JAMES MCGRAW,

Grievant,

v. Docket No. 03-DOH-079

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

James McGraw ("Grievant"), employed by the Division of Highways ("DOH" or "Respondent") as a Transportation Worker II - Craftsworker, filed a level one grievance on January 6, 2003, in which he alleged a written reprimand constituted harassment. The only relief Grievant requested was attorney fees, if needed. The record does not include responses from levels one and two. The grievance was denied following an evidentiary hearing at level three, and appeal to level four was made on March 17, 2003. A level four hearing was conducted in the Grievance Board's Westover office on July 11, 2003, at which time Grievant was represented by Scott Cundiff, and DOH was represented by Barbara Baxter, Esq. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 12, 2003.

The following facts are derived from the evidence presented at level four, as well as the level three transcript and exhibits.

Findings of Fact

1. Grievant has been employed by DOH for approximately ten and one-half years, and has been classified as a Transportation Worker II - Craftsworker, at all times pertinent to this grievance.

2. Pursuant to Respondent's request, Grievant requested that Dr. Rick Grecoprovide DOH a list of his medications. Dr. Greco's letter, dated November 11, 2002, stated as follows: Mr. McGraw has asked that I present a list of his medicines to you. He has been on these without change for some time. They include:

Lipitor 10 mg qd

HCTZ 25 mg qd

Prevacid 30 mg qd

Ativan .5 mg bid prn

Celexa 20 mg qd

Tenormin 50 mg qd

Diltiazem 50 mg qd

Trazodone 25 mg @hs

Grievant refused to sign a medical release requested by administrators for the purpose of inquiring whether the medication would have any impact on his ability to perform his duties.

3. Grievant was scheduled to be on-call for Snow Removal Ice Control (SRIC) duty on December 14 and 18, 2002.

4. On Friday, December 13, 2002, Grievant was directed to report to work on Saturday, December 14, 2002, for SRIC duty. Grievant did not report to work, and did not call to explain his absence.

5. On December 18, 2002, Office Assistant III Tom Minger called Grievant at approximately 4:30 a.m. Mr. Minger spoke with Grievant's wife, advising her that Grievant was to report to work immediately for SRIC duty. Grievant did not report to work until 7:30 a.m., his regularly scheduled time.

6. As a result of Grievant's failure to report to work as directed, or to call in that he was unable to work, Respondent completed "Record[s] of Significant Occurrence," for both December 14 and 18, 2002, noting that Grievant had "performed below expectations."

Discussion

The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va.

Dep't of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Grievant admits that he did not report for SRIC duty on December 14 and 18, but argues that his failure was due to good cause. Specifically, he responded to a family emergency on December 14, when Daniel Shields, his brother who lives in Westerville, Ohio, asked that Grievant come and sit with him while his live-in girlfriend, along with her previous lover and several of his friends, moved her belongings out of his house. In an affidavit, Mr. Shields described these individuals as being "of dubious character" and "notorious reputation," and expressed concern for his safety. In reference to December 18, 2002, Grievant testified that he had taken some of his medication later than usual the night before, and his wife simply could not wake him at 4:00 a.m. Given these reasons, Grievant alleges that the Records of Significant Occurrence, which are written reprimands, constitute harassment on the part of DOH. Because Grievant's claim is in the form of an affirmative defense, he has the burden of proving the claim by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995). "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession. W. Va. Code § 29-6A-2(l). Harassment has been found in cases in which a supervisor has constantly criticized an employee and created unreasonable performance expectations, to a degree where the employee cannot perform his duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997). See also Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999)(disallowing such a claim because it was based on an isolated incident); Thacker v. Bd. of Trustees/Marshall Univ., Docket No. 98-BOT-400 (June 24, 1999)(distinguishing a situation where the employer established legitimate reasons for all of its actions)." Earnest v. BOD/SWVCTC, Docket Nos. 98-BOD-273/00-HE-396 (Jan. 2003).

Grievant has presented no evidence to demonstrate a pattern of harassment on the part of DOH. Assistant District Engineer Lloyd Adams testified that had Grievant called in to report the family emergency, he would likely have been excused from work. Further, since Grievant had refused to sign a medical release, DOH administrators were unaware of what, if any, effects Grievant's medication might have on his ability to function, or if any accommodation

was necessary. However, Grievant did not request an excuse or provide the relevant information, and because he had been warned verbally prior to December for similar occurrences, the written reprimands were issued. Progressive discipline for repeated acts of misconduct, such as failure to report to work, does not constitute harassment.

Grievant additionally argued that he was subject to harassment when he was required to drive a truck while under the influence of medication, and was then reassignedto load bags of calcium chloride when he should have been given light duty due to a permanent partial disability. Grievant asserts that DOH was aware of the medications he was taking in November 2002, and that he had received a permanent partial disability award from Workers' Compensation in August 2002, yet failed to take appropriate measures.

The pharmaceutical inserts submitted by Grievant for the medications he takes all indicate that dizziness and/or drowsiness may be a side effect. However, as noted by Mr. Adams, DOH administrators do not have medical training, and, because Grievant refused to sign a medical release, were not aware of any restrictions or warnings. As a lay person, Mr. Adams stated that he did not observe Grievant exhibit any adverse symptoms, and would have never guessed he was taking so many drugs.

Subsequent to the incidents in December 2002, Grievant signed a medical release form, and by letter dated January 20, 2003, Dr. Greco advised DOH that it was possible for the medications to interfere with Grievant's work. He recommended that Grievant be considered for light duty, given the possible effect when operating heavy machinery and/or vehicles. Upon receipt of this information, DOH reassigned Grievant to day shift, with no responsibility for operating trucks or other heavy equipment.

The permanent partial disability award from Workers' Compensation was awarded due to a lumbar injury, and Grievant stated that he would prefer to spray weeds or perform janitorial work, rather than move bags of calcium, as a light duty assignment. Grievant offered no physician statement indicating that the work he is performing is detrimental to his health, or that his duties should be restricted to any greater extent than they are atpresent. Of course, Grievant may always apply for a transfer to a custodial position when there is a vacancy.

At level four, Grievant submitted a log which he maintained from December 24, 2002, through February 26, 2003, in which he documented events primarily concerning usage of

leave time, and the failure of other employees to report for SRIC duty. While Grievant apparently intended this to be in support of his claim of harassment, it may also be interpreted as a claim of discrimination.

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 employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:
(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

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

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employmentdecision. Smith, supra; see Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The document does not establish that any other employee has been treated differently than Grievant with respect to not reporting for SRIC. While some individuals may not have reported for SRIC, there is no evidence whether they were excused, or if they were later subject to discipline. There is also a lack of evidence that any other employee missed two SRIC assignments within such a short period of time. The information provided fails to establish either a prima facie case of discrimination or harassment.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of

the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. DOH has proven by a preponderance of the evidence that Grievant did not show up for SRIC duty on December 14 and 18, 2002, did not notify his supervisor in advance of taking leave, and did not call in to request time off on those days.

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

4. Grievant has failed to establish a pattern of harassment by his employer. 5. 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 employees or agreed to in writing by the employees."

6. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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

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

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7. Grievant failed to establish a prima facie case of discrimination.

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.

DATE: AUGUST 22, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE