

CHARLES BARNES,

Grievant,

v.

Docket No. 99-DOH-305

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

DECISION

On July 24, 1999, Charles A. Barnes (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 29-6A-4(e)(2), challenging his dismissal by Respondent West Virginia Department of Transportation, Division of Highways (WVDOT). Following a series of continuances, each of which was granted for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on December 7, 1999. [\(See footnote 1\)](#) WVDOT presented the testimony of Larry Barnhart, Sheriff of Pleasants County, Ernie Larzo, Employment and Benefits Coordinator in the Human Resources Division of the Division of Highways (DOH), and Mike Davis, DOH County Administrator for Pleasants County. At the conclusion of the hearing, the parties made oral closing arguments, waiving written arguments, and this matter became mature for decision at that time. Consistent with the practice of this Grievance Board, this disciplinary action has been advanced on the docket.

DISCUSSION

Grievant was employed by WVDOT as a Transportation Worker I. On June 28, 1999, Jeff Black, Human Resources Director for the Division of Highways, notified Grievant that he was being dismissed from employment based upon Grievant's incarceration for a probation violation, as a result of which Grievant was not available for work. R Ex 3. WVDOT treated Grievant's absence as "job abandonment."

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). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden of persuasion. Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

Consistent with the foregoing standards, WVDOT established that following his arrest on May 1, 1997, by the Sheriff of Pleasants County, Grievant pled guilty on July 16, 1997, to the offense of making harassing phone calls in violation of a family protective order, and was sentenced to 12 months in jail, with all jail time after four months suspended. Grievant was also to remain on unsupervised probation for two years. R Ex 1. As a result of Grievant's four month incarceration, he was dismissed from employment by WVDOT on August 12, 1997. R Ex 1. Grievant was released from jail on October 25, 1997. Grievant had challenged this dismissal through the grievance procedure for state employees, and the parties settled the matter, reinstating Grievant to his previous position on March 2, 1998.

On March 1, 1999, Grievant was arrested for violating his probation by making more harassing phone calls to his wife. Sheriff Barnhart testimony. On April 9, 1999, Grievant's probation was revoked by the Circuit Court of Pleasants County, and Grievant was directed to serve the remainder of his 12-month sentence, with credit for 144 days previously served. R Ex 3. Grievant's projected release date was October 7, 1999. [\(See footnote 2\)](#) Sheriff Barnhart testimony. As authorized under Section 15.8(a) of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 15.8(a) (1998), Grievant requested a discretionary leave of absence on April 5, 1999. However, this request was denied, as the employer does not generally grant personal leaves of absence to employees who are incarcerated. Larzo testimony. Based upon Grievant's extended unavailability for work, WVDOT took this dismissal action in June 1999. Grievant has been employed by WVDOT for approximately 19 years. Prior to these absences for criminal violations that were not work-related,

Grievant's work performance had been satisfactory. If this were Grievant's first and only extended absence, WVDOT's decision to terminate his employment might reasonably be viewed as unduly harsh. However, Grievant was previously given a "second chance" by his employer following his initial extended incarceration and the dismissal action which followed. Approximately one year later, through his own misconduct, Grievant found himself back in jail, and WVDOT was required to do without his services for several months.

An essential element of employment is to be on the job when your services are required. See Davis v. Veteran's Admin., 792 F.2d 1111, 1112 (Fed. Cir. 1986). Whatever an employer's workload, an extended absence by an employee will tend to disrupt its operations. See Johnson v. Defense Logistics Agency, 54 M.S.P.R. 370 (1992). Grievant did not have sufficient annual leave to cover the extended absence resulting from his incarceration. Thus, WVDOT had discretion to grant or deny Grievant's request for a leave of absence from employment for this absence, so long as that discretion was not exercised in an arbitrary and capricious manner.

In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. Given the length of time Grievant would be off the job, and the fact that a previous extended absence and dismissal for the same reason had been compromised to allow Grievant to return to work, WVDOT refused to approve a leave of absence in this instance. Grievant did not demonstrate that WVDOT routinely grants such requests by other employees in similar circumstances. Accordingly, WVDOT's determination that Grievant's absence should not be excused is not arbitrary and capricious, or an abuse of the agency's discretion in making such determinations.

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

FINDINGS OF FACT

1. Grievant was employed by the West Virginia Department of Transportation, Division of

Highways (WVDOT) as a Transportation Worker I for approximately 19 years.

2. Grievant was arrested by the Sheriff of Pleasants County, West Virginia, on May 1, 1997, and charged with making harassing phone calls in violation of a family protective order. Grievant subsequently pled guilty to those charges in the Circuit Court of Pleasants County, and was sentenced to 12 months in jail, with 8 months suspended, and 2 years of unsupervised probation. After he was sentenced to jail, Grievant obtained court approval to participate in a work release program, but WVDOT did not elect to cooperate in that program

3. WVDOT dismissed Grievant from employment in July 1997. R Ex 1; Larzo testimony. Pursuant to a written settlement agreement, Grievant was reinstated as a WVDOT employee in March 1998. R Ex 2. 4. On March 1, 1999, Grievant was arrested for making harassing phone calls to his wife in violation of W. Va. Code § 61-8-16. R Ex 3.

5. On March 24, 1999, Grievant pled guilty to the charges, and was sentenced to 7 days in jail. R Ex 3. Subsequently, on March 29, 1999, his probation was revoked and Grievant was sentenced to serve the remainder of his 12 month sentence, with credit for 144 days previously served. R Ex 3. Grievant's projected release date was October 7, 1999. Sheriff Barnhart testimony.

6. Grievant requested a personal leave of absence from WVDOT in accordance with Section 15.8(a) of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 15.8(a) (1998). This request was denied.

7. After he was incarcerated in March 1999, Grievant requested court approval to participate in a work release program, but that request was denied.

8. On June 28, 1999, WVDOT notified Grievant that he was being terminated, effective July 12, 1999, because he was "not available to report for work." R Ex 3.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, 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. Wellman v. W. Va. Dep't of Health & Human Serv., Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. A civil service employee may only be dismissed for good cause, which means misconduct of

a substantial nature directly affecting the 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. Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. An essential element of employment is to be on the job when your services are required. See Davis v. Veteran's Admin., 792 F.2d 1111, 1112 (Fed. Cir. 1986). A state employee may be dismissed for an extended absence when they are incarcerated for engaging in criminal conduct, whether or not such conduct is related to their employment.

4. WVDOT established by a preponderance of the evidence that Grievant was absent from his employment without authority based upon a jail sentence imposed for Grievant's probation violation. In the circumstances presented, Grievant's termination was not an abuse of discretion or an arbitrary and capricious act. See Cook v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-298 (Nov. 30, 1999).

Accordingly, this grievance is **DENIED**.

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." Any 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 31, 2000

[Footnote: 1](#)

Grievant appeared pro se. Respondent was represented by Krista Duncan, an attorney with the Division of Highways' Legal Division.

[Footnote: 2](#)

Prior to his release, Grievant was arrested on additional felony charges. As a result, he was not released from jail until October 27, 1999, when he was able to post bond on those charges. These charges are not relevant to the action WVDOT initiated in June of 1999, and will not be considered in this decision.