WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL EDWARD WINTERS,
Grievant,

v. **Docket No. 2013-1016-DOC**

DIVISION OF LABOR,
Respondent.

DECISION

Michael Edward Winters ("Grievant") is employed by the Division of Labor ("Respondent"). Grievant's position is classified as a Compliance Officer 2 and he is assigned to Respondent's Licensing Section. Mr. Winters filed a level three grievance form[1] dated January 7, 2013, alleging the following:

> Contrary to recommendation of accident review committee and to "Accident Rating System and Disciplinary Measures" now in place, Commissioner Mullins suspended me for 3 days without pay.[2]

As relief, Grievant seeks, "Re-instatement for those 3 days with full pay and benefits."

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board of February 11, 2013. Grievant Winters appeared *pro se* and Respondent was represented by Elizabeth G. Farber, Assistant Attorney General. The parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on March 19, 2013. This matter became mature for decision on that date.

[1] Grievant filed directly to level three as permitted by W. VA. CODE § 6C-2-4(a)(4) when contesting a suspension without pay.
[2] Grievant attached a memorandum and a policy to his grievance form which are now part of the record.

Synopsis

Respondent gave Grievant a three-day suspension for wrecking a State vehicle while on duty. Grievant argues that the penalty was discriminatory because other employees had not been suspended for having automobile accidents with State vehicles. Grievant also argues that the suspension was arbitrary because a review committee did not recommend a suspension. Respondent proved that the suspension was justified.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter. There was very little dispute concerning the facts of the case.

Findings of Fact

1. Grievant Winters is employed in the Licensing Section of Respondent, Division of Labor. Grievant's position is classified as a Compliance Officer 2.

2. For more than five years, Grievant has been assigned an automobile through the State Fleet Management Office to use in the performance of his official duties.[3]

3. Grievant was involved in an accident while driving his State-owned vehicle in Parkersburg, West Virginia, at approximately 10:30 a.m. on August 28, 2012. Grievant filled out a "Fleet Driver Report of Accident/Incident/Event" the same day and described the accident as follows:

> Came to a work zone where right hand lane (of three south-bound lanes) was coned off. A stationary truck was inside the cones. Evidently, the vehicle ahead of me opted not to proceed on a yellow light, and then came to a sudden stop. I

[3] Respondent's Exhibit 2, State Fleet Management Office, "Lease Terms and Conditions" statement, signed by Grievant May 15, 2007.

> could not get stopped in time and rear-ended the vehicle ahead of me. The car to the left of me proceeded through the light.[4]

Grievant also noted that the road was dry, traffic was heavy, and he was traveling at thirty miles per hour before attempting to stop.[5]

4. The accident was investigated at the scene by a police officer for the Parkersburg Police Department who filled out a "State of West Virginia Uniform Traffic Crash Report.[6] The officer noted that the vehicles were headed in the same direction. The first vehicle came to a stop at an intersection and Grievant's vehicle "was unable to get stopped and rear-ended" the first vehicle. Grievant's vehicle suffered "disabling damage" and had to be towed from the scene. The police officer marked the section of the investigation form indicating the accident was a "speed related offense" of "failure to maintain control of vehicle."[7]

5. Grievant sent an e-mail to John Junkins, Respondent's Deputy Commissioner, and Denise Brown, Respondent's Administrative Services Manager, at 3:13 p.m. on the day of the accident stating that he had spoken with the driver of the other car. The other driver said she was uninjured and had received an estimate for the repair of her vehicle of $4,937. (Respondent's Exhibit 4).

6. Manager Brown reported the accident to the West Virginia Board of Risk Management ("BRIM"), who referred the claim to the insurance carrier, Chartis. Manager Brown received a letter from a Chartis claim representative dated September 5, 2012, stating:

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[4] Respondent's Exhibit 3.
[5] Respondent's Exhibit 3.
[6] Respondent's Exhibit 13.
[7] *Id.*

> Please be advised that we have completed our liability investigation into this matter and have determined that liability, or some degree of liability, can reasonably be expected to be found against the insured and/or its employee(s).[8]

7. The City of Parkersburg sent an invoice for $150 to Grievant dated September 7, 2012, for the cost of cleaning up after the accident. (Respondent's Exhibit 8).

8. Respondent received an estimate from Braden Auto Damage Appraisals for repair of Grievant's State-owned vehicle of $6,518.90,[9] and a supplemental estimate of $1,542.45[10] after additional damage was discovered. The total estimate for repair of the State-owned vehicle was $8,062.35.[11]

9. The estimate of repair for the other vehicle was conducted by Macaw Appraisals. That estimate totaled $5,850.53. (Respondent's Exhibit 10). Additionally, there was the price of a rental car while the other car was being repaired; $626.36.

10. The total cost of the accident was $15,110.24,[12] making it the most expensive at-fault accident at the Division of Labor.

11. Pursuant to the requirements of the State Fleet Management Office, Respondent established a policy entitled "Accident Review Committee and Employee Accountable."[13] This policy became effective July 1, 2011. The policy requires that all accidents be immediately reported to the Respondent's Fleet Coordinator, Denise Brown, along with the accident report from the investigating law enforcement officer.

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[8] Respondent's Exhibit 5.
[9] Respondent's Exhibit 6.
[10] Respondent's Exhibit 9.
[11] *Id.*
[12] Respondent's Exhibit 11.
[13] Respondent's Exhibit 12.

The accident is then reviewed by an internal accident review committee who "make a determination as to whether the accident was the result of carelessness or other improper actions by the employee."[14] The committee then makes a report to the Commissioner along with a recommendation regarding any progressive disciplinary action.

12. The Review Committee met on September 19, 2012. Present were Mitch Woodrum, Mike Sams, David Teets, Denise Brown and Grievant.[15] The committee issued a report to Commissioner Mullins dated October 24, 2012, finding that the accident was preventable and Grievant failed to maintain safe following distance and keep his vehicle under control. The committee recommended that the Commissioner take the following disciplinary action:

> 1. Mr. Winters should as soon as possible take the State's driver safety course.
> 2. Mr. Winters should receive a written reprimand for not following the West Virginia Fleet Management Drivers safety guidelines and procedures, with a special notation if an accident like this occurs in the future it may result in immediate termination.[16]

13. Commissioner Mullins held a predetermination meeting with Grievant and Grievant's immediate supervisor, Mike Sams, on November 14, 2012. At that time, Commission Mullins went over the committee's report with Grievant and heard his comments regarding the matter. Thereafter, Commissioner Mullins informed Grievant that he was considering issuing him a three-day suspension.

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[14] *Id.*
[15] Respondent's Exhibit 14.
[16] Respondent's Exhibit 15.

14. By letter dated December 4, 2012, Commissioner Mullins suspended Grievant Winters for three days without pay because of "[his] failure to maintain control of [his] vehicle, resulting in a preventable accident." (Respondent's Exhibit 17).

15. Commissioner Mullins decided to give a more severe discipline than was recommended by the committee because the accident was preventable, the costs of repairs were very high which could result in higher insurance premiums through BRIM, the crash was severe, and he was concerned about the risk of liability due to injuries to the other driver.[17]

16. No other employee of Respondent previously had been suspended for being involved in an automobile accident involving a State-owned vehicle issued by the Respondent.

17. Respondent established a new policy for assessing accidents that became effective January 3, 2013. The new policy was entitled, "Policies and Procedures – Accident Rating System and Disciplinary Measures." Under this policy, points are assessed for certain occurrences such as, "Failure to stay alert to traffic condition" and "Failure to maintain a safe following distance," etc. The number of points accumulated determines the appropriate discipline. The policy specifies that:

> Multiple points can be assessed for the same accident if the accident fits into more than one description, circumstance or category.[18]

[17] Level three testimony of Commissioner Mullins. The driver of the second vehicle advised Grievant that she was not injured. There was no evidence related to personal injuries at the time of the hearing. However, the statute of limitations for making such a claim had not expired and it is not unusual for medical issues to arise some time following an accident.
[18] Grievant's Exhibit 4, the new policy.

18. Grievant asserted to the Commissioner that he would not have received a suspension under the new policy. Commissioner Mullins asked Deputy Commissioner Junkins to assess the accident under the new procedure as a "dry run."

19. Deputy Commissioner Junkins determined that under the new policy the Grievant would have been assessed four points under Section 6.B.1, "Failure to maintain a safe following distance and have the vehicle under control", three points under Section 6.B.2 "Failure to stay alert to traffic conditions",[19] and one to three points under Section 16.2 "costs of the accident". The total points would be between eight and ten. The new policy states:

> If an employee accumulates between **8 and 10 points** during a 12-month period from the date of the (first) accident the employee will be suspended without pay for a minimum of three days.

(Emphasis in original). Deputy Commissioner Junkins determined that Grievant would have received a minimum of a three-day suspension had the new policy been in effect when his accident occurred.

20. The notice of the level three hearing was mailed from the West Virginia Public Employees Grievance Board on January 28, 2013. Grievant's Exhibit 1.

21. Respondent received the notice on February 5, 2013. Respondent's Exhibit 1.

22. Respondent submitted its witness list to Grievant and the Grievance Board on February 7, 2013, four days prior to the hearing. The Grievance Board's Procedural Rule 156 C.S.R.1 § 6.5.1. provides:

> 6.5.1. All parties shall provide the Board and all other parties with a list of the witnesses they intend to call at the level

[19] In this instance, the work zone would have required additional vigilance.

> three hearing, whether subpoenaed or not, at least six days prior to the hearing.

23. At the level three hearing, Grievant alleges that he must prevail by default because Respondent failed to provide a witness list within the time frame required by Procedural Rule 156 C.S.R.1 § 6.5.1.

Discussion

Since Grievant first raised the issue of default at the level three hearing, evidence was taken on default and the merits of the grievance at that time.

Default:

A grievant who alleges a default has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). "The grievant prevails by default if a required response is not made by the employer within the time limits established in **this article**, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1). (Emphasis added) The issues to be decided, at this juncture, are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

The time limit for providing a witness list for the level three hearing is not set out in the "article" referred to in the default provision, W. VA. CODE § 6C-2 1 *et seq*. Rather, that time frame is set out in the Grievance Board Procedural Rules. Accordingly, failure to provide a timely witness list at level three does not trigger a default under W. VA.

CODE § 6C-3-3(b)(a). Additionally, Respondent was justified in the delay of providing the witness list because it did not receive the notice of the level three hearing in time to comply with the procedural requirement. The undersigned offered Grievant a continuance to prepare for the hearing and an opportunity to interview the witnesses prior to commencement of the hearing. Grievant declined both. Since the default provision does not apply to the Procedural Rule requirement to provide a witness list at least six days prior to the hearing, Grievant did not prove a default occurred.

Merits:

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Grievant was suspended for three days without pay because he was involved in a preventable automobile accident while he was driving a State-owned vehicle while

conducting State business. Respondent argues that the suspension was justified because Grievant was at fault in the accident; the cost of repairs was the highest the Agency had experienced in an “at fault” accident, which could result in an increase in the agency’s BRIM premium costs; and concern regarding future liability for personal injury to the driver of the second vehicle.

Grievant counters that the suspension was arbitrary and capricious and discriminatory because, the Commissioner gave a greater punishment that was recommended by the accident review committee; other employees had not been suspended for automobile accidents; and he would not have received a suspension under the new policy related to discipline for accidents had it been in effect.

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Commissioner Mullins gave Grievant a three-day suspension for the accident after the accident review committee recommended a strongly worded written reprimand. Commissioner Mullins was not bound by the committee’s recommendation and offered valid reasons for his decision to impose a stronger penalty. The damages caused in this accident were more severe than any other accident in Respondent’s history where

the employee was at fault and there was no doubt that Grievant was at fault. Additionally, the Commissioner was appropriately concerned that the Agency's insurance premiums would significantly increase as a result of the accident. The adoption of a new policy setting out specific disciplinary guidelines demonstrated a desire by Respondent to encourage safe responsible driving by its employees. Respondent proved that the disciplinary action taken against Grievant was justified and not arbitrary or capricious.

Grievant also argues it constitutes discrimination to give him a three-day suspension when no other employee had been suspended for being involved in an accident while driving a State-owned vehicle while on State business. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did not provide any evidence related to the nature of previous automobile accidents in which other employees were involved. The only comparative

evidence on the record is that this accident was the most costly at-fault accident in Agency history. Without any evidence to compare Grievant's accident to those of other employees, Grievant failed to prove that the other employees who did not receive suspensions were similarly situated to him.

Finally, Respondent's "Policies and Procedures – Accident Rating System and Disciplinary Measures" did not take effect until January 3, 2013, more than four months after Grievant's accident. This policy had no application to the discipline Grievant received in this matter. Nevertheless, Commissioner Mullins asked Deputy Commissioner Junkins to assess the accident under the new policy to provide a "dry run" and address Grievant's assertion. Respondent demonstrated that it would have been justified in giving Grievant a three-day suspension under the new policy as well.[20] Accordingly, the Grievance is DENIED.

Conclusions of Law

1. A grievant who alleges a default has the burden of proving the default by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002).

2. "The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1).

[20] This is another indication that the Commissioner's decision to give Grievant a three-day suspension under the old policy, which lacked objective disciplinary guidelines, was not arbitrary and capricious.

3. The time limit for providing a witness list for the level three hearing is not set out in the "article" referred to in the default provision, W. VA. CODE § 6C-2 1 *et seq*.. Rather that time frame is set out in the Grievance Board Procedural Rules. Consequently, failure to provide a timely witness list at level three does not trigger a default under W. VA. CODE § 6C-3-3(b)(a), and Grievant failed to prove default.

4. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

5. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va.*

Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

6. Respondent proved by a preponderance of the evidence that the disciplinary action taken was justified and not arbitrary and capricious.

7. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d).

8. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

9. Grievant failed to prove that Respondent discriminated against him by giving him a three-day suspension.

Accordingly, the 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: JULY 19, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE