

PAUL DOUGLAS,
Grievant,

v. Docket No. 99-BOT-522

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Paul Douglas, employed by the Board of Trustees as a Trades Worker at West Virginia University (Respondent), filed a level one grievance on August 5, 1999, in which he complained, "[w]rongful suspension without warning." Grievant requested to be made whole, including back pay. The grievance was denied at level one. At level two the grievance was denied in part, and was granted in part when the suspension was reduced to ten days. Appeal was made to level four on December 17, 1999, and an evidentiary hearing was conducted to supplement the lower level record on February 22, 2000, at the Grievance Board's Morgantown office. Grievant was represented by Timothy Tucker, Business Manager of L.I.U.N.A., Local 814, and Respondent was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law filed by the parties on or before March 23, 2000.

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by West Virginia University for approximately twenty-one years, and has held the position of Trades Worker at all times pertinent to this grievance. 2. In September 1998, Supervisor Jerry Howell assigned Grievant the duty of performing monthly inspections of fire extinguishers in all Housing and Residence Life buildings, and to file the requisite reports documenting the inspections. The inspection requires Grievant to check the gauge to determine whether it is adequately charged, or has been discharged, ensure that the pin and seal are intact, and the hose is in good condition. Additionally, this assignment includes reporting missing equipment, and recharging or replacing non-functioning equipment. Grievant was directed to obtain

any training he felt necessary from his coworkers.

3. The inspection of fire equipment and completion of reports is included in the generic job description of Trades Worker, and was an appropriate assignment for Grievant to perform.

4. On June 23, 1999, Mr. Howell noticed that a fire extinguisher inspection verification tag in Boreman South residential hall had been initialed by Grievant for the month of July 1999. Further inspection revealed that seventeen fire extinguishers in Boreman South had been initialed for the month of July, and that seven were malfunctioning, one had a broken hanger, one was missing, and those in the kitchen area had not been initialed for June.

5. Grievant had completed a Fire Equipment Inspection Report verifying that an inspection had been completed for all fire equipment listed for Boreman South for the month of June.

6. Boreman South was closed for renovation in June 1999. Electrical service to the building had been cut off, and only construction workers were in the building. 7. Grievant completed inspection of the fire equipment during his regularly scheduled work hours. At that time, Grievant was assigned to work the night shift, from 11:00 p.m. to 7:00 a.m. Flashlights are readily available to Grievant.

8. Grievant had satisfactorily completed inspections of the fire equipment in all thirty buildings prior to June 1999, and in the remaining twenty-nine buildings in June 1999.

___9. By letter dated July 16, 1999, Mr. Howell advised Grievant that his failure to complete the inspections, and the falsification of documents, constituted gross misconduct, and that he would be suspended without pay for a period of fifteen days, and be reassigned to the day shift, in lieu of separation.

___10. Pursuant to the level two decision, the period of suspension was reduced to ten days.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Where the evidence equally supports both sides, a party has not met its burden of proof.

Id. Respondent asserts that Grievant engaged in gross misconduct, defined in WVU Policy HR-9 as conduct “of substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct”

Gross misconduct may result in the imposition of any level of discipline, up to and including dismissal, at the supervisor's discretion. Respondent concludes that Grievant willfully, blatantly, and flagrantly neglected duties and falsified documents which could have created a serious health and safety hazard for those in the building. Although Grievant's actions warranted dismissal, Respondent claims that consideration was given to Grievant's long work history, and the discipline was mitigated to the suspension and schedule change.

Grievant does not dispute the irregularities, and states that he had no intent to falsify records, but did the assignment to the best of his ability. Grievant opines that the punishment he received was too severe for the infraction, and that the shift change is in fact a perpetual punishment which prohibits him from engaging in contracting work during the day. By way of explanation, Grievant attributes the infractions cited by Respondent to a number of sources. He first states that he was given no training for this assignment, despite a request he made in October 1998. He also claims that with no electricity, he was working with the street light as his only source of illumination, hampering his ability to see. Grievant explained the notations of July inspections were the result of his having gone through part of the building a second time in June.

Grievant's explanations are not persuasive. First, he satisfactorily completed the inspection and reporting duties from September 1998 until June of 1999. Furthermore, there is no evidence that the inspections conducted in June were defective in any of the remaining twenty-nine buildings assigned to Grievant. Therefore, there can be no finding that Grievant lacked adequate training or ability to complete the inspections and reports. Second, Grievant admits that in hindsight, it would have been wise for him to have located and used a flashlight while completing the inspections. To state that he inspected the fire extinguishers in the dark is an admission by Grievant that he had engaged in willful misconduct while completing his duties. Finally, Grievant's testimony that he had twice inspected some of the equipment in June is simply not credible. There is no reason to inspect the equipment more frequently than once a month, particularly when other pieces were not inspected at all.

It appears that because of the construction, and lack of electricity in the building, Grievant simply

did not inspect the fire extinguishers in Boreman South in June 1999. However, he completed reports, and initialed the tags on the equipment indicating that it was inspected, and in working order, when it was not. Even though there were no students or regular employees in the building, Grievant's failure to insure that functional fire extinguishers were where they were supposed to be could have resulted in significant consequences had there been a fire. The imposition of a ten day suspension is consistent with Respondent's policy, and because Grievant can no longer be trusted to complete his work without direct supervision, the shift change was not arbitrary and capricious.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Aglinsky v. Bd. of Trustees/ W. Va. Univ., Docket No. 97-BOT-256 (Oct. 27, 1997); Rinehart v. Bd. of Directors/Fairmont State College, Docket No. 93-BOD-514 (Sept. 22, 1994); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent has proven by a preponderance of the evidence that Grievant willfully failed to complete the inspection of fire extinguishers in June 1999, and knowingly completed documentation indicating that the inspections had been completed and the equipment was in good working order when it was not.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County 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.

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: May 15, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE