THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELWOOD DEVAULT, JR.,
Grievant,

v. **Docket No. 2010-0292-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Elwood Devault, Jr., filed this grievance against his employer, Division of Highways, on September 2, 2009, challenging a written reprimand and seeking the removal of the reprimand. This grievance was denied at level one by decision of Respondent's designee dated October 26, 2009. Level two mediation was conducted on February 17, 2010. Appeal to level three was perfected on February 17, 2010, and a level three hearing was conducted before the undersigned Administrative Law Judge on July 13, 2010, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its attorney, Barbara L. Baxter. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on August 30, 2010.

Synopsis

Grievant stated that he was so displeased with his supervisor's decision not to put him in the truck that he wanted to drive that he told his supervisor that he would settle matters off work property and after work hours. This behavior was abusive, inappropriate, and constituted a threat, albeit a somewhat weak one. Respondent met its burden of

proving the charge against Grievant and that the written reprimand was appropriate discipline. This grievance is denied.

The following findings of fact are based upon the record developed at the level one hearing and the limited record developed at level three.

Findings of Fact

1. Grievant has worked for the West Virginia Division of Highways ("DOH") as a transportation worker for the past four years.

2. On or about August 10, 2009, Anthony Paletta, Administrative Services Manager in District 4, and Mr. Henderson met with Grievant to explain DOH truck assignment policies. Nevertheless, Grievant complained over a two-week period to his supervisor about his truck assignment.

3. Grievant was upset on August 19, 2009, when he approached Mr. Henderson in the crew supervisor's room about his truck assignment. Mr. Henderson tried to explain the assignment to Grievant; however, Grievant walked out of the room at that point only to come back in the room visibly upset and lacking composure. At that point, Grievant indicated to his supervisor, "never mind. We'll settle it outside the gate." Level One Transcript, page 16.

4. On August 21, 2009, Grievant was issued a written reprimand by Monongalia County highway administrator Kathy Westbrook, stating that, on August 19, 2009, Grievant approached his crew supervisor, Bill Henderson, to complain about his vehicle assignment. Mr. Henderson reported that Grievant stated that, in response to his vehicle assignment, "we'll settle this outside of the gate." Mr. Henderson perceived this statement as a threat and a violation of the Workplace Security Policy.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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 preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

DOH contends that it properly issued a written reprimand to Grievant for allegedly threatening his supervisor, Bill Henderson, because he did not assign Grievant a certain truck to operate. Specifically, DOH asserts that Grievant's statement to Mr. Henderson that "we will settle this outside the gate" violates Workplace Security Policy. Grievant argues that he did not threaten Mr. Henderson and that his statement only meant that he wanted to discuss their disagreement in a private setting away from work and after work.

Respondent notes that Grievant's activities fall within the Division of Personnel's policy which addresses the behavior at issue as follows:

> Threatening or Assaultive Behavior: Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. Any person (e.g., client, customer, vendor, visitor, etc.) who exhibits threatening, hostile, or abusive behavior, either physically or verbally, or who otherwise willfully interrupts or molests the orderly and peaceful process of any department, division, or agency of State government, may be denied services and may be subject to arrest and criminal prosecution. In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following:
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> - the perception that a threat is real;
> - the nature and severity of potential harm;
> - the likelihood that harm will occur;
> - the imminence of the potential harm;
> - the duration of risk, and/or
> - the past behavior of an individual.[1]

DOH has met its burden of proof and demonstrated that the statement by Grievant to his supervisor on August 19, 2009, was meant to be an affront to the authority of Mr. Henderson and a threat. The limited record of this grievance establishes that Grievant, two weeks prior to the incident, was informed by DOH administrators, including Mr. Henderson and Anthony Paletta, Administrative Services Manager for District 4, that he had to drive the truck that his supervisor assigned to him each day.

The record also establishes that Grievant was angry and upset to the point where he would not discuss his complaint in any calm fashion with his supervisor. Understandably, Mr. Henderson felt somewhat threatened by Grievant's statement, "we'll settle this outside of the gate," particularly since Grievant was angry during the exchange. Grievant's issue was his dissatisfaction with the truck assignments and that issue had been

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[1]Division of Personnel Workplace Security Policy, Section III. Respondent also points to its own policy which include the following behavior as warranting a written reprimand: "insulting, abusive, threatening, offensive . . . conduct or language." Division of Highways' Administrative Operating Procedures, Section II, Chapter 6.

recurring over the previous few weeks, despite attempts to explain the reasoning behind those assignments prior to the incident on August 19, 2009. Nevertheless, Grievant did not heed the advice and explanation concerning truck assignments.

Grievant has attempted to defend his actions by claiming that he intended to meet his supervisor outside the gate so that they could discuss the matter privately. Mr. Henderson countered that meeting outside the gate after work meant that the Grievant wanted to fight over the matter. The record establishes that Grievant knew that Mr. Henderson had a private office. Grievant could have ensured privacy by requesting to meet with Mr. Henderson in his office. He did not, but instead chose to make a comment that was threatening in nature.

The testimony in this grievance demonstrates that Grievant's statement was a threat against his supervisor occurring during a temper tantrum. The Grievance Board has long held that threatening behavior toward supervisors is unacceptable in the work place. *Kessler v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-490 (June 30, 1997); *Payne v. W. Va. Dept. of Transp.*, Docket No. 93-DOH-454 (Apr. 29, 1994). Respondent has met its burden of proof and demonstrated Grievant's written reprimand was reasonable and his behavior was sufficiently hostile to warrant this type of disciplinary action by the employer.

The following conclusions of law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees

Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. The Grievance Board has long held that threatening behavior toward supervisors is unacceptable in the work place. *Kessler v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-490 (June 30, 1997); *Payne v. W. Va. Dept. of Transp.*, Docket No. 93-DOH-454 (Apr. 29, 1994).

3. Respondent has proven by a preponderance of the evidence that Grievant's behavior on August 19, 2009, concerning his statement that a disagreement with his supervisor would be settled off work premises and after work was a threat to his supervisor. In addition, the record of this grievance supports a finding that a written reprimand was appropriate discipline in this matter.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 18, 2010

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Ronald L. Reece
Administrative Law Judge