BOYD MYERS,

Grievant,

v.

DOCKET NO. 01-DOH-608

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Boyd Myers, filed the following grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways"), on July 11, 2000:

> Discrimination and harassment by Lowell Moore and Dick Davis. On the recommendation of Lowell Moore, Tucker County, County Supervisor to Richard Davis, District 8 District Administrator. Mr. Davis wrote a letter to me on June 8, 2000. This letter from Mr. Davis made personal threats to me. By stating that if I don't get the tanker endorsement that I had removed from my C.D.L.'s put back on in 30 days that I could expect disciplinary action, and dismissal. (see attached letter) Mr. Davis states in the letter that I had put Tucker County in a critical situation. This is not true. The tar distributer (ED#512-153 was a new distributer, and Lowell Moore had sent only one truck driver to school to learn how to operate it. That was Victor Beckman. (Victor Beckman is one of the persons talked about in the letter that is permanently assigned equipment operate.) The old distributer that Tucker County had (ED 512-049) was an 1970 model. It took two persons to operate. One person driving, and one riding the back working the controls. The new tar distributer (ED 512-153) is an 1998-1999? This tar disturber (sic) needs only one person to operate. It has a computer that runs all the controls. The only thing (ED# 512-049) and (ED# 512-153) have in common is that they both are trucks. And any person operating (ED# 512-153) tar disturber (sic) would to have proper training to do so. If Tucker County was put in a critical situation, it was done so by Tucker county Supervisor LowellMoore, by not having all persons in the county with tanker endorsements, trained on how to operate the new tar distrutor(sic)(ED#512-153)!
>
> Relief sought: If employees do not have the right to drop endorsement from there(sic) licenses they paid for to get, then all D.O.H. employees that have C.D.L. License must have tanker endorsements, and any other endorsement needed on the D.O.H. such as

passenger to drive buses, and hazard material, to transport explosives, etc. And never to be harassed or discriminated against by Lowell Moore or Richard Davis again.

The grievance was denied at levels one and two, and following numerous continuances, a level three hearing was held June 6, 2001, before Grievance Evaluator Brenda Craig Ellis. Ms. Ellis recommended the grievance be denied by decision dated November 30, 2001, and the recommendation was accepted by Jerry Bird, Assistant Commissioner, that same day. Grievant appealed to level four on December 10, 2001, and the parties thereafter agreed to submit the grievance on the lower-level record. This matter became mature for decision on March15, 2002, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant appeared pro se, and Highways was represented at level three by Nedra Koval, Esq., and at level four by Belinda B. Jackson, Esq.

SUMMARY OF EVIDENCE

Level III Grievant's Exhibit

Ex. 1 -

CDL drivers report by organization dated March 2000.

Level III Highways' Exhibits

None.

Testimony

Grievant presented the testimony of Richard Davis, Dewey Purnell, Lowell Moore, Robert Cooper, and John Davis. Highways presented no additional witnesses.

FINDINGS OF FACT

Based upon the testimony and evidence of record in this matter, I find the following facts have been proven by a preponderance of the evidence.

1. Grievant is employed by Highways in Tucker County, District Eight, as a Transportation Worker II Equipment Operator.

2. Lowell Moore is the Tucker County Administrator. In Spring 1998, he assigned Grievant as the primary operator of the tar distributer, and assigned Sam Blosser as his backup. Grievant did not object to this assignment, and performed these duties until approximately March 2000.

3. As an equipment operator, Grievant is required to hold a commercial driver's license (CDL). Grievant and Mr. Blosser also held a tanker endorsement on their CDLs to enable them to operate the tar distributer.

4. In late 1999, Mr. Blosser voluntarily relinquished his tanker endorsement, but did not inform his supervisors. Mr. Moore became aware of this through the State Police, but did not do anything about it at the time, because Mr. Blosser was just a backup.

5. In March 2000, the District found out it was going to get a new tar distributer, and was told to send one mechanic and one operator for training.

6. Shortly thereafter, also in March 2000, Grievant voluntarily relinquished his tanker endorsement, but did not inform his supervisors. Mr. Moore became aware of this through the State Police, and discussed the matter with Richard Davis, District Engineer. 7. As a result of both tar distributer operators relinquishing their endorsements, Mr. Moore sent an older employee, Victor Beckman, to training for the new tar distributer.

8. Mr. Davis sent both Grievant and Mr. Blosser a letter dated June 8, 2000, informing them they had to get their tanker endorsements reinstated, as they had put the District in a critical situation in relinquishing their endorsements.

9. Both Grievant and Mr. Blosser got their tanker endorsements reinstated. Shortly after Grievant had his endorsement reinstated, Mr. Moore offered Grievant the primary operator assignment on the new tar distributer, but Grievant turned it down.

10. From time to time, prior to 1998, operators without a tanker endorsement have been asked to drive the tar distributer, including John Davis and Robert Moats. Mr. Davis, an Equipment Operator III, had even told Mr. Moore when he assigned Mr. Moats, that Moats should not be driving the tanker, because he did not have an endorsement.

DISCUSSION

In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). Grievant alleges discrimination and harassment by Highways in requiring him to have his tanker endorsement reinstated on his CDL, and objects to language in the June 8, 2000 letter that he left Tucker County in a critical situation. Highways denies any wrongdoing.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "[a]ny differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." A grievant alleging discrimination must establish a prima facie case by demonstrating:

a (a) that he is similarly situated in a pertinent way to one or more other employee(s);

b (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

c (c) that such differences were related to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

"Harassment" is defined in W. Va. Code § 29-6A-2(l) as "repeated or continual disturbance, irritation or annoyance of an employee, which would be contrary to the demeanor expected by law, policy and profession."

In support of his discrimination claim, Grievant presented the testimony of John Davis, Equipment Operator III, who testified that, from time to time, he and at least one other employee, Robert Moats, had driven the tar distributer without holding a tanker endorsement. Mr. Davis understood that a tanker endorsement was necessary to operate the tar distributer, because he had brought it to the attention of Mr. Moore when he had asked Mr. Moats to drive the equipment. Mr. Moore was fairly new on the job at the time he had asked Mr. Moats to operator the equipment, and it was shortly after that incident that Mr. Moore initially assigned Grievant as the primary operator of the tar distributer.

It appears from the testimony that the operators who had driven the tar distributer from time to time, had done so mostly before Mr. Moore came on as County Administrator. Furthermore, it appears those instances were only on occasion, and those individuals were not assigned as primary or even backup operators on the tar distributer. Because Grievantwas assigned as primary operator of the tar distributer, he has failed to demonstrate that he was similarly situated to the other employees with respect to the requirement that he hold a tanker endorsement, and thus, has failed to make a prima facie case of discrimination.

With respect to Grievant's claim that the June 8, 2000 letter from Mr. Davis constitutes harassment, there is simply no evidence to support this claim. Mr. Davis had every right to be concerned that the primary operator of the tar distributer had voluntarily relinquished his tanker endorsement, and had not told him or any other supervisors about it. As Tucker County Administrator, it is part of Mr. Davis' responsibility to make sure his equipment operators are properly licensed before sending them out on the road. The fact that the State Police, on their own initiative, informed Mr. Davis that his equipment operators had relinquished necessary endorsements speaks to the seriousness of the situation, and undoubtedly the State Police would have been observing the job sites in Tucker County to make sure no one was violating the law.

Finally, although Grievant stated at level three that he simply did not want the tanker endorsement anymore, he raised the issue of improper training on the equipment in his grievance statement. Mr. Moore testified that the training provided by the vendor of the new equipment was insufficient, and that his employees basically had to figure it out themselves in the equipment yard. Grievant stated he did not want to operate the tar distributer if he had to receive training from Jesse Smith, who has been assigned as the primary operator of that equipment. It is unclear what, if any, control Highways has over the amount and quality of training provided by their suppliers, and thus, Grievant has a valid point that additional training is probably needed. Nevertheless, it does not excuse hisrelinquishment of his endorsement without informing anyone, and doing so right before the busy spring season was irresponsible and certainly did leave Tucker County in a critical situation. Grievant should be glad he did not receive disciplinary action over his actions.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a

preponderance of the evidence. Procedural Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. W. Va. Code § 29-6A-2(d) defines "discrimination" as "[a]ny differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant alleging discrimination must establish a prima facie case by demonstrating:

> d (a) that he is similarly situated in a pertinent way to one or more other employee(s);
>
> e (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> f (c) that such differences were related to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant has failed to establish a prima facie case of discrimination.

4. "Harassment" is defined in W. Va. Code § 29-6A-2(l) as "repeated or continual disturbance, irritation or annoyance of an employee, which would be contrary to the demeanor expected by law, policy and profession." 5. Grievant has failed to establish that he has been harassed by Highways in this particular instance.

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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: April 1, 2002