THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANA HILL,
Grievant,

v. **Docket No. 2010-1009-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Dana Hill ("Grievant"), employed by the Division of Highways ("DOH") as Transportation Worker 2 in Harrison County, filed an expedited grievance to level three on February 3, 2010, as is permitted by W. VA. CODE § 6C-2-4(a)(4), following his suspension without pay for ten working days for losing control of and damaging a state one-ton dump truck. Grievant seeks restoration of all lost pay and benefits with interest. An evidentiary hearing was conducted before the undersigned Administrative Law Judge in the Grievance Board's Westover office on August 18, 2010. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. DOH was represented by its counsel, Barbara L. Baxter. The grievance became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 7, 2010.

Synopsis

Grievant was suspended for ten days for losing control of and damaging a state one-ton dump truck while allegedly plowing on streets surrounding Washburn Street, the street on which the Grievant resides in Clarksburg, West Virginia. Grievant does not deny being in the area, but contends he was not plowing streets that are not part of the state

road system. The limited evidence relevant to the charge offered at level three did not satisfy Respondent's burden of proving the charge by a preponderance of the evidence. Consequently, the grievance is granted.

The following facts have been derived from a preponderance of the evidence.

Findings of Fact

1. Grievant is employed as a Transportation Worker 2 in Harrison County by the DOH. He has been employed by DOH for a number of years and receives satisfactory performance appraisals for the quality of his work.

2. In the early morning hours of December 20, 2009, Grievant lost control of his truck which led to it going over a hill and coming to rest against a tree resulting in damage to the truck. On December 21, 2009, DOH suspended Grievant without pay stating "[t]he location of this accident was off road system in behind the residential area where you live. Any other violations of the policy of working off system, will result in further disciplinary action up to and including dismissal." Respondent's Exhibit No. 2.

3. Grievant was driving his truck on December 20, 2009, on snow removal and ice control ("SRIC") duty when the truck slide on a snow and ice-covered Pike Street, Route 19, in Clarksburg, West Virginia.

4. Grievant overcompensated for the slide, causing his truck to skid sideways on Route 19, and in order to avoid a hydrant and telephone pole, he steered straight down Little Street, which runs down a steep hill intersecting Route 19.

5. Grievant dropped the snow plow blade to slow his descent and control his direction as the truck went down Little Street until he reached the bottom of the street. He then turned the truck around and tried to go back up the hill to Route 19, but found the

street too slick to get up the incline.

6. Grievant then tried to plow over to River Avenue, which reconnects with Route 19 and is not as steep as Little Street. The amount of snow built up in front of the snow plow blade as Grievant drove along River Avenue, resulting in the truck being pushed off the road and up against a tree stump. Grievant was required to call for a tow truck to remove the truck.

7. David Cava, Grievant's supervisor, initiated disciplinary action against Grievant because he opined that since Grievant lived in the neighborhood he was trying to clear his own streets, was intentionally working off the state road system, and misusing state equipment and time. However, when Mr. Cava was asked what happened concerning the incident on December 20, 2009, he answered; "I don't know. I wasn't there when it happened." David Cava Level Three Hearing Testimony.

8. Mr. Cava acknowledged that he did not recall seeing any snow or ice treatment material on the road surfaces of Little Street or River Avenue, an area one street over from the street where Grievant resides. Mr. Cava further recognized that there were at least three major accidents involving DOH's vehicles in Harrison County during the 2009-2010 SRIC season and some twenty incidents requiring tow trucks to remove DOH's vehicles. Grievant was the only employee recommended for discipline. *Id*.

9. Daniel Wharton, a Mechanic 2 for DOH, was the first employee of DOH to arrive on the scene of the accident. Mr. Wharton reported that the 2009-2010 SRIC season was the worst he had experienced, with trucks in ditches everywhere. Mr. Wharton saw skid or spin out marks on Route 19 at the intersection with Little Street when he arrived on the scene.

10. Based on his observations, Mr. Wharton surmised that Grievant went down over the hill in question instead of hitting a telephone pole while trying to plow out along Little Street.

11. Grievant's performance appraisals do not reflect any disciplinary record for working off the state road system. Mr. Cava's assertion that Grievant intended to either plow or treat the street on which he resides on December 20, 2009, is without a factual basis. While the DOH offered the testimony of one witness concerning collateral acts of Grievant working off the state road system, it was not relevant to the charge resulting in suspension.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The record of this grievance established that Grievant was given the assignment of treating roads in a residential area of Clarksburg. Grievant had left the county garage with a full load of material on the truck. Road conditions at 3:00 a.m. on December 20, 2009, required that tire chains be installed on the truck. Grievant's original direction of travel was

south on US 19 toward Clarksburg. Prior to reaching his assigned area, Grievant realized that he needed cigarettes. At this point, Grievant turned around at Watkins Lane to go back to the Dairy Mart in Adamston, a store that was opened at that hour, and an area only approximately three miles from his assigned area. Heading to the store for cigarettes Grievant lost control of his truck, but he was able to steer clear of a fire hydrant and telephone pole. Eventually, Grievant's truck became stuck as he was attempting to plow out to get back to Route 19.[1]

This fact scenario does reflect a somewhat unwise decision on Grievant's part, an error in judgement, and would be almost comical if it were not for the cost of towing the truck that the state incurred as a result of it getting stuck in the snow. Nevertheless, it does not support a finding that DOH has met its burden of proof in this case.

DOH relies heavily on the opinion of Mr. Cava that had the wreck occurred in the way that the Grievant represented that it happened, the heavy load in the truck would have turned the truck the other way than it did. In short, Grievant's explanation of the wreck was not plausible. This evidence has little or no weight as it does not address the allegation that Grievant was plowing roads that were off the state road system. In addition, DOH suggests that the undersigned give weight to a hearing conducted by the Equipment Operational Review Committee.[2] At this meeting Grievant denied the allegations, reciting the same series of facts that he provided at level three; however, despite the fact that the

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[1]All due apologies to those not familiar with the road system surrounding Clarksburg, this information is reflected in a map marked as Respondent's Exhibit 1.

[2]This committee is responsible for reviewing damage to vehicles and evaluating violations of operating procedures and recommending disciplinary action.

winter weather resulted in bad road conditions, the Committee determined that the wreck was avoidable. Again, this memorandum of the minutes of this meeting does not prove it was more likely than not that Grievant was plowing roads that were off the state road system.[3] The undersigned concludes that DOH did not prove by a preponderance of the evidence the charge against Grievant. Consequently, this grievance is granted.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Grievant provided a somewhat reasonable explanation for his actions and, more to the point, Respondent failed to prove the charge against Grievant by a preponderance of the evidence.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reimburse Grievant all pay and benefits he lost as a result of the suspension and to remove all record of the disciplinary action from its files.

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

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[3]As mentioned in the Findings of Fact, DOH offered the testimony of one witness concerning collateral acts of Grievant working off the state road system. This evidence carries no weight since it was not relevant to the charge resulting in suspension.

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: December 23, 2010

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Ronald L. Reece
Administrative Law Judge