THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARK BAKER,
Grievant,

v. **DOCKET NO. 2012-1372-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Mark Baker, on June 1, 2012, after he was suspended for 20 days without pay, and demoted. His statement of grievance reads, "[d]iscipline didn't meet good cause. It was inconsistent with past practices of the Agency. Discipline imposed was not reasonably related to the seriousness of the offense." The relief sought by Grievant is "[r]eturn to work in the previous position (foreman) with backpay, interest, leave accrual, and to be made whole in every way."

A level three hearing was held before the undersigned Administrative Law Judge on April 3, 2013, in the Grievance Board's Westover office. Grievant was represented by counsel, Kristopher Mallory, American Federation of State, County and Municipal Employees, AFL-CIO, and Respondent was represented by Mark C. Dean, Attorney, Legal Division of the Division of Highways. This matter became mature for decision on June 3, 2013, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a supervisor, was suspended for 20 days without pay, and demoted from a Transportation Crew Supervisor 1 to a Transportation Worker 2, Craftsworker, with a reduction in pay, because rather than ignoring an emergency call when he was the on-call supervisor responsible for dispatching a crew in an emergency, after-hours situation when he was out of town on annual leave and exhausted, which would have been acceptable, he answered the telephone and asked the dispatcher if she could contact the next person on the on-call list, which she said she would do. Grievant acknowledged it was his responsibility to call out someone to respond to the emergency, but argued that the discipline imposed was excessive. Despite Grievant's prior disciplinary history, the undersigned cannot help but find the severe consequences imposed for this minor infraction of an unwritten practice, particularly under the circumstances here, to be clearly excessive.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for more than 20 years. Prior to his demotion, he was a Transportation Crew Supervisor 1 in Berkeley County, and had served in a supervisory capacity for more than 10 years.

2. Berkeley County DOH maintains an on-call list of which employee is responsible for emergency situations after hours. This list is provided to the State Police

Dispatcher and the Central 911 Dispatcher. The week of March 18 through 24, 2012, Grievant was the person on-call for emergency response, and Grievant was aware of this.

3. Ronnie Allen is the Berkeley County Administrator. Mr. Allen has not reduced the expectations of those on-call for emergency response to writing. He expects the on-call employee to answer the telephone if he is called, and once the employee answers the telephone, he is expected to take care of the problem in order to maintain safety on the county's highways by calling out other employees to respond to the emergency. If an employee who is on-call does not answer the telephone, the Dispatcher placing the calls will call the next person on the list, and the on-call employee who did not answer faces no disciplinary consequences. The employee is not expected to keep the telephone near him so he will be sure to hear it when he is on-call. Mr. Allen has provided those employees who are regularly on-call with a list of the names and contact numbers for all employees who may be called out to respond to the emergency, and he expects the on-call employee to carry that list with them at all times.

4. Grievant was on annual leave March 22, 2012,[1] and Mr. Allen was aware of this, and he was aware that Grievant was going to be out of town. When an employee schedules his annual leave time prior to the time the on-call list is prepared, Mr. Allen does not schedule an employee to be on-call when he or she is on annual leave. If the list has already been prepared when the annual leave time is requested, however, he does not change the on-call list, and Grievant was still the person on-call during the time he was on

[1] It appears that Grievant was also on annual leave on March 21, 2012, but the record is not clear on this point.

vacation. Mr. Allen testified, however, that if the person on-call is out of town, they probably should not answer the telephone when called.

5. On March 22, 2012, at 1:00 a.m., Brett Minnick, Crew Supervisor in Berkeley County, received a telephone call from the West Virginia State Police Dispatcher in the area, advising him that a tree had fallen on a roadway in the county, and needed to be removed. The Dispatcher also told him that the DOH employee on his list who was on-call was Grievant, and that he had been able to reach Grievant by telephone, but Grievant told him he was on vacation and to contact the next person on the list. Mr. Minnick called DOH employee Dave Sandlin and directed him to remove the tree from the roadway, and to call him if he needed someone to help him. Mr. Sandlin did not call Mr. Minnick for additional help. Mr. Minnick reported what had occurred to Mr. Allen when he went to work that morning.

6. Mr. Minnick does not always answer the telephone when he is the person on-call. Mr. Minnick believed that Grievant should have called him or Mr. Allen if he did not have his call-out list with him or otherwise was unable to take care of the problem, rather than telling the Dispatcher to call the next person on the call-out list, and that this would have been within the proper protocol. Mr. Minnick stated that Grievant "had no business" telling the Dispatcher to call the next person.

7. Jay Parsons is a Crew Supervisor 1 for DOH in Berkeley County. A little after 1:00 a.m. on March 22, 2012, Mr. Parsons received a telephone call from the West Virginia State Police. Mr. Parsons did not answer the telephone, but heard the message being left regarding a tree in the road. Mr. Parsons then made his way to the telephone to return the call, and at the same time Central 911 Dispatch called Mr. Parsons and told him about the

tree in the road. Mr. Parsons did not tell Central 911 Dispatch that the State Police had just left a message on his telephone. Mr. Parsons was unaware that Mr. Minnick had also been called, and he told Dispatch that he would take care of the problem. None of the witnesses could explain why both the State Police Dispatch and Central 911 Dispatch were placing telephone calls. Mr. Parsons started placing telephone calls to find an employee to respond. No one answered the telephone. Mr. Parsons then called Mr. Allen and relayed the problem and that he could not find anyone to respond. Mr. Parsons and another employee, Kevin McKinney, had to be on the road early that morning to go to training, and he asked Mr. Allen if he wanted them to go take care of the tree. Mr. Allen also was unaware that Mr. Minnick had been called. Mr. Allen was hesitant to send Mr. Parsons and Mr. McKinney out because they had to travel early that morning to the District Headquarters for a class, and he told Mr. Parsons he would try to find someone.

8. Mr. Allen placed some telephone calls and two employees answered, Jimmy Gusciora and Jim Linton. Mr. Allen sent them to take care of the tree, and told Mr. Parsons this information, but Mr. Parsons and Mr. McKinney went to the headquarters to take care of the tree anyway. While these four employees were loading equipment they would need at headquarters, Mr. Sandlin pulled in and told them he had already gotten the tree out of the road with the assistance of the State Troopers. He told them there was still some debris on the side of the road.

9. Mr. Parsons decided to send Mr. Linton home, but he, Mr. McKinney and Mr. Gusciora each took a state-owned vehicle to the site of the downed tree to clear the remaining brush. The reason for taking more than one vehicle was to provide sufficient

lighting, but Mr. Parsons did not explain why three vehicles and three people were needed to remove brush from the side of the road, or why this could not have waited until morning.

10. Grievant drove to Georgia to take care of his bees on March 21, and worked with them into the evening. He had had very little sleep over the previous 36 hour period when he received the telephone call from Central 911 Dispatch around 1:00 a.m. on March 22, 2012, and was exhausted. He had not taken his call-out list with him, and he asked the Dispatcher if she could call the next person on the list as he was on vacation, and she told him she would. This is the only time he had not taken responsibility for calling out personnel to respond to an emergency when he was on-call.

11. Grievant told Mr. Allen he knew he should have called Mr. Allen or Mr. Minnick, but that he had worked in the bee yard all day and was tired.

12. By letter dated May 15, 2012, Grievant was advised by Kathleen Dempsey, Employment Manager for DOH, that he was being suspended for 20 working days without pay, and demoted, with prejudice, to a Transportation Worker 2, with a change in his rate of pay from $3808.00 per month to $18.67 per hour. The letter states the reason for the disciplinary action as "continued unsatisfactory job performance," and cites the incident of March 22, 2012, detailed in the preceding findings of fact. The letter states, "[a]s a result of your actions, several calls were subsequently placed resulting in two crews being called out to remove the tree. Berkeley County Maintenance compensated five employees for their time, totaling $245.14 and the two vehicles used for this callout cost an additional $58.72." This discipline was recommended by J. Lee Thorne, District Engineer, and was approved by Ms. Dempsey and Jeff Black, her supervisor.

13. There are two categories of Transportation Worker 2's, Craftsworkers and Equipment Operators. Grievant was demoted to a Transportation Worker 2, Craftsworker. Equipment Operators must hold a Commercial Drivers License, and Grievant holds such a license. As a Craftsworker, Grievant performs duties such as flagging, removing dead deer from the road, cutting trees, patching pot holes, and driving a small dump truck during the winter months.

14. In December 2006, Grievant received a written reprimand for failure to properly supervise a work crew.

15. In February 2007, Grievant was suspended for 10 days without pay for misuse of state equipment and resources.

16. In May 2008, Grievant was suspended for 15 working days without pay for misuse of state issued equipment and resources.

17. In October 2008, Grievant was suspended for 15 working days without pay for failure to follow instructions and personal use of state equipment.

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 and 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*.

Grievant does not dispute that he failed to follow the proper procedure, rather Grievant argues that the punishment imposed is too severe for the infraction. Respondent pointed to the many previous disciplinary actions which have been taken against Grievant, and argued that it followed the progressive discipline policy. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

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 must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The 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 Res./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 shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

"As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988).

First, Grievant was clearly not responsible for all the employee hours and vehicle hours involved in this fiasco. Mr. Allen decided to send four employees to headquarters to take care of the problem, when Mr. Minnick had sent one, and Mr. Parsons decided to send three employees and three vehicles to the site after being told that Mr. Sandlin had already gotten the tree out of the road. The only duplication of manpower was Mr. Sandlin, and the reason for this was the failure of the State Police Dispatcher and the Central 911 Dispatcher to communicate that either had reached someone to respond.

DOH has no written policy clearly outlining the procedure when someone is on-call. Mr. Allen testified that if someone who is on-call does not answer the telephone when he is called to respond to an emergency, he has no problem with that. Mr. Allen knew Grievant was on annual leave on March 21 and 22, 2012, yet took no steps to relieve him of his on-call duties. Grievant knew he was responsible for dealing with emergencies, even though he was out of state, but he was exhausted when he received the telephone call,

and did not make the decision expected of him by Mr. Allen. Mr. Allen believed Grievant had shirked his duty, although, had Grievant simply shirked his duties by ignoring the call completely, he would not have had any problem with that. None of the testimony offered demonstrated that this was a serious infraction, and the undersigned cannot find that it was, particularly under the circumstances. Quite frankly, this should have ended with Mr. Allen reprimanding Grievant, especially after Grievant acknowledged that he should have acted differently.

Ms. Dempsey testified that Grievant was demoted and suspended for 20 working days without pay because he had demonstrated a "clear pattern" of inability to perform the duties of a supervisor. It had been three and a half years since Grievant was last disciplined, and he has been a supervisor for over 10 years, yet DOH is just now deciding, after this minor incident that he is not supervisory material? Ms. Dempsey could not recall whether Grievant's annual evaluations since his last suspension reflected whether he had or had not been a good supervisor. Ms. Dempsey acknowledged that a demotion with a pay cut and a 20-day suspension are both serious penalties, but stated that the pattern of behavior, and the failure to follow a "long-standing established procedure" justified this action. She stated that the seriousness of this particular infraction was of no consequence, rather the severity of the penalty was based on his work history, and those making the decision did not believe Grievant should be a supervisor anymore. She also acknowledged that the costs incurred in responding to this situation also had some small bearing on the penalty. Ms. Dempsey could not explain why Grievant was placed in a Craftsworker position, but she assumed it was because that was the position open at that time.

After a review of all the facts presented, and listening to Ms. Dempsey's explanation, the undersigned cannot help but conclude that the punishment imposed was clearly excessive for such a minor slip-up, regardless of Grievant's prior disciplinary record. Had Grievant "shirked" his duty by not answering the telephone when he was on-call, no one would have had a problem with that. Grievant's statement that he was exhausted was not questioned. Mr. Allen and Grievant should have simply had a heart-to-heart about how to handle such a situation in the future, and that should have been the end of it.

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. Respondent proved Grievant did not try to find employees to respond to an emergency when he answered the emergency call when he was the person on-call, and that he asked the emergency dispatcher if she would contact the next person on the on-call list.

3. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va.*

Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

4. 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 must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). 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 Res./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 shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. Grievant demonstrated that the penalty imposed for this minor infraction under extenuating circumstances, when no penalty would have been imposed had he simply not answered his telephone, was clearly excessive.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED TO REINSTATE** Grievant to his position as a Transportation Crew Supervisor 1 in Berkeley County, and to pay him back pay for the 20 days he was suspended and for the difference in pay between a Transportation Crew Supervisor 1 and a Transportation Worker 2, Craftsworker, plus interest at the statutory rate, from the time of his demotion until the effective date of his reinstatement, and to make the necessary adjustments to his seniority and benefits, including retirement as though he had never had a change in his salary or title. Respondent is further **ORDERED** to remove all references to this disciplinary action from Grievant's employment record.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 17, 2013