JOHN COLLINS,

Grievant,

v v.

DOCKET NO. 02-DOH-228

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, John Collins, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways") on April 24, 2002, alleging as follows:

> The write-up that I received on Thursday, April 18, 2002, has no merit. I firmly deny any wrong doing.
>
> Relief: To have the write-up I received removed from my work record, and to be compensated for the cost of lawyer fees and other costs that have occurred because of incident.

The level one evaluator stated he could not resolve the grievance, and Grievant appealed to level two. The level two evaluator denied the grievance, and Grievant appealed to level three on June 7, 2002. A level three hearing was held on June 17, 2002. The level three evaluator, Brenda Craig Ellis, recommended the grievance be denied on July 22, 2002, and her recommendation was accepted by Jerry Bird, Assistant to the Secretary for Administration and Assistant Commissioner. Grievant appealed to level fouron July 26, 2002, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on September 5, 2002. The parties declined to submit post-hearing

submissions, and this matter became mature for decision on September 5, 2002. Grievant was represented by Roger Sowards, and Highways was represented by Barbara Baxter, Esq.

SUMMARY OF EVIDENCE

Level Three Highways' Exhibits

Ex. 1 -

April 15, 2002, Notice to Grievant of Warning, Form RL-544.

Ex. 2 -

April 8, 2002 handwritten statement of Mark Terry.

Ex. 3 -

April 8, 2002 handwritten statement of Jimmy Adams.

Level Three Grievant's Exhibits

Ex. 1 -

May 28, 2002 Return to Work Notice for Mark Terry; April 15, 2002, Report of Occupational Injury for Mark Terry.

Ex. 2 -

Hand-drawn map.

Ex. 3 -

April 8, 2002, Daily Work Report.

Level Three Post-Hearing Exhibit

Ex. 1 -

April 15, 2002, Notice to Grievant of Warning, Form RL-544.

Level Four Exhibits

None.

Testimony

Highways presented the testimony of Mark Terry, Jimmy Dale Adams, Larry Pauley, and Wilson Braley. Grievant testified in his own behalf, and presented the testimony of Randy Allen Adkins, Michael Adkins, Thomas Gore, Bill Topping, Mark Terry, and Wilson Braley.

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

FINDINGS OF FACT

1. Grievant is employed by Highways as a Transportation Worker II in Lincoln County.

2. On April 8, 2002, Jimmy Dale Adams and Mark Terry were hauling pipe from a job to be performed on Lincoln County Route 7/3. They were unsure of the job location and pulled off on the left side of the road, heading in the opposite direction from the flow of traffic.

3. They saw a Highways crew cab truck approach, and walked onto the road to stop the truck to ask for directions to the job location.

4. Grievant was driving the crew cab truck, Mike Adkins was seated in the front passenger seat, and Bill Topping, the Crew Leader, was seated in the rear seat. The truck was stopped in the lane of traffic.

5. Jimmy Adams opened the rear passenger door of the truck and placed his foot inside the crew cab.

6. Mr. Adams shook hands with Bill Topping and asked the location for the delivery of the pipe.

7. Mark Terry was standing forward of the opened rear passenger door, near the front door, talking to Mr. Topping through the front window of the passenger side door.

8. Grievant began moving the truck while the door was still open. The opened door made slight contact with Mr. Terry, and he had to jump back quickly from the moving truck. Mr. Adams, who had his foot inside the truck, stepped back from the cab quickly, and shut the door.

9. The next morning, April 9, 2002, Mr. Terry told Mr. Topping he wanted the incident noted on his time sheet because his back was hurting, and he wanted a record ofthe incident in case he needed to seek medical attention. Mr. Topping made the following note on the back of the Daily Work

Report for April 8, 2002:

> Johnny Collins pulled out in truck, while Mark and Jimmy was talking to us, almost ran over their feet.

LIII G. Ex. 3.

10. Mr. Pauley overheard Mr. Terry on the telephone with Mr. Topping, and asked Mr. Terry what happened. Mr. Terry told Mr. Pauley about the incident, but indicated it was not a big deal, and they should all just forget about it.

11. Mr. Pauley then told Mr. Terry he wanted him and Mr. Adams to give written statements about what happened. Mr. Terry told Mr. Adams that Mr. Pauley wanted a written statement.

12. Within the next day or two, Mr. Pauley called a meeting of all who were involved in the incident, and had Mr. Warren Miller present as a witness. Mr. Pauley let everyone go around the room and tell their story with the intention of trying to settle the matter there. He told them at the beginning that he did not want any arguing or quarreling. Mark Terry and Jimmy Adams had given their stories, and Randy Adkins had just started speaking. Apparently, some of the other men were talking when Mr. Adkins started telling his story, and Grievant got up and walked out of the meeting. At that point, Mr. Pauley ended the meeting.

13. Mr. Pauley consulted with Wilson Braley, District Engineer, about the incident, and they decided a written warning should be issued to Grievant, which was delivered to Grievant on approximately April 18, 2002.

DISCUSSION

In a disciplinary matter, the burden of proof lies with the employer to prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 29-6A- 6; Viers v. W. Va. Div. of Highways, Docket No. 97-DOH-562 (Mar. 25, 1998); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The burden is to demonstrate the accuracy of the facts contained in the written warning, and that these facts constitute the problem addressed therein. The action also must not be arbitrary and capricious, and must have some rational basis. Runyan v. W. Va. Dept. of Corrections, Docket No. 95-CORR-414 (Jan. 31, 1996). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that contested fact is more likely

true than not. Leichliter v. W. Va. Dept. 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 of proof. *Id.*

The only material dispute in this matter is whether Grievant verbally gave a warning to Mr. Terry and Mr. Adams before he drove off. (See footnote 1)

The testimony of Mark Terry was that the truck was stopped on the road, and the rear passenger side door was open. Mr. Adams had his foot inside the truck, and Mr. Terry was leaning on the front passenger door talking to Mr. Topping through the window. Mr. Terry did not hear Grievant say anything before he suddenly pulled the truck out and drove off. The rear door brushed Mr. Terry before Mr. Adams closed it, and he had to jump back as the truck drove off. The testimony of Jimmy Adams confirms the truck was stopped on the road, and the rear passenger side door was open. Mr. Adams had his foot inside the truck while talking with Mr. Topping, who was seated in the back seat. Mr. Adams did not hear Grievant issue any warning before he pulled the truck out and drove off. Mr. Adams quickly stepped back and shut the door as the truck drove off.

The testimony of Bill Topping, the Crew Chief, who was seated in the back of the truck, was that he was talking to Mark Terry, and did not hear Grievant give a warning. He did not see any vehicles, nor did he see the door hit anyone. He was still talking to Mr. Terry when the truck pulled out, and the rear passenger door was open. Mr. Topping testified they were not on the job site at the time, so there would be no need for flagging.

Randy Adkins, who was seated in the front passenger seat of the truck, testified he heard Grievant say, “Get out of the way. We got a four-foot pipe to put in.” LIII Tr., Adkins, p. 153. He said he saw a vehicle nearing, and heard Grievant say they were going to pull out.

Grievant testified that he was blocking the road with his truck stopped, and there were no flaggers. He testified he looked in his rear view mirror and saw a vehicle coming behind him, and said, “Boys, we're going to have to get out of the way.” LIII Tr., Collins, p. 198. He testified he could not see the rear passenger door because Mr. Topping was leaning forward, and did not know it was open when he drove off.

Mr. Braley and Mr. Pauley considered the statements of all those involved in the incident in determining that a written warning, the least amount of discipline they could impose, was appropriate in this matter. At level three, Grievant presented the testimony of Mike Adkins, who was not

involved in the subject incident. Mr. Adkins offered hearsay testimony that Mark Terry told him that Larry Pauley had written up Grievant and was trying to get him fired.

Grievant also presented the testimony of Thomas Gore, District 2 Safety Officer. Mr. Gore was given a description and drawing of the scene of the incident, and asked to render an opinion whether Mr. Terry and Mr. Adams were in any way at fault for not having flaggers out while their vehicles were pulled off the road. Mr. Gore could not give a definitive opinion because there was no evidence that they were in a work zone at the time they pulled their vehicles off the road. Also, the evidence did establish they had flashing lights on, which Mr. Gore felt would be sufficient in that specific circumstance.

Mr. Gore also testified that it was basic operator's training that when a driver operates a vehicle, he adjusts his seat, mirrors, checks the vehicle, and makes sure there are no objects around it. Therefore, it was no excuse that Grievant did not know the rear passenger door was open, because he should have checked his vehicle before pulling out. LIII Tr., Gore, p. 177.

Based upon all of the evidence presented at levels three and four, the undersigned concludes that Grievant did not give a warning before pulling the truck out. I also believe that Grievant did not know the rear passenger door was open, and that he did not intentionally set out to put anyone in danger, and that the incident was an accident. That being said, it does not excuse the incident. Grievant, as the operator of the vehicle, should have made sure the men were clear of the vehicle before taking off. Grievant clearly thought everything was fine when he drove off, but the fact of the matter is, the door was open and the men were standing close to the truck. The fact that Grievant did not knowthat anything unusual had occurred lends support to Mr. Wilson and Mr. Pauley's decision to issue him a written warning. The written warning is meant to get an employee's attention so that the conduct he engaged in does not happen again. In this instance, it was not inappropriate, nor arbitrary and capricious, to issue a warning to Grievant that he must take more care in the future when operating a State-owned vehicle.

CONCLUSIONS OF LAW

1. In a disciplinary matter, the burden of proof lies with the employer to prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Viers v. W. Va. Div. of Highways, Docket No. 97-DOH-562 (Mar. 25, 1998); Broughton v. W. Va. Div. of Highways,

Docket No. 92-DOH-325 (Dec. 31, 1992). The burden is to demonstrate the accuracy of the facts contained in the written warning, and that these facts constitute the problem addressed therein. The action also must not be arbitrary and capricious, and must have some rational basis. Runyan v. W. Va. Dept. of Corr., Docket No. 95-CORR-414 (Jan. 31, 1996). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that contested fact is more likely true than not. 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, the employer has not met its burden of proof. *Id.*

2. Highways has proven by a preponderance of the evidence that Grievant drove off in the crew cab without warning, with the rear passenger side door open, while Mr. Terry was leaning on the truck, and while Mr. Adams had his foot inside the truck.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 19, 2002

Footnote: 1

There was much testimony regarding whether, and to what extent, Mr. Terry suffered an injury as a result of the incident. However, the warning given to Grievant does not hinge upon the fact that someone was hurt, but on the fact that his conduct endangered his co-workers.