JOHN COLLINS,

Grievant,

v. **Docket No. 02-DOH-206**

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 Division of Highways ("DOH"), on May 7, 2002, alleging:

> **Truck 377-237 is being operated for some time now with an unsafe front steering tire. The driver is Mark Terry. This situation has put my safety, co- workers and the public [in danger?] in violation of the laws of the WV Dept. of Highways and the State Motor Vehicles regulations.**
>
> **RELIEF SOUGHT: Since this situation has been going on for a matter of time, the only alternative would be to give the driver of this truck a written reprimand. I have no other solution but to file a grievance on this matter.**

This tire was replaced on the day the grievance was filed. In his May 13, 2002 response at Level I, Grievant's direct supervisor, Larry Pauley, stated he was without authority to grant the relief, as reprimands are a management decision. At Level II, the grievance was viewed as granted since the tire had already been replaced, and Grievant was thanked for his attention to the matter. Grievant appealed to Level III, and a Level III hearing was held on July 1, 2002. This grievance was denied at Level III on July 8, 2002, stating Grievant did not have standing to ask for a written reprimand against another employee, as Grievant had no personal stake in the controversy. Grievant appealed to Level IV on July 12, 2002, as he still desired to have this co-worker disciplined. A LevelIV hearing was held on August 28, 2002. (See footnote 1) **This case became mature for decision at that time, as the parties elected not to submit proposed**

findings of fact and conclusions of law.

Issues and Arguments

Grievant believes he was harmed by having to ride in an unsafe truck, and he should be able to force management, through the grievance procedure, to give this co- worker a written reprimand. It is clear the co-worker did not force Grievant to ride in the truck; Grievant was told to do so by Mr. Pauley. Grievant believes Mr. Terry should receive a written reprimand because he drove a truck in unsafe condition.

Respondent notes the worn tire was changed on the same day the grievance was filed, Grievant was not harmed and has no standing to file a grievance, and management had no reason to give Mr. Terry a written reprimand in this set of facts. Respondent notes it is management's decision whether disciplinary action should be taken. Further, Respondent notes its belief this grievance was filed because Grievant received a written reprimand shortly before he filed this grievance, and he wants to force DOH to give a written reprimand to another employee.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by Respondent for approximately fourteen months.

2. Approximately two to three weeks before he filed this grievance, Grievant was told by Mr. Pauley to ride in Mr. Terry's truck several times. He believed one of the truck's front tires was unsafe.

3. Grievant did not refuse to ride in the truck, did not tell Mr. Terry that he thought the tire was unsafe, and did not report his belief to Mr. Pauley, or anyone else in administration.

4. Although unclear from the testimony as to whether the truck was brought in for inspection and the tire replaced before or after the time the grievance was filed, the truck was inspected, and the tire replaced on the same day the grievance was filed, on May 7, 2002. The Repair Work Order indicates the problem with the tire was reported by Mr. Terry.

5. On April 5, 2002, preventative maintenance was done on Mr. Terry's truck. Mr.

Sowards, Grievant's representative and a Mechanic III, certified this work. This maintenance included a visual inspection of the tires.

6. Mr. Terry had been watching the tires, and he knew they were close to needing replacement, and had noted this issue on his reports. Further, Mr. Terry had told Mr. Sowards on, or about, April 18, 2002, that the tires needed replacing. He asked Mr. Sowards to check the tires, and Mr. Sowards did so. (See footnote 2) **7. Grievant received a written reprimand on April 18, 2002, for failure to operate a truck safely, and creating a situation that could have caused danger to Mr. Terry and a co-worker. Grievant filed a grievance over his written reprimand on April 24, 2002.**

8. At Level III, Grievant testified he was very upset by having to ride in this truck, and this event caused him to have nightmares and much anxiety. He also said he was afraid the public or maybe his wife and children could be killed by this truck. He testified twice on the record that he did not go to the doctor for treatment even though this ride in Mr. Terry's truck upset him greatly.

9. At the Level IV hearing, Grievant submitted a doctor's statement dated April 24, 2002. (See footnote 3) **This statement explained Grievant was in the office with "Nerves." Grievant informed the doctor he worked for DOH, and he specifically complained about "His Boss" causing him increased stress for three months, and that he had left work early on the date of the examination. This is the same day Grievant filed his grievance over his written reprimand. Grievant also complained of decreased sleep.** (See footnote 4) **The doctor prescribed Visteril 25 mg, one or two at bedtime as needed.** (See footnote 5) **10. Mr. Terry was waiting to put the truck in the garage at the same time the inspection sticker would need to be redone, the first of May 2002. He did not feel the truck was unsafe to drive, and would not have driven it if he had thought so.**

11. On May 7, 2002, at the time the tire was changed, it was worn and needed replacement.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va.

Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 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.

I. Credibility

The first issue to address is Grievant's credibility, as he changed his testimony from the Level III hearing to the Level IV hearing. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't ofHealth & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in many cases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge finds Grievant's testimony about his severe

anxiety implausible for three reasons: 1) that one or two trips in a truck with a bad tire would cause such severe anxiety; 2) if it did cause such severe anxiety, it does not make sense Grievant would not complain to his supervisor and refuse to ride in the truck; and 3) if the anxiety was so severe, this grievance would have been filed sooner, as Grievant has filed numerous grievances about other perceived problems in the recent past. The undersigned Administrative Law Judge also finds Grievant to be less than truthful in regard to the testimony about why he visited the doctor. His testimony at Level III was diametrically opposed to his testimony at Level IV. At the July 1, 2002, Level III hearing, Grievant said not once, but twice, that he had not gone to the doctor even though the truck ride had caused him great distress. At Level III, Grievant was informed he must show harm or personal injury in order to have standing to request an action against a co- worker. In the July 8, 2002 denial at Level III, the Hearing Examiner stated Grievant had not met this burden of proof.

It would appear Grievant decided to submit the April 24, 2002 doctor's report at Level IV to substantiate such an injury. However, this report does not confirm Grievant's assertions. Grievant saw the doctor on the day he filed his grievance on the written reprimand, and this is the day he left work early. Additionally, Grievant told the doctor his distress was caused by difficulties with "His Boss," the same individual who had given him the written reprimand. Further, the result of this distress was difficulty sleeping, not terrible nerves caused by his fear he, his wife, and children would be killed by the truck with the bad tire. Grievant did not tell the doctor he was having nightmares. Accordingly, this testimony will not be credited, and indeed shows bad faith on the part of Grievant.

II. Merits

W. Va. Code § 29-6A-2(i) defines a grievance as:

> **any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; anyspecifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.**

(Emphasis Added.)

It is clear Grievant had the right to grieve the issue of the tire, as this could affect his safety. This issue was resolved, and the tire was replaced. However, Grievant was not satisfied with this relief, and has continued asked for this Grievance Board to issue a written reprimand to Mr. Terry, a co-worker.

Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Education and State Employees Grievance Board. Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). This Grievance Board may award relief against the employer based upon conduct of which the employer is aware and, which it in effect, "condones." White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994). "However, this Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992)." Rice v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-288 (Apr. 30, 1997). See Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999).

A decision concerning disciplinary action resides with the employer, and it is a management determination. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). See Ball v.Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). DOH did not believe Mr. Terry's actions warranted a written reprimand. Accordingly, the relief sought cannot and will not be granted.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (2000); Howell v. W. Va. Dep't of

Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W. Va. Code § 29-6A-2(i) defines a grievance as:

> **any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.**

(Emphasis Added.)

3. Grievant had the right to file a grievance over the worn tire as this was a safety issue. 4. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Education and State Employees Grievance Board. Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996).

5. This Grievance Board may award relief against the employer based upon conduct of which the employer is aware and, which it in effect, "condones." White v. Monongalia County Bd. of Educ., Docket No. 93-30-371 (Mar. 30, 1994).

6. "[T]his Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. Daugherty v. Bd. of Directors, Docket No. 93-BOD-295 (Apr. 27, 1994). See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992)." Rice v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-288 (Apr. 30, 1997). See Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999).

7. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). See Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247

(Aug. 29, 1997).

8. Once the safety issue was resolved, the only remaining issue in this grievance was Grievant's disagreement with management's failure to issue a written reprimand a co-worker. There was no longer a grievable event.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 20, 2002

Footnote: 1

Grievant was represented by co-worker Roger Sowards, and Respondent was represented by its Attorney Barbara Baxter.

Footnote: 2

Mr. Sowards testified he was asked to check the tires by Mr. Terry, but he did not testify as to what his conclusion was.

Footnote: 3

As this statement revealed Grievant's personal problems, the undersigned Administrative Law Judge asked Grievant if he knew what was written on the paper, and if still wanted to submit it into the record. Grievant wanted the doctor's notes admitted.

Footnote: 4

The undersigned Administrative Law Judge has summarized this portion of the doctor's report because this section contained some medical abbreviations. The undersigned has a degree in nursing, and she read this

section to the parties.

Footnote: 5

Grievant's doctor later took Grievant off this medicine as he has liver damage.