WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK D. MOONEY,
Grievant,

v. **Docket No. 2013-0149-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS.
Respondent.

D E C I S I O N

Mark D. Mooney, Grievant, filed this grievance against his employer the West Virginia Department of Transportation, Division of Highways ("WVDOH"), Respondent, on August 7, 2012, protesting a five-day unpaid suspension. Grievant request his suspension be overturned and that all back pay and leave be restored to him.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on November 15, 2012, at the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by counsel Robert Miller, WVDOH, Legal Division. This case became mature for decision on January 11, 2013, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Two adult men participated in a heated verbal altercation at the workplace which stopped short of physical contact between the co-workers. An invitation was extended to take the matter outside; neither co-worker threw a first punch. Grievant's participation in

the altercation is not disputed. Grievant's degree of culpability is disputed. Further, Grievant contests the severity of the disciplinary action levied. Respondent maintains its disciplinary action with regard to Grievant was lawful and reasonable.

Applicable West Virginia Division of Personnel Workplace Security Policy provides that 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 is subject to disciplinary action, up to and including dismissal. Respondent established that Grievant engaged in prohibited workplace behavior. It is not unreasonable to suspend an employee for violation of Workplace Security Policy. This Grievance is DENIED.

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

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator (TW2EQOP). Grievant began working for Respondent on July 12, 2000.

2. On July 25, 2012, Grievant and Eldon Chafin, another employee of Respondent, engaged in a verbal argument. The argument drew the attention of others in the vicinity. All witnesses, including Grievant, agreed that adult language was used and the co-workers exchanged barbs.

3. Stefen White is an employee who has worked for Respondent for nearly 17 years. On the morning of July 25, 2012, Mr. White observed Grievant and Eldon Chafin

exchanging words with one another. Mr. White stepped between them and held his hands up in an attempt to calm them down.

4. Newly appointed Supervisor Keither Baisden, Jr.[1] who has worked for Respondent for approximately 18 years, observed Grievant and Eldon Chafin engaged in verbal argument, with a coworker, Stefen White, standing between them.

5. Supervisor Baisden attempted to defuse the situation.

6. Grievant had wanted a particular shoe for his mower and Eldon Chafin had told him that he did not have that particular shoe at that time. There was an exchange of words between them which included an invitation by Grievant that he and Eldon Chafin go outside to conclude this matter. Which employee started the argument is debated.

7. Both Grievant and Chafin acted in an ill-advised manner during the course of events.

8. Kathleen Curtis Dempsey, the Employees and Benefits Manager for the WVDOH, has been employed by Respondent for almost 4 years. Ms. Dempsey reviews all disciplinary actions, studies the witness statements, discusses appropriate disciplinary actions with the district officials, and prepares the documents which are sent to those who are to be disciplined.

9. In response to a verbal request made by District One Engineer/Manager, John McBrayer, Ms. Dempsey prepared a suspension letter given to Grievant.

10. In accordance with *Section 12.3 of the West Virginia Division of Personnel's Administrative Rule,* the letter informed Grievant he was suspended without pay for a

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[1] Keither Baisden Jr., is currently the Administrator II of Boone County and has been in that position since January 2012.

period of ten days so that the matter which occurred on July 25, 2012, could be investigated. *Resp. Ex. 1*.

11. An investigation into the events included written statements of witnesses, conversations with District One Engineer/Manager John McBrayer, and consideration of Grievant's prior employment record. No witness indicated he or she witnessed the entire event.

12. An August 10, 2012 letter issued to Grievant reduced the suspension from the ten (10) working days, set forth in *Resp. Ex. 1,* to five (5) working days. This letter states in part:

> "On July 25, 2012 you engaged in a verbal argument with another employee, Eldon Chafin. This argument quickly escalated into a shouting match. You then stated that you would ring Mr. Chafin's neck, at which point in time, you told him to step outside so you could settle this matter and teach him a lesson. While you were outside, you actively attempted to escalate this verbal argument into a physical fight by commanding Mr. Chafin to throw the first punch, which he did not. This event was witnessed by many employees. This is not your first occurrence of making verbally threatening remarks of a violent nature. In February 2012 you made generalized threatening remarks in the presence of your co-workers. Then the week prior to this incident you met with District One's Manager, John McBrayer, and had a discussion with him regarding you making threatening remarks about your co-workers in their presence. You were informed that such comments make your co-workers afraid to work with you. More importantly, you were informed that such remarks are inappropriate and would not be tolerated. The safety of our workforce is our paramount concern and when you make threats of physical violence, whether you mean those statements or you are just "venting," we are bound to take your threats seriously."

Resp. Ex. 2.

13. On August 7, 2012, Ms. Dempsey telephoned Grievant to tell him that his discipline had been reduced from ten (10) working days to five (5) and that he would be notified of this by a letter dated August 10, 2012.

14. West Virginia Division of Personnel Workplace Security Policy, *Resp. Ex. 4,* was utilized by Respondent in preparing *Resp. Ex. 2.* DOP Workplace Security Policy provides, "Threatening Behavior: Conduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm." Sections II. Definitions. Further, Section III. C. provides that threatening or assaultive behavior will not be tolerated and that any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal.

15. Grievant's General Employee Information Sheet indicates Grievant's suspension began on 07/25/12 and ended when he returned to duty on 08/02/12. *Resp. Ex. 6.*

16. At the time of the level three hearing, the record is unclear as to the disciplinary measures levied against Grievant's co-worker, Eldon Chafin.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The West Virginia Division of Personnel Workplace Security Policy defines, "Threatening Behavior" as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm." §II. M., Workplace Security Policy. One of the central purposes of the Policy is "to protect the health, safety, and welfare of State employees. . .". The Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated. *See* W.Va. DOP Workplace Security Policy. Generally, consideration must be given to the context in which the threat is made. This includes the perception that the threat is real; the nature and severity of the potential harm; the likelihood that harm will occur; the imminence of the potential harm; the duration of the risk; and/or the past behavior of the individual. *Id* at §III. C.

Grievant participated in an ill-advised verbal altercation by his own admission at the work-site. The degree of Grievant's culpability in escalating the verbal altercation is of much debate.[2] The undersigned is not persuaded that Grievant was necessarily the aggressor. Recollections of witnesses vary on issues of escalation and no one witness seems to have been present throughout the entire situation. In some circles, an invitation

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[2] The undersigned is not persuaded that, Respondent's investigating agent, Ms. Dempsey's perception of events is accurate. Ms. Dempsey's analysis of witness statements and hearsay information tends to differ with that of the undersigned but, overall, the differences in opinion do not exonerate Grievant's acknowledged conduct. Thus, it is not necessary to belabor differences which have limited effect on the ultimate issue(s) in discussion.

to step outside and settle a verbal debate in a physical manner is not necessarily considered menacing. The workplace is not such a setting. Grievant subscribes to a code of conduct that is no longer recognized as acceptable workplace conduct. An honest attempt to escalate a verbal conflict to physical combat is threatening. Playground rules are not applicable to the modern day workplace; thus, who swung first offers limited justification unless genuine self-defense is applicable. Grievant participated in a workplace altercation that was disruptive and threatening. It was well on its way toward physical combat.

Grievant violated applicable Workplace Security Policy. Such conduct constitutes good cause for disciplining Grievant. Grievant failed to maintain an acceptable standard of personal conduct and an appropriate level of courtesy in dealing with his coworker.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which would be determined on a case-by-case basis..." *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.,* Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial

discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge can not substitute his judgment for that of the employer. *Tickett v. Cabell County Bd. of Educ.,* Docket No. 97-06-233 (Mar. 12, 1998). *Meadows v. Logan County Bd. of Educ.,* Docket No. 00-23-202 (Jan. 31, 2001).

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). Grievant has failed to demonstrate that a five-day suspension is excessive. The heated verbal altercation could have and seemed inclined toward physical combat if not for the intervention of calmer souls. The event was disruptive and threatening. With consideration to participants' past behavior, Respondent has a duty to act in a responsible manner. Respondent established good cause for disciplining Grievant. Respondent's actions were lawful. There is insufficient justification to overturn the disciplinary action taken. The undersigned is not permitted to substitute his opinion for that of the employer if the agency's actions are supported by the facts and are reasonable.

The following conclusions of law support the decision reached in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. The West Virginia Division of Personnel Workplace Security Policy defines "Threatening Behavior" as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm." The Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated.

3. Grievant participated in a heated verbal confrontation, which was disruptive and threatening, with a co-worker, during working hours at the workplace. Respondent proved by a preponderance of the evidence that Grievant's behavior on July 25, 2012, constituted a violation of applicable Workplace Security Policy.

4. "Mitigation of the punishment imposed by the employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. Grievant failed to demonstrate that the discipline levied was excessive and/or unreasonable.

6. Respondent established by a preponderance of the evidence that Grievant's behavior was improper and unacceptable workplace conduct. Respondent established good cause for disciplining Grievant.

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: May 15, 2013

Landon R. Brown
Administrative Law Judge