**LINDA TANTLINGER**

**v. Docket No. 93-BOT-364**

**BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY**

**D E C I S I O N**

Grievant, a custodian at West Virginia University (WVU), complains because she was given a "Letter of Warning" for a misdeed, characterized in the letter as "violating the confiden tiality of an office." She claims WVU was able to prove only that she left her assigned work area without permission and urges that a lesser form of punishment such as a "counseling" letter would have been appropriate. She requests that the warning letter be removed from her personnel files. (See footnote 1) WVU's position is that the issuance of a warning letter was based on policy and was entirely proper, given the nature and severity of Grievant's offense. For reasons more fully set forth below, this grievance must be granted in part and denied in part.

Grievant has ten years' seniority at WVU. She works in WVU's Health Sciences Center (HSC) on the "afternoon" shift,from 3:00 until 11:00 p.m. Her assigned work areas on Friday, June 18, 1993 were several offices within HSC's School of Dentistry; she took her lunch break from 6:45 to 7:15 p.m. that evening. Grievant admits that on June 18, shortly after her lunch break was over, she left her own work area without permis sion and accompanied another custodian, Lonnie Joseph, to HSC's Human Resources (HR) office, part of Mr. Joseph's designated work area that evening. At that time the HR office was offi cially closed, as its hours of operation are from 8:15 a.m. until 4:45 p.m.

Grievant's presence in an outer office area located within the HR office is undeniable. She was seen by Daniel Durbin, HSC's Director of Budget and Financial Operations. Mr. Durbin testified that as he was making his way out of the building at about 7:25 p.m. on June 18, he noticed lights on in the HR office and looked into the office door's window, partially obscured by postings on the glass. He said he observed a woman sitting at the secretary's desk and a man standing behind her, looking over her shoulder. He claims the woman was flipping through and looking at some papers, some of which were stapled together. He said the woman occasionally pointed to something on the papers and that the man would then bend down to look. T.5-7.

After he had watched the pair for approximately three or four minutes, Mr. Durbin departed to find a security guard. Unable to find a guard, he returned to the HR office and looked through the door window again. He said the man and woman werestill there looking at papers, but that they finally

turned out the lights and departed together, both empty-handed. Mr. Durbin believed the parties were WVU custodians because of the uniforms they wore.

Mr. Durbin tried but was unable to contact several WVU officials to report the incident after he arrived home and throughout the weekend. Durbin finally reached Gary Miller, HSC's physical plant program director, on Monday, June 21, 1993 and reported that two custodians had been reading documents in the HR office the previous Friday evening. Mr. Miller informed his subordinate, Pauline Sines, the housekeeping supervisor who supervises Grievant and Mr. Joseph, of the incident as told to him by Mr. Durbin. He also informed Guy Varchetto, HSC's maintenance manager.

After the matter was brought to Ms. Sines' attention, she approached Mr. Joseph and Grievant when they reported for work for their afternoon shift. According to Ms. Sines, she asked them why they were reading materials on the desk in the HR office, and they responded that they were reading an application form, not confidential documents. Ms. Sines reported back to Mr. Varchetto. He, in turn, discussed the situation with an employee relations specialist in order to ascertain the proper course of action.

Mr. Varchetto believed the two custodians had committed a serious offense and directed Ms. Sines to issue both Grievant and Mr. Joseph a "Letter of Warning." In the June 24, 1993 letter sent to Grievant, Ms. Sines recounted that Grievant hadbeen observed "going through documents on the desk" in the HR office. The letter continued, "Such activity does not in any way relate to your duties as a custodian and violates the confidentiality of an office that maintains records and docu ments that are highly confidential and personal in nature." Ms. Sines concluded with a statement that a future infraction of that nature would result in immediate dismissal.

Mr. Joseph testified on behalf of Grievant at level two. His version of the incident was that after he finished lunch at 7:15 p.m. he spent approximately fifteen or twenty minutes cleaning the periodontics unit. When he came out of the unit he met Grievant. He said Grievant asked him to get her an applica tion and offered to accompany him to the HR office after he told her that he was heading for that office. He said he gave Grievant a blank application from the wall rack and went to check for dirty floors in another office area.

Mr. Joseph said that, when he returned, Grievant was sitting at the desk looking at the application. He said he began to check the area in and around the back of the desk to determine whether he may have missed some papers on the floor when he emptied the trash in the room earlier

that evening. He said he did not know how long he and Grievant were in the room or recall that Grievant pointed to things on a paper or that he bent down to look or nodded his head. T.72, 83. According to Mr. Joseph, Grievant did comment about some changes that had been made on the application form over the years.

Mr. Joseph did not recount the events of June 18 consistently. Prior to the level two hearing, probably on July 1, 1993, Mr. Joseph recalled, at Grievant's request, he wrote and signed an "open" letter, T.75, in which he stated that he and Grievant went to the HR office "to pick up a[n] application." He further wrote that Grievant sat at the desk, knocked some papers from the desk top to the floor, and then picked up the papers and straightened them up on the desk. Ex.8. When questioned during cross-examination about how Grievant acciden tally knocked the documents to the floor, Mr. Joseph admitted that he was not in the room when it happened. At that point, he said that when he returned to the room where Grievant sat, he saw Grievant straightening up papers on the desk top. T.81. Earlier, on direct, he said Grievant had been looking at the application when he returned. T.72, 81.

Grievant also testified on her own behalf. Her account of the incident was similar to Mr. Joseph's. Grievant stated that her son needed an application. She said after she and Mr. Joseph entered the office he got her an application from a wall rack. According to Grievant, Mr. Joseph "walked on back" and she "leaned up against the desk" to look at the application. She said her backside must have hit some papers on the edge of the desk and they fell to the floor. She said she "picked them up, tapped them, laid them down." She said she then laid the application on the desk and sat down to look at it. T.87. She said Mr. Joseph returned while she was still reading the cover page on the application, and that she briefly discussed the changes on the application form with him before they left theoffice together, she with the application rolled up "like in a tube" in her hand. T.88.

When asked why she did not get the application earlier in the afternoon when the office was open, Grievant responded that she had forgotten. She also stated she forgot to get the application the previous day when she visited the HR office during business hours for some insurance papers. Finally, Grievant offered no reasonable explanation as to why she even entered the office with Mr. Joseph or, once inside, why she had not simply taken the application and immediately returned to work. See T.96-98.

In support of her position in this grievance, Grievant apparently relies on the recommended findings and conclusions of the level two hearing examiner and reproduced them in her level four

brief:

Because conclusive evidence was not presented as to what documentation Ms. Tantlinger was reading at the time she was observed by Mr. Durbin, and Ms. Tantlinger's letter of warning addressed only the perceived infraction of going through documents on a desk, the grievance evaluator finds in favor of Ms. Tantlinger.

Recommendations

The letter of warning received by Ms. Tantlinger should be deleted and a letter of counseling should be sent instead. Within the letter of counseling Ms. Tantlinger should be reminded that leaving her work station without permission is inappropriate behavior. She should also be reminded about the confidentiality of documentation within the Human Resources Office and the appearance she and Mr. Joseph gave by sitting at the desk going over what she states as an "application form."

Notably, Herman Mertins, WVU's President's designee at level two, rejected the grievance evaluator's recommendation anddenied the grievance. Mr. Mertins determined that the warning letter was justified regardless of whether or not Grievant had actually looked at sensitive materials, primarily because Grievant had not received permission to leave her work area, to enter the HR office or to take any materials from the HR office. He opined that Grievant breached her trust as a custodian and could have been suspended for the offense. (See footnote 2)

Grievant essentially argues that she should not be punished for something she did not do. Grievant urges that her account of the incident should be believed because it was consistent with Mr. Joseph's explanation, and because the only other eyewitness to the event, Mr. Durbin, could not see what she was reading at the desk from his vantage point at the door. Grievant insists that WVU should not be permitted to maintain a warning letter in her file based on the stated offense that she violated the HR office's confidentiality, simply because WVU could not prove she actually read confidential documents.

Based on all matters of record, the following determina tions and conclusions are made.

Findings of Fact

1. During scheduled work time, Grievant, a custodian, left her work area, entered a personnel office which contains sensitive materials and was seen by another employee outside the personnel office as she looked at some unidentified documents at a desk in the office for several minutes.

2. Grievant admitted that she left her assigned work site and entered the personnel office. However, although she stated that her only purpose in being in the office was to get a blank job application, she could have gotten the application the day before while she was legitimately in the office for another matter or earlier on the day in question after she got to work but before the office closed. Moreover, assuming that Grievant wanted only a blank application on the evening in question, she could have obtained the form and immediately returned to work, which she did not do.

3. Grievant had not received permission to leave her work area or neglect her work, enter the personnel office or take even a blank application at a time when the office was not open.

Conclusions of Law

1. In a disciplinary case such as this, WVU bears the burden of proof by a preponderance of the evidence. W.Va. Code §18-29-6.

2. "When the standard of proof is a preponderance of the evidence it is not necessary for the employer to prove the facts to the exclusion of all reasonable doubt, but rather, the decision must be made in favor of the party on whose side theweight of evidence preponderances, and according to the reason able probability of truth." Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994) (cite omitted).

3. Regardless of whether or not Grievant did in fact read sensitive materials, WVU established that Grievant's unautho rized presence in a personnel office to obtain or read a docu ment, while she should have been working elsewhere, compromised and "violated the confidentiality of an office that maintains records and documents that are highly confidential and personal in nature," a serious offense.

4. According to WVU's Employee Handbook, a written warning may be issued to an employee when a dean, director or supervisor determines that the nature of the offense permits such action. WVU's Ex.1.

5. In this case, WVU justified the issuance of a warning letter and established that the form of the discipline was reasonable, under the circumstances, and not an arbitrary or capricious act.

6. WVU's governing board requires that a written warning issued to an employee by a supervisor, "must specify how long it will remain in the file," and that the warning letter must never remain in the file more than "twelve months from the date the letter was written." WVU's Ex.2.

Accordingly, the grievance is **GRANTED**, to the extent that the warning letter must be removed

from Grievant's files by June 24, 1994, if no further infractions of a similar nature occur,but **DENIED**, as to the immediate removal of the warning letter.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monngalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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**NEDRA KOVAL**

**Administrative Law Judge**

**Date:** May 6, 1994

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*Footnote: 1 Grievant did not prevail at the lower grievance levels. She appealed to level four and requested that a decision be based on the record below. The parties submitted written fact/law proposals in early January 1994. Thereafter, in early March 1994, the case was transferred to the undersigned for administrative reasons.*

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*Footnote: 2 There was some testimony at level two that termination had been considered. However, some deference was given due to Grievant's ten-year tenure with WVU.*