal and Ice Control.

4. Effective November 15, 1999, Grievants were to work second (evening) shift in the event of inclement weather during evening hours, pursuant to the new SRIC schedule.

5. On November 3, 1999, at approximately 3:30 p.m., an unexpected early snowstorm occurred in Tucker County. A DOH employee phoned the county garage to inform them of the hazardous road conditions and requested that a truck be sent to a particular portion of Route 219 on “Backbone Mountain.” The inclement weather caused several car accidents at that location.

6. Although posted, the SRIC schedule was not yet in effect on November 3, 1999. 7. Just after receiving the call that a snow plow was needed, and just before Grievants were to leave work for the day, Mr. Moore asked Grievant Booth if he would stay and work overtime. Grievant replied “no,” with no further explanation. Mr. Moore did not ask why Grievant would not work overtime and did not press the matter further.

8. After Grievant Booth stated that he would not stay over, Mr. Moore made the same request of Grievant Blosser. Mr. Blosser also replied “no”, and no further discussion occurred between him and Mr. Moore regarding the matter.

9. DOH policy provides that scheduled overtime in non-emergency situations is awarded to employees on a rotating basis. Employees are free to refuse their turn to work scheduled overtime.

10. When Mr. Moore asked Grievants to work overtime on November 3, 1999, he did not tell them that it was considered an emergency situation and that he was not following the scheduled overtime rotation. He assumed Grievants knew that the inclement weather conditions had created an emergency situation and that the SRIC schedule would be used.

11. On November 5, 1999, Mr. Moore issued written reprimands to Grievants for violating Department of Transportation Administrative Operating Procedures for their failure to work overtime as directed by their supervisor, failure to comply with major instructions, and refusal to work overtime.

12. Mr. Moore issued a check to Grievant Booth on February 5, 1999, as settlement of a grievance he had filed over Mr. Moore's use of another employee tooperate a grader instead of Grievant. (See footnote 2)

Discussion

The burden of proof in disciplinary matters rests with 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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent contends that Grievants violated the following portions of its Administrative Operating Procedures:

> The District Engineer/Division Director or their designee will be the approving authority for the scheduling of work on holidays, overtime, and any permanent workweek that differs from the normal workweek of five eight hour days. Deviations from the normal workweek can be made, if they benefit the Division. **Employees will work overtime hours as directed by their supervisor.**
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> If work is to be performed in inclement weather, employees may be assigned duties to perform which may fall outside of their regular duties. **In these cases, the employees do not have the option of refusing to perform these duties.**

Level III, Respondent's Ex. 1 (Emphasis added). In addition to the above, DOH has formulated written policies and developed established practices for dealing with employee overtime. DOH's "scheduled overtime" policy has been the subject of several previous grievances, and it is well established that, pursuant to that policy, employees are offered the opportunity to work preplanned overtime on a rotational basis. They may refuse to work scheduled overtime at their option. See Chaney v. W. Va. Dep't of Transp., Docket No. 99-DOH-301 (Dec. 20, 1999); Blake v. Dep't of Transp., Docket No. 97-DOH-338 (Feb. 9, 1998); Michael v. W. Va. Dep't of Transp., Docket No. 97-DOH-148 (July 18, 1997); Henderson v. W. Va. Dep't of Transp., Docket No. 95-DOH-548 (Apr. 23, 1996). However, in emergency situations, and specifically when SRIC season is underway, employees are required to work overtime, if directed by their supervisor. Nevertheless, the evidence in the instant case shows that, if an employee is sick or has already worked several hours of

overtime, he may even be excused from working emergency overtime.

Respondent contends that the events which occurred on November 3, 1999, clearly involved emergency overtime and the implementation of the SRIC schedule. DOH argues that Grievants knew this, and insubordinately refused to work the overtime, which they knew was required in this situation. Grievants contend that, because the SRIC schedule had not yet been implemented, and because Mr. Moore failed to explain to them that he was utilizing that schedule, they did not realize he was "ordering" them to work overtime. Indeed, the testimony even of Mr. Moore was that he could not remember if he actually "asked" Grievants to work over or "told" them they had to work over.

The charges against Grievants in this case are tantamount to insubordination. "[I]nsubordination involves 'willful failure or refusal to obey reasonable orders of a superiorentitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995) (Citations omitted.). Where an employee has justifiably misunderstood or misinterpreted a superior's instruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to establish insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998) (citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991)).

Grievants have been charged with refusing a direct order from their supervisor to work overtime. However, the undersigned finds that Respondent has failed to prove by a preponderance of the evidence that Grievants clearly understood that this was a directive, rather than a request. It is obviously well understood by DOH employees that scheduled overtime is a choice, while SRIC overtime is not. Grievants credibly testified that they believed Mr. Moore was asking them to work non-emergency overtime, and that is why they refused. Grievants are both long-term DOH employees with no history of insubordination or disciplinary problems, and both are well-acquainted with DOH policies regarding overtime. Respondent has provided no plausible explanation as to why these two exemplary employees would suddenly decide to be flagrantly disobedient to their supervisor. Accordingly, the undersigned finds that Grievants lacked the intent to defyauthority which

is necessary to prove insubordination or an intentional refusal to comply with a superior's directive.

Grievant Booth has also argued that the reprimand he received in this instance was the result of retaliation against him by Mr. Moore. The chief piece of evidence offered in this regard was a copy of check which Mr. Moore issued to Grievant Booth in February of 1999, allegedly to settle a grievance. Some testimony was elicited from Mr. Moore to the effect that this check had "caused him some problems," but no further details were given. In addition, Mr. Booth made a statement on his grievance form that the check had been used by another employee in a grievance against Mr. Moore. (See footnote 3) However, the record contains no evidence regarding this other grievance.

W. Va. Code § 29-6A-2(p)(3) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging unlawful retaliation, in order to establish a prima facie case, must prove:

> (1) that the employee engaged in activity protected by the statute;
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> (2) that the employee's employer was aware of the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hofferv. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate,

nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997).

The evidence of record does not establish a prima facie case of reprisal. Although there is evidence that Grievant Booth did engage in a protected activity, i.e. a previous grievance, there is insufficient evidence to infer that the discipline in this case was the result of that grievance activity. Accordingly, Grievant Booth has failed to establish reprisal, and his request that Mr. Moore's retaliation cease must be denied.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with 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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. "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 and Human Resources, Docket No. 92-HHR-486 (May17, 1993).

3. "[I]nsubordination involves 'willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995) (Citations omitted.).

4. DOH policies allow employees to refuse to work scheduled overtime, but they must work emergency overtime during inclement weather, as directed by their supervisor.

5. Respondent has failed to prove by a preponderance of the evidence that Grievant's knowingly and intentionally refused to comply with a directive from their supervisor on November 3, 1999.

6. In order to establish a prima facie case of reprisal, pursuant to W. Va. Code § 29-6A-2(p)(3), a grievant must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro.Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

7. Grievant Booth has failed to establish a prima facie case of reprisal.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to remove all references to Grievants' written reprimands from its records.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: December 8, 2000 _____ **DENISE M.**

SPATAFORE

Administrative Law Judge

Footnote: 1

It appears that Ms. Ellis' recommended decision and the transcript of the level three hearing were reviewed by a three-member review panel. This review panel disagreed with some of Ms. Ellis' conclusions about the facts, and also disagreed with her final conclusion regarding whether Grievants had been properly reprimanded. In turn, their recommendations were adopted by the Assistant Commissioner, and the record does not indicate whether he also independently reviewed the evidence. The propriety of this procedure was not specifically challenged by Grievants in this case. It is noted, however, that W. Va. Code § 29-6A-4 states that "the chief administrator or his or her designee" shall hold a hearing and issue a written decision at level three, and no additional entities or "steps" in the process are mentioned.

Footnote: 2

The evidence regarding this matter was somewhat confusing, in that the check which was allegedly issued as a "settlement" of a grievance was written from Mr. Moore's private bank account.

Footnote: 3

The recommended level three decision stated that this grievance hearing occurred in October of 1999, but there is no evidence in the record to support this statement.