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WILLIAM R. WALKER, JR.

v.

Docket No. 91-PSC-422

WEST VIRGINIA PUBLIC SERVICE COMMISSION

D E C I S I O N

This matter has an unusual procedural history. On June 17, 1991, Grievant William R. Walker was notified that his probationary employment with Respondent West Virginia Public Service Commission would be terminated July 2, 1991. He filed a grievance at Level IV, which was assigned the docket number of 91-PSC-301. At the hearing of August 30 Respondent's counsel announced that, in Respondent's opinion, it had failed to provide proper written notice of the charges, as required by Section 11.06 of the Administrative Rules and Regulations of the West Virginia Civil Service System (Section 11.06),¹ and agreed to reinstate Grievant

¹Section 11.06 provides in pertinent part,

(a) If at any time during the probationary period it is determined the services of the employee are unsatisfactory, the employee may be separated from the service, but such action shall take place only after the person to be discharged has been presented with the reasons for such discharge or reduction stated in
(Footnote Continued)

immediately and to provide full back pay. It was clarified that Respondent could terminate Grievant again upon notification of the charges. It was therefore accepted that the grievance of Docket No. 91-PSC-301 was settled and an Order memorializing the agreements of the parties and dismissing the grievance was issued the day of hearing.

Thereafter, by letter of September 11, 1991, Franklin Crabtree, Director of Respondent's Transportation Division, advised Grievant that he was discharged, effective September 30. The rather lengthy letter initially stated, "I find that you have failed to satisfactorily meet the required standards of work during your probationary period[,]" and continued,

I further find that your misconduct, which we discussed in my office on September 11, 1991, and which is further set forth below, was of such a nature as to warrant your dismissal regardless of your employment status. As a Utility Inspector it is your responsibility to enforce motor carrier economic and safety laws and regulations as a duly authorized law enforcement officer. It is my finding that you failed to discharge properly the duties and responsibilities of that position, and that such failure warrants your dismissal.. Specifically:

1. On or about June 12, 1991, while off-duty, you made unauthorized use of the law enforcement vehicle assigned to you by using it for a social engagement;
2. Simultaneously, you made unauthorized use of the law enforcement vehicle assigned to you by transporting an unauthorized passenger;
3. Also on June 12 during your unauthorized use of your law enforcement vehicle you "blew the cover" of motor carrier officers conducting surveillance

(Footnote Continued)

writing, and has been allowed a reasonable time to reply thereto in writing or upon request to appear personally and reply to the head of the department or his deputy.

- operations of trucks and drivers which had been placed out-of-service for safety violations;
4. Just before or during this unauthorized use of your law enforcement vehicle you had consumed or were consuming an alcoholic beverage;
 5. Prior to June 12, 1991, you had been advised by your supervisors, including Assistant Chief Hatfield and Manager Brooks, that your law enforcement vehicle could be used only for state business, and that you were not permitted to transport unauthorized passengers;
 6. On at least three occasions during your employment you used your assigned law enforcement vehicle to pull over commercial vehicular traffic when working alone, in direct contradiction of the instructions of your supervisors; and
 7. In your conversation with Chairman Griffith on July 2, 1991, you gave information which was inconsistent with your earlier statements concerning drug use. ...

This, a second grievance, was brought October 9, 1991, and hearing was held November 14, 1991. At hearing Respondent's counsel withdrew the seventh charge.² The undersigned preliminarily ruled that, even where the employee is a probationer, if misconduct is alleged the employer has the burden of proof pursuant to W.Va. Code §29-6A-6¶5, which provides in pertinent part, "The burden of proof shall rest with the employer in disciplinary matters." Respondent therefore presented witnesses on the remaining charges.³

²Counsel stated that the witness needed was not available to testify.

³The number 5 allegation of the September 11th letter does not constitute a charge separate from numbers 1 and 2.

Upon presentation of his case Grievant did not testify. Post-hearing briefs were submitted.⁴

It is determined that at the time he was terminated the second time Grievant remained a probationer. Grievant argues that, because his probationary term was scheduled to end July 2, 1991, and he was reinstated to continue employment from that day until the second termination date, September 30, he was not a probationary employee on that date. However, Respondent correctly relies on the holding in Major v. DeFrench, 286 S.E.2d 688 (W.Va. 1982),

Where the probationer is prevented from serving the full probationary period by forces beyond his or her control, the probationary period must be extended to provide the probationer, as well as the employer, the full benefit of the probationary period.

Syl. Pt. 2. In Major the employee was seeking what Grievant seeks here, a determination that her probationary term had expired while she was not allowed to work. In that case the employer had wrongfully disallowed the employee from serving her probationary term. Since the Supreme Court of Appeals of West Virginia denied the relief the employee sought in Major, there is no basis to determine a different ruling is warranted here. That is, the record supports that Grievant has not actually been allowed on the job, carrying out his duties, since June 17; he merely remained on the payroll from June 17 to July 2 and was reinstated to the payroll

⁴ Respondent filed its brief December 4, Grievant responded December 26, and Respondent replied January 2.

from July 2 through September 30. Since Grievant had not served out his probationary term on September 30, Major requires a holding that he remained a probationary employee on that date.

Mr. Crabtree's letter states that Grievant failed to perform satisfactorily and charges him with misconduct. However, the record as a whole supports that Grievant was terminated because of the charged misconduct.⁵ That is, his discharge was essentially disciplinary and it is confirmed that Respondent had the burden of establishing those charges under Code §29-6A-615. However, Grievant's contention that in order for his termination to be sustained Respondent must further establish that he was dismissed for "good cause" as defined by Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980), quoting Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W.Va. 1965), as

misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention[,]

is rejected, for that standard only applies for terminating non-probationary employees. Rather, if an employer of a probationary employee establishes that such employee engaged

⁵This case does not raise the issue, therefore, whether notifying a probationary employee that he is being terminated for unsatisfactory performance, without further specificity, would fulfill the requirement of Section 11.06 that such employee be "presented with the reasons" for his discharge.

in the misconduct it has alleged, the termination will be sustained unless the employee affirmatively establishes that the employer unreasonably determined that because of the misconduct "the services of the employee [we]re unsatisfactory," Section 11.06.⁶ See also Section 11.01(a).⁷ That is, just as a statute may create a property interest for a probationary public employee of a "reasonable expectancy that if [he or] she has satisfied all the eligibility requirements and has performed well on the job, [his or] her employment will be continued[,]" Major, 286 S.E.2d at 695, so does a probationary employee have such expectancy under Section 11.06.

Under these standards, therefore, the initial inquiry is whether Respondent established the charged misconduct, as enumerated in Mr. Crabtree's letter. The first five

⁶It is stressed that where a probationary employee's employment is terminated on the grounds of incompetency, not misconduct, the termination is not disciplinary and the employer carries no burden of proof in a grievance proceeding; rather, the employee has the burden of establishing that his services were satisfactory. Bonnell v. W.Va. Dept. of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990).

⁷That regulation provides, The probationary period shall be a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his position and to adjust himself to the organization and program of the agency. It shall be an integral part of the examination process and shall be utilized for the most effective adjustment of a new employee and the elimination of those who do not meet the required standards of work.

numbered allegations given in that letter all relate to one incident, occurring June 12, 1991, when Grievant, along with other inspectors, was engaged in a four-day surveillance operation in Princeton, West Virginia. June 12th was the third day of the operation. While there was surveillance going on that evening, Grievant was off duty. The allegations are essentially that Grievant acted improperly in his use of the enforcement vehicle assigned him, as follows: that he used it while off duty, that he allowed an unauthorized passenger in it, that he drove it after consuming alcohol, and that his usage of it "blew the cover" on the evening's surveillance.

Respondent's witnesses' testimony without a doubt established that Grievant, while off duty, used the vehicle to transport a female companion; it was overwhelming and consistent. The same cannot be said regarding the evidence on whether Grievant had consumed alcohol before operating the vehicle.⁸ Of the several employees of Respondent who saw and talked to Grievant that evening, only two were asked about their observations of Grievant in that regard. Enforcement Officer Samuel Doss testified that he and Grievant were about three feet apart in parallel vehicles. He was questioned as follows by Grievant's counsel:

- Q. In that conversation did you notice anything unusual about Mr. Walker's speech or his behavior?
A. No sir, just like now.

⁸There is no contention that Grievant was in any way impaired by alcohol.

- Q. And he appeared to be as much under the influence then as he does now? Is that a fair statement?
- A. Yes sir.
- Q. Specifically, did you get any indication that he had been consuming any kind of an alcoholic beverage?
- A. No sir.

Enforcement Supervisor and Training Officer Edward Pritt, on the other hand, testified that Grievant "was kneeling down right beside of where I was sitting in the passenger seat[,]" and, "I did at that point smell alcohol and it was from Walker's breath." Respondent submitted into evidence a memo from Mr. Pritt to Danny Lynch, Chief Enforcement Officer of the Motor Carrier Section, his supervisor, written on June 13. The memo did not mention anything at all about alcohol; it only related Mr. Pritt's observations of Grievant's use of the vehicle on June 12. Grievant's counsel questioned Mr. Pritt,

- Q. The exhibit that's been marked as Exhibit 6, you wrote this? It's your writing, right?
- A. Yes sir.
- Q. And you put in here everything that you thought was important or pertinent to this episode?
- A. At the time. Yes sir.
- Q. It's as complete as you could have made it?
- A. Oh, I could have gone into minute details and everything else but that's the general information that I felt necessary at the time.
- Q. This has got all the important stuff in it?
- A. It's got what I felt at the time to be necessary.

On this issue the case is very close because it may be that Mr. Doss simply had not noticed what Mr. Pritt had. Nevertheless, the record indicates that Mr. Doss had been as close or almost as close as Mr. Pritt had been to Grievant and the inference does arise that he would have smelled the alcohol also. Moreover, the credibility of Mr. Pritt's

testimony is eroded somewhat by his failure to make any note of his smelling alcohol on Grievant's breath in his memo of June 13. While such lack may be explained, as his testimony indicates, by his failure to consider it important at that time, if he did not consider it important then it is questionable whether he would have remembered it much later. Mr. Pritt's testimony therefore simply does not have the weight to carry Respondent's burden.

There are also problems with the third allegation. The basis of it was that Grievant pulled up his vehicle beside that of Enforcement Officer Sharon Randall,⁹ which was parked behind a service station and from which Ms. Randall was watching a road to a hotel to make sure that an individual did not leave the hotel and go back onto the road.¹⁰ Questioned on cross-examination whether Grievant's appearance interfered with the surveillance she was engaged in, Ms. Randall answered, "No sir. I was very apprehensive that it might interfere but, to my knowledge, it did not."¹¹ It may be that that answer alone would require a finding that the third charge was not proven. Moreover, even if the

⁹Ms. Randall testified that Grievant asked what she was doing there and introduced his companion.

¹⁰The record is very sketchy as to the purposes of Ms. Randall's surveillance.

¹¹There was no undercover aspect to Ms. Randall's operation. She, like Grievant, was in a marked enforcement vehicle, equipped with flashing lights across the top, and she was wearing her uniform.

charge relates more to Grievant's driving to the surveillance area and not so much to whether his doing so actually resulted in "blowing the cover" on any surveillance (i.e., relates to Grievant's action more than to its effect), the charge has not been proven. Mr. Doss testified that Grievant had asked him if it was all right to go talk to Mr. Lynch while in civilian attire and that he had said, "I don't see anything wrong with you[r] driving up to the surveillance area to talk to Danny." With such advice from a senior officer it cannot be determined that Grievant's action was misconduct.

Regarding the events of June 12 Respondent therefore established the charges that Grievant used the vehicle while off duty and allowed an unauthorized individual to ride in it. Moreover, as Grievant recognized in his proposals, there is little doubt that misconduct was involved. Submitted into evidence was a two-page excerpt from the West Virginia Department of Finance and Administration,¹² Transportation Division, Motor Vehicle Rules and Regulations. The excerpt includes, in pertinent part, "All State-owned vehicles must be used for OFFICIAL USE[,]" and "Operator shall NOT permit passengers in State-owned vehicles unless they are State official or employees." Mr. Crabtree, questioned on direct as to what is Respondent's policy

¹²Now consumed by the West Virginia Department of Administration.

concerning the use of its cars, stated, "State vehicles are...to be used only for state business, official state business. There is to be no carrying of unauthorized passengers in those vehicles[.]"¹³ On cross-examination, asked whether it was his position that "anyone who uses a vehicle for personal use or transports an unauthorized person in [his] vehicle [is] in violation of regulations and should be discharged," the witness replied,

No. I don't believe that's my position here today. I can't answer a question that is that broad. It would depend on the circumstances I would think. The reason being, I would say as far as the personal use of the vehicle, certainly lines have to be drawn and even when an officer is on the job, there may be situations where he deviates from the course of his work. He may be going to Morgantown, for instance, to work and he may get off at Flatwoods and drive five miles down to a MacDonal'd's to eat lunch. That's, in a sense, a personal use but, of course, the person is on his lunch hour during that period but that would not be a personal use. That's an incidental personal use in my opinion.

The questioning continued,

- Q. So, in other words then, in your opinion... incidental personal use of an assigned vehicle is acceptable?
- A. That's acceptable and, to give you another example, for instance, during the road checks in the area that we described earlier on June 12th, when we have those particular occasions among the field staff and have a major road check on one of the major highways, there are periods of time where the inspectors spend an entire week away from their home and they stay generally in motels if they don't have a relative in the area. And we also consider it personal but incidental use of

¹³He, like other witnesses, also testified regarding Respondent's policy on alcohol-consumption prior to driving a car. Such testimony is not discussed because of Respondent's failure to establish that Grievant consumed alcohol.

that vehicle to use their assigned state vehicle to obtain food or essential items, for instance a razor from the drugstore during those periods of being stationed away from home. So it's difficult to say with a blanket statement that you would discharge an employee for a very broad thing.

Q. ...[W]ould it be fair to say then that your assessment of the events of June 12th, with regard to allegations one and two and five I guess, those were not incidental personal uses? Or an incidental personal use?

A. I believe the use of that vehicle on June 12 by Mr. Walker, while off duty, using a vehicle for a social engagement and having a non-employee social engagee in the car constituted gross misconduct.

Ms. Randall testified that she was advised of Respondent's policies of "[n]o personal use of vehicles[,]" and "[n]o unauthorized passengers" at the time she was hired, and Mr. Doss also testified he was so advised. Moreover, Robert Hatfield, who as Assistant Chief Enforcement Officer of Respondent's Motor Carrier Section is responsible for orientation for new employees, testified that during his orientation of Grievant

he [Grievant] was instructed in the use of the vehicles assigned to him by the state or by the Public Service Commission; that the vehicles were to be used only for official use with the Commission; that no unauthorized persons are to be transported in the vehicle other than related to the job.

Asked on cross-examination to state specifically what he had told Grievant, Mr. Hatfield iterated, "[that the vehicle] be used solely and only for official state business and under no circumstances are unauthorized passengers to be transported in that vehicle." Also, Bob Brooks, Manager of the Motor Carrier Section, testified that prior to the June incident Grievant had asked him if it was all right for him to take "his small daughter for a ride in the cruiser

because she really liked that cruiser." The witness testified that he had told Grievant that it was "strictly against policy," advising him that, although he might consider it a small matter, it would "make us all look bad."

While, as indicated, misconduct was established, the record does not support as a charge separate from the charge of allowing an unauthorized passenger in the cruiser that it was misconduct for Grievant to use the vehicle because he was off duty. Mr. Crabtree's testimony indicates, as common-sense would dictate, that when inspectors are to be involved in a lengthy surveillance operation, they drive their cruisers to the town where the operation is headquartered and are allowed to use them for eating out or running incidental errands, not having their private cars available. Moreover, it is clear from the record that there was nothing wrong with Grievant's being off duty that third evening of the surveillance operation. Accordingly, the inescapable conclusion is that if he had gone to a restaurant to eat that night, as the record reflects he and his date had done, but had gone alone or with other inspectors, no impropriety would have resulted; Grievant's error was in taking his date in the car.

The remaining charge is that Grievant "pull[ed] over commercial vehicular traffic when working alone." While the letter refers to "at least three occasions," the testimony established only two. The first, supported by the testimony of another inspector, Barry Hudnall, was that while Grievant

was a temporary employee (sometime between when he was employed as a temporary in September 1990 and when he became a probationary employee in January 1991) and thereas was assigned a "K-car" rather than the cruiser later assigned, he pulled over a tractor-trailer that was obstructing the road, i.e., although it had been issued a permit to obstruct the road at bridges and other narrowings of the roadbed, it was unnecessarily travelling in the center of the road. Mr. Lynch's testimony establishes the second, as follows:

He told me twice he pulled over vehicles but I can only remember one because I thought it was kind of funny that a [trucker] had wr[itten] on the back of the truck and painted on the back of it, "Show Me Your Tits." He pulled the truck driver over, so he says, and told me that he told him to paint it off because he didn't want his daughter to see something like that.

Mr. Lynch testified that the sign was not illegal. The witness was cross-examined,

- Q. What did you do about that?
A. Just told him that he wasn't allowed to do it.
Q. Did you write it down anywhere?
A. Not to my knowledge.
Q. Okay.
A. I mean I didn't think it was that serious to pull someone over one time.

While this incident was not as clearly placed in time as the other, the record indicates that it also was early in Grievant's employment with Respondent. Mr. Pritt testified that he instructed Grievant at the very beginning of his employment that he should never pull over a motorist while using a K-car and Argel Stull, Supervisor in the Motor Carrier Division, testified he had told Grievant in September and February not to pull over motorists while a

probationary employee. The evidence establishes that at least regarding the incident of the obstructive tractor-trailer, Grievant acted contrary to directions given him.

In conclusion, Respondent established (1) that on June 12th Grievant, contrary to instructions of his supervisors, transported an unauthorized individual in the law enforcement vehicle assigned him; and (2) that Grievant, after being instructed not to pull over commercial vehicles, on at least one occasion early in his service with Respondent did so. In that it did not establish all charges of misconduct alleged, Respondent must remove from Grievant's personnel file the September 11th letter from Mr. Crabtree. It must also make a new determination whether the charges it did establish warranted Grievant's dismissal. If its determination is affirmative, it must issue a new letter providing as the basis for Grievant's dismissal those charges; the dismissal may be retroactive to September 30. If its determination is negative (that dismissal is not warranted), it may set a new, lesser penalty and provide Grievant a letter stating as the basis of such penalty the charges established in this proceeding; and it must provide any backpay that would be appropriate. Reinstatement of Grievant would be immediately after such determination is made or at a later time, depending on what penalty is determined to be appropriate.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Findings of Fact

1. On June 12 Grievant, contrary to instructions of his supervisors, transported an unauthorized individual in the law enforcement vehicle assigned him.

2. Grievant, after being instructed not to pull over commercial vehicles, on at least one occasion early in his service with Respondent did so.

Conclusions of Law

1. Even where the employee is a probationer, if misconduct is alleged the employer has the burden of proving those allegations by a preponderance of the evidence. See W.Va. Code §29-6A-6~~1~~5, providing in pertinent part, "The burden of proof shall rest with the employer in disciplinary matters."

2. While Respondent alleged various actions allegedly constituting misconduct, the only misconduct by Grievant it established were those actions provided in the above Findings of Fact.

Accordingly, the grievance is GRANTED insofar as it is held that Respondent did not establish all charges alleged in the termination letter of September 11, 1991. Respondent is ORDERED to provide relief consistent with this decision.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
ADMINISTRATIVE LAW JUDGE

March 11, 1992