BOYD MYERS,

Grievant,

v.

DOCKET NO. 01-DOH-592

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Boyd Myers, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways") on March 6, 2000, as follows:

> Discrimination and Harassment. On February 25th I asked Lowell Moore, to explain to me why he had put a man on the backhoe with only three months of employment, and not put me or Danny Booth on the hoe. I had five years and Danny had eight years, and we both could run the hoe. At this time Lowell Moore got mad, and told me "he was the boss, and people like myself, Danny Booth, Sam Blosser, and some others, were nothing but trouble makers, and wanted to tell him what to do." When I told Lowell Moore he had picks, and he took care of them, and the rest of us had to put up with it. Lowell Moore lost control; He ran across the lunch room got in my face and pushed me against the wall, and made threats. Telling me not to talk about his picks. Lowell Moore told me that I wasn't qualified to run the backhoe, and I had never run one for the Department of Highways. When I asked Bob Cooper to tell Lowell Moore that I had ran backhoe for Department of Highways, Lowell Moore lost control again. He was getting in Bob's face and yelling. If an employee gets mad or loses his temper and yells at the supervisor, the supervisor is to try to defuse the problem, not make it worse. There is no diplomacy with Lowell Moore, and [he] is very unprofessional in handling a problem. If someone doesn't agree with him, and by Lowell Moore naming Boyd Myers, Danny Booth, Sam Blosser astrouble makers and not naming others[,] [t]his shows discrimination against us[,] [a]nd is harassment by naming us as trouble makers.
>
> Relief sought: Not to ever be discriminated against in any manner or harassed in any manner ever.

The grievance was denied at levels one and two, and advanced to a level three hearing before Grievance Evaluator, Brenda Craig Ellis, on June 6, 2001. Ms. Ellis recommended the grievance be denied by written decision dated November 14, 2001, and the recommendation was accepted by Jerry Bird, Assistant Commissioner, by letter dated November 14, 2001. Grievant appealed to level four on November 30, 2001, and the parties agreed to submit the matter based on the record developed below. This matter became mature for decision on March 15, 2002, the deadline for the parties' submission of 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 Joint Exhibit

Ex. 1 -

Stipulated Findings of Fact.

Level III Grievant's Exhibits

Ex. 1 -

Five photographs of the Tucker County lunch room.

Ex. 2 -

Diagram of the Tucker County lunch room.

Ex. 3 -

Highways Administrative Operating Procedures, Volume IX, Chapter 12, Disciplinary Action, Suspension and Dismissal.

Level III Highways Exhibits

None.

Testimony

Grievant presented the testimony of Carl Antolini, Daniel Booth, Bob Cooper, Sam Blosser, and Michael Wamsley. Highways presented the testimony of Ed Phillips and Lowell Moore.

STIPULATED FINDINGS OF FACT

The parties stipulated at level three to the following facts:

1. Grievant has been employed by Respondent WV Division of Highways at its Tucker County maintenance operations in District Eight since March 21, 1995, and is currently classified as a Transportation Worker 2 - Equipment Operator (TW2EQOP).

2. Lowell Moore, who served as Tucker County supervisor briefly in 1988-89, became Tucker County's Highway Administrator for a second time in 1997.

3. Robert Davis and James Smith were hired for the Tucker County operations in September 1997, and November 1999, respectively. Like Grievant, both hold the TW2EQOP classification.

4. During his employment, Grievant has frequently worked for Crew Chief Robert Cooper.

5. In late Winter 1999-2000, Tucker County experienced a flooding situation, and the county was in Code Red alert for flood cleanup operations from the end of February 2000 until the first week or so of March 2000. Mr. Moore borrowed a backhoe from another county for flood cleanup work in the Thomas substation area.

6. For approximately two weeks during the flood cleanup work, beginning February 22 and ending March 8, 2000, Mr. Moore upgraded R. Davis and J. Smith to TW2EQOP on a half-day basis and assigned less-senior equipment operators than him and another worker to operate the backhoe. 7. Sometime in the late afternoon of February 25, 2000, Grievant asked Mr. Moore to explain why he had upgraded less-senior equipment operators than him and another worker to operate the backhoe.

8. In response to Grievant's question about the upgrade, Mr. Moore replied that he had selected the most qualified workers for the backhoe assignment and upgrades.

9. Mr. Moore and Grievant then disagreed in raised voices about the issue of qualifications for operating the backhoe and other matters.

FINDINGS OF FACT

In addition to the above stipulations, and based upon the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

10. Grievant provoked the argument with Mr. Moore.

11. Mr. Moore reacted by pointing his finger in Grievant's face.

12. Mr. Moore did not push or shove Grievant.

DISCUSSION

Grievant alleges he has been the victim of discrimination and harassment with respect to the February 25, 2000 incident with Mr. Moore. Highways admits an argument occurred between Grievant and Mr. Moore, but denies it was an act of discrimination or harassment.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.21 (2000); 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). A preponderanceof 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 Resources, 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.

There is no dispute that a heated argument occurred between Grievant and Mr. Moore on the afternoon of February 25, 2000, in the lunch room at the Tucker County facility. There is conflicting testimony as to the particulars of that argument, specifically, whether Mr. Moore called certain employees “troublemakers” by name, and whether he physically pushed Grievant against the wall. 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. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the

witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to bythe witness, and the plausibility of witness' information. See Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).

Danny Booth, Transportation Worker II, Equipment Operator, testified he was working the afternoon shift on February 25, 2000, and began his shift at 3:30 p.m. He came into the lunchroom and heard Grievant and Mr. Moore talking in loud voices out in the shop area, which is connected to the lunch room by a door. Grievant and Mr. Moore then entered the lunch room, continuing a heated discussion. Mr. Booth testified that Grievant said to Mr. Moore, “Tell Danny that his seniority isn't any good either,” and Mr. Moore said, “I didn't say that your seniority wasn't any good.”

Mr. Booth testified that Mr. Moore made the statement that Grievant, Sam Blosser, Michael Wamsley, and he, were all troublemakers and wanted to tell him how to run the county. Grievant told Mr. Moore he wasn't being a troublemaker, but that Mr. Moore had his “picks” and the rest of them just had to take it. Mr. Booth testified that, at that point, Mr. Moore spun around, came at Grievant, and pushed him up against the wall, with a finger pointed under his nose, and said, “Don't you dare talk about my picks. Don't you dare.” Mr. Booth testified that Grievant did not respond, and that Mr. Moore told Bob Cooper, who was working on time sheets, to stop Grievant's pay, because he wasn't going to pay him to argue with him.

Bob Cooper, Crew Leader, was in the lunch room seated at the desk, filling out time sheets when the altercation occurred. He also said Mr. Moore called Grievant, Mr. Blosser, and Mr. Booth troublemakers. He testified that Mr. Moore “got up against” Grievant, pointed a finger under his nose, and told Mr. Cooper to stop Grievant's time. Mr. Cooper testified that at the beginning of the conversation he heard Grievant ask Mr. Moore why hehad assigned two less senior employees to work on the backhoe rather than utilizing Danny Booth and himself, and there was some discussion about who was more qualified to operate the backhoe.

Sam Blosser, Transportation Worker II, Equipment Operator, testified that he heard Mr. Moore say that he, Danny Booth, Grievant, and Mike Wamsley, were nothing but troublemakers. He testified Mr.

Moore told Grievant not to talk about his picks, and shoved him up against the door with his elbow. He also testified that Grievant turned around and walked out and did not respond to Mr. Moore.

Michael Wamsley, Transportation Worker III, Equipment Operator, testified he was putting his grader up at the end of his shift when he first heard the discussion between Mr. Moore and Grievant. He testified that Mr. Moore stated, “I'm not paying him to argue.” Mr. Wamsley did not hear or see anything further, and left shortly afterwards.

Ed Phillips testified that Grievant came into the lunch room and asked Mr. Moore why he had not been assigned to operate the backhoe. Mr. Moore responded that he had two guys who were qualified on the backhoe, Jesse Davis and Bob Smith. Grievant then asked Mr. Moore why he and Danny Booth were not assigned to the backhoe when they had more seniority, and Mr. Moore responded that he felt the other men were more qualified to run the backhoe. He testified that Mr. Moore stated, “The trouble around here is some of you all don't want to do what you were told to do, you want to do what you want to do.” Mr. Phillips testified there was argument back and forth between Grievant and Mr. Moore, and Grievant said something to the effect that they would have made more money if they had been able to operate the backhoe. Mr. Moore stated it would equal out, because Grievant was making as much as Mr. Smith and Mr. Davis. Mr. Phillips testifiedthere was no cursing from either Grievant or Mr. Moore, and that no one came to blows, and he did not see anyone push anyone. He testified he wasn't paying a lot of attention, because it wasn't any of his business. He also testified he is about 85% blind in his right eye, but has 20/20 vision in his left eye, and can still see.

Lowell Moore testified that Grievant approached him the afternoon of February 25, 2001, and asked why he hadn't put him and Danny Booth on the backhoe. Mr. Moore said he tried to put the most qualified employees on a piece of equipment. Grievant asked if he was saying that he wasn't qualified, and Mr. Moore responded, no, but he wanted to put the best qualified men on the backhoe. Mr. Moore testified that Grievant said, “Just because Jesse Smith owns a G-d d_n backhoe don't make him an f_-ing operator no more than just cause you own a farm don't make you a farmer.” Mr. Moore admits that at this point he became angry, and asked Grievant what his qualifications were for the backhoe. Grievant told him and asked Bob Cooper if he hadn't operated a backhoe, and Cooper said yes. Upon further questioning from Mr. Moore, Mr. Cooper admitted that Grievant had never run a backhoe an entire day.

Mr. Moore admits having a heated exchange with Grievant, but denies physically touching him. He admits they were loud, and admits saying there were a bunch of them that wanted to do as they pleased. He denies using names or calling anyone a troublemaker. Mr. Moore admits stating that he was not going to pay the men overtime to sit around and argue with him, and told Mr. Cooper to stop their time. At that point, the men began to leave, and the incident was over.

Based on the testimony of all the witnesses, there is no dispute that Grievant and Mr. Moore engaged in a heated argument in the lunch room. Grievant did not testifyhimself as to the circumstances surrounding the incident. Mr. Moore testified and obviously has an interest in the matter, as he is the one accused of wrongdoing. Mr. Moore is the only witness who testified there was cursing. Mr. Phillips testified that neither Grievant nor Mr. Moore cursed. Mr. Phillips also testified that there was no physical contact between Mr. Moore and Grievant. Mr. Cooper testified that Mr. Moore “got up against” Grievant, but did not specifically say he pushed him. It is important in this case to note that Grievant did not call Mr. Phillips to testify, although he was present during the entire incident. Highways called Mr. Phillips, and his testimony is the opposite of Grievant's witnesses with respect to whether there was any shoving by Mr. Moore. The undersigned can draw an inference that the reason Grievant did not call Mr. Phillips as a witness was because Mr. Phillips was not going to support his version of events. Given that Mr. Booth and Mr. Blosser apparently have a motive to testify against Mr. Moore, in that they are allegedly the “troublemakers,” I find Mr. Phillips' testimony to be the only testimony without motive or bias, and thus, the more credible. Therefore, I conclude that Mr. Moore did not shove Grievant against the wall during their argument. I also conclude that Mr. Moore did not call specific individuals “troublemakers” but did state that the “trouble” was that there were some of them who wanted to do as they pleased, which would have necessarily included Grievant.

Grievant alleges he was discriminated against by Mr. Moore's conduct on the afternoon of February 25, 2000. W. Va. Code §29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee 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 unrelated to the actual job responsibilities of the grievant and/or 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).

Grievant also alleges he has been the victim of harassment. “Harassment” is defined by 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.”

Grievant claims that Mr. Moore referring to him, Danny Booth, and Sam Blosser, as troublemakers proves discrimination and harassment. However, other than the February 25, 2000, incident between Grievant and Mr. Moore, Grievant did not present evidence of any other “treatment” by Mr. Moore which would be sufficient to establish a case of discrimination or harassment. Even if Mr. Moore believes Grievant and the others are troublemakers, his belief alone is not enough to establish discrimination or harassment. As for the February 25, 2000, incident, the undersigned finds that this was an isolated incident, for which both Grievant and Mr. Moore share the blame. Grievant approached Mr. Moore in a crowded lunch room, demanding to know why he and Mr. Booth were not put on the backhoe. When Mr. Moore responded he tried to put the most qualified men on the equipment, Grievant challenged him by asking if he was saying he was not qualified to run the backhoe. From then on, the conversation deteriorated into argument. Clearly, Mr. Moore, as supervisor, could have handled this situation better, for example, by askingGrievant to leave the room to discuss the matter in private; but then so could Grievant have asked to speak to Mr. Moore in private.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 §4.21 (2000); 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. 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 Resources, 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.

3. W. Va. Code §29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or agreed to in writing by the employees.”

4. 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 unrelated to the actual job responsibilities of the grievant and/or 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).

5. “Harassment” is defined by 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.”

6. Grievant has failed to establish discrimination or harassment with respect to the February 25, 2000, incident between Mr. Moore and himself, by a preponderance of the evidence.

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: April 1, 2002