NIGEL MAXEY

v. Docket No. 93-HHR-424

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

DECISION

The grievant, Nigel Maxey, is employed by the Department of Health and Human Resources (HHR) as an Eligibility Specialist II assigned to its Pineville office. He filed a grievance at Level II October 28, 1992, protesting a written reprimand issued October 23, 1992. (See footnote 1) The grievance was denied at that level and at Level III following a hearing held April 20, 1993. (See footnote 2) Appeal to Level IV was made October 12, 1993 and a hearing was held June 23, 1994. (See footnote 3) Thegrievant submitted extensive proposed findings of fact and conclusions of law on July 26, 1994. Pursuant to the undersigned's finding at hearing that proposals were unnecessary, the agency declined to make submissions. (See footnote 4)

There is no dispute over the facts of the case. Between July 20, 1992 and September 16, 1992, the grievant's supervisor, Nancy Simpson, sent him five memoranda in which she gave him the following directions concerning the timely disposition of certain public assistance and\or food stamp applications.

As you know processing applications is our first priority, and as a general rule they are to be processed within thirty days.

The following applications are thirty days or past on the application register. Check on these cases, respond with a reason on this memo and return it to me today. (RETURN ALL

APPLICATIONS NOT ALREADY TRANSMITTED TO ME WITH THIS MEMO). (See footnote 5)

The grievant did not carry out any of the directions. Instead, he located the applications and completed all tasks necessary for them to be "transmitted" or forwarded to the agency's central office fordisbursement of benefits. He notified Ms. Simpson either verbally or in writing as he did so.

After receiving no response to the fifth memorandum and determining that there had been no responses to the previous four, Ms. Simpson advised Economic Service Coordinator Anita Adkins

that disciplinary action was in order. Subsequent to a discussion with Regional Administrator Louis Palma and a review of the grievant's personnel file, Ms. Adkins concluded that the grievant should be reprimanded. She did so via the following October 23, 1992 letter.

> Specifically, on July 20, 1992, July 29, 1992, August 5, 1992, August 14, 1992 and September, 1992 your supervisor gave you memos (attached) regarding applications which were 30 days old or older and not marked off the application register (ES-15) as having been transmitted. You were directed, in each memo, to check on the cases listed, respond and return it to her on the same date. You did not respond to any of these notices. Although some applications were processed, they were not processed according to directions issued by your supervisor as reflected in the memos. Of the 19 cases listed, 12 exceeded the appropriate processing time. Of these 12 cases, 9 were applications to be approved. One case in particular was brought to your attention on three separate occasions before being transmitted on September 17, 1992, 56 days after the date of AFDC application. Additionally, there were other cases which were handled inappropriately.
>
> Your inaction violated Economic Service policy and caused applications to become overdue resulting in delayed benefits to eligible clients. You also placed the DHHR in violation of various court orders such as Miller, Stump and Crichfield. These violations subject the Agency to possible litigation as well as being held in contempt of court.
>
> It is reasonable to expect you to be aware of your responsibilities in processing casework as the subject of priorities, especially as they pertain to applications, was discussed in unit meetings on October 28, 1991, December 30, 1991, June 18, 1992 and June 26, 1992 as well as on other undocumented occasions. The Economic Services Manual, a copy of which is in your possession,also details the proper handling of casework and has been the subject of many training sessions.
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> Your completion of casework on time has been the subject of many conferences, evaluations and memoranda since 1985. Conference notes, memos and notes to you from your supervisors (three different supervisors) consistently document your inability or unwillingness to complete assignments. Even though you were given recording time and compensatory time, reassignment of your overdue work to other Economic Service Workers occurred repeatedly from 1987 through 1992.
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> Since you received written reprimand in October 1991 (for insubordination), it appears a suspension would be most appropriate at this time. But, during the past few months you have made significant progress in processing overdue case maintenance. This improvement in your performance gives me some hope you may be able to reach and maintain an acceptable level of performance without moving forward in the progression of discipline. Now, you must manage your assignment so you complete all casework as required by policy and in a timely fashion. If you cannot do this you should be exploring other career alternatives.

> Where insubordination is concerned in light of the changes taking place in your unit at the present time, again, I have some hope you will immediately correct your behavior and eliminate the need to move forward in the progression of discipline. However, your failure to keep the supervisor informed of the status of your casework, especially applications, is unacceptable and will not be tolerated at all in the future. Please be advised you are warned to avoid insubordinate behavior of any kind. Specifically, when asked a question, in writing or verbally, you are to take immediate action to answer the questions. If you are unable to take immediate action you are to let the supervisor know immediately of the same and arrange to respond as soon as possible. No delays are acceptable. Failure to respond as outlined here will be considered insubordinate.
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> Your demonstrated behavior of not completing casework as required and ignoring inquiries by the supervisor will not be tolerated anymore. You need to adjust your behavior to insure you are able to meet expectations. Future problems will be addressed with more severe actions. Like it or not your supervisor is the person from whom you are to seek guidance and direction to correct deficiencies which have been identified in your performance.
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> You may provide a written response to the matter of this reprimand for inclusion in the record. This reprimand may be purged from your record at your written request after 12 months should you not experience more problems.

It is undisputed that the grievant received an October 16, 1991 written reprimand for insubordinate conduct. The grievant eventually filed grievances over that action and two other reprimands. In Maxey v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-088 (Aug. 16, 1993) (hereinafter "Maxey I"), Administrative Law Judge Albert C. Dunn, Jr. found that the agency had proven the charges which formed the basis for the October 16 reprimand. The remaining reprimands were invalidated on the basis of a lack of evidence or a finding that the agency had not disciplined other similarly-situated employees.

The only clearly articulated legal theory advanced by the grievant is that the reprimand "grew out of" or was predicated on disciplinary actions which were reversed in Maxey I and that it was impermissible for the agency to consider those charges. He asserts that the agency was bound by its personnel policies to take a progressive approach to discipline and that once a particular disciplinary measure is invalidated, subsequent measures are also rendered void. (See footnote 6)

HHR denies that the reprimand in issue was predicated on past disciplinary matters which were reversed in Maxey I and notes that the October 16, 1991 reprimand was affirmed in the decision. The agency further asserts that in any event, the policies referenced by the grievant are simply guidelines and that it was not thereby bound to impose any particular punishment for the grievant's failure to follow Ms. Simpson's directions. For the reasons discussed below, the undersigned concludes that HHR must prevail. The grievant confirmed at the Level IV hearing that he had notfollowed Ms. Simpson's directions. (See footnote 7) He further testified that his caseload was heavy at the time and he and other Eligibility Specialists were generally overworked. The grievant did not, however, attribute his failure to follow the directions to his workload. He provided no reason at all.

Insubordination is the deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor. Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). There are few legally-recognized defenses to the charge. Essentially, an employee must show that the person conveying the order was without authority to do so or that the direction entailed unreasonable risk. Thompson v. W.Va. Dept. of Human Resources Docket No. 94-HHR-254 (Jan. 20, 1994). (See footnote 8) The grievant herein does not raise either defense.

The evidence clearly demonstrates that the grievant made a conscious decision to disregard the explicit orders of his supervisor. That the applications were ultimately processed is of little relevance. It is clear from the language in the memorandathat Ms. Simpson was attempting to obtain the actual applications and elicit a written response from the grievant regarding the reasons for delays in processing. It is entirely reasonable to assume that the grievant disobeyed the orders to avoid having to supply those reasons. Accordingly, it is concluded that the grievant was insubordinate on each of the five occasions on which he failed to respond to Ms. Simpson's orders.

It is further concluded that the agency was not bound by any of its personnel policies to impose a particular punishment for the grievant's conduct (See footnote 9) and that the punishment levied was not inconsistent with the holdings in Maxey I. A review of the policy cited by the grievant indicates that it is merely a list of suggested guidelines that administrators should review and consider before taking disciplinary action. The policy contains a clearly worded proviso to that effect and its list of punishments for particular offenses is denoted "recommended."

Maxey I merely invalidated two written reprimands. There were no pronouncements therein that the agency was required to "return to first base" when considering further discipline against the

grievant. Moreover, given that the October 1991 reprimand was affirmed, the reprimand in issue was entirely in keeping with the agency's guidelines and the holdings in the case.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1) Between July 20, 1992, and September 16, 1992, the grievant was given five direct orders, via memoranda, by his supervisor to provide immediate written explanations for overdue applications for financial assistance and to submit the applications to her.

2) The grievant did not obey the orders of his supervisor. Instead, he completed the steps necessary to process the applications and advised the supervisor that he had done so.

3) After conferring with the supervisor and reviewing the grievants personnel file, Economic Service Coordinator Anita Adkins issued the grievant a written reprimand for insubordination. The grievant made a timely appeal of that action.

4) The grievant received an October 1991 reprimand for insubordinate conduct. On appeal to Level IV, that action was affirmed. This action and other aspects of the grievant's work history were considerations in Ms. Adkins' decision.

CONCLUSIONS OF LAW

1) In disciplinary matters, the employer bears the burden of proving that the employee engaged in the conduct for which he was disciplined and that the conduct affected the rights and interests of the public. W.Va. Code §29-6A-6; Thompson v. W.Va. Dept. of Health and Human Resources, Docket No. 94-HHR-254 (Jan. 20, 1995). The respondent herein has met that burden.

2) The grievant neither raised nor demonstrated a defense to the charge of insubordination. He otherwise failed to show that the agency acted arbitrarily or violated any policy, regulation, statute or theory of law.

Accordingly, the grievance is **DENIED.**

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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: February 28, 1995

Footnote: 1Per W.Va. Code §29-6A-3(c), the grievant was permitted to bypass Level I of the grievance procedure for state employees.

Footnote: 2The transcript of this hearing and exhibits admitted are part of the record herein.

Footnote: 3The case was consolidated for hearing with Maxey v. W.Va. Dept. of Health and Human Resources, Docket No. 93-HHR- 070. At least three hearings were continued on the parties' joint motions and their representations that a pending decision in a previous grievance heard at Level IV might have bearing on the manner in which they would proceed in the present case. Further, the hearing was delayed by the withdrawal of three of the grievant's West Virginia State Employees Union representatives. An August 29, 1993 request for a continuance of the August 30, 1993 Level IV hearingby WVSEU representative Dave Bielski was denied on the grounds that both parties had unnecessarily delayed the proceedings. Representative Steve Wade appeared at the hearing.

Footnote: 4At the conclusion of what appeared to be a de novo presentation of evidence, the undersigned ruled that the agency had proven that the employee had engaged in the conduct for which he was reprimanded and that such conduct constituted insubordination. It was noted that these findings were tentative since the lower level record had not then been tendered or reviewed. In that the parties' legal positions were made clear during the hearing, they were advised that written argument was not necessary. Nevertheless, the undersigned has reviewed the grievant's proposals and, when necessary, anticipated the agency's responses thereto.

Footnote: 5Because the applications were identified by client name, they are not listed herein.

Footnote: 6At the Level III hearing, the grievant stated in his opening remarks that "reprisal is part of the issue here." However, he did not present evidence in support of that argument. The issue of reprisal was not even raised at Level IV. Accordingly, to the extent that such a defense was ever properly raised, it is considered abandoned.

Also, it is noted that several weeks prior to the Level IV hearing, the undersigned held a telephone conference call withagency counsel and the grievant's representative during which a number of matters, including a request made by the grievant for a subpoena duces tecum directing Mr. Palma to bring certain client records to the hearing. The grievant's representative stated that the grievant would use the documents in an attempt to show that other employees had disregarded the supervisor's directions but had not been disciplined. After affording the agency the opportunity to object to the issuance of the subpoena, the undersigned advised that the request was overly broad and that the grievant would

need to make a new, more narrowly defined request. In an effort to limit the number of documents needed, it was suggested that the grievant should identify at least one other employee in the request whom he believed was not disciplined for the same conduct. The undersigned also advised that in the event such identification was made, the burden would be upon the agency to explain the disparity in treatment. No such request was made.

At the Level IV hearing, both the grievant and his representative made requests that a decision be issued on the record developed at Level III which contains little if any evidence on disparate treatment. Curiously, however, the grievant, in his post-hearing submissions complains that he was not permitted to pursue this defense at Level IV. It is an unfounded complaint in that he was permitted to question Ms. Adkins extensively on whether other employees were treated differently. Ms. Adkins testified credibly and convincingly that there were no employees in the grievant's unit who failed to follow Ms. Simpson's orders and who, like the grievant, also had a previous history of insubordinate conduct. During the grievant's testimony, he made no mention of any employees whom he believed had been given preferential treatment. Accordingly, to the extent that the grievant raises such an argument, Ms. Adkins' testimony is considered dispositive.

Footnote: 7This admission was made during the agency's cross-examination of the grievant. He was evasive and nonresponsive to forthright questions and conceded that he had not complied with the directions in the memoranda only after the undersigned directed him to be responsive to counsel's questions.

Footnote: 8As noted, the grievant does assert that the reprimand was violative of the holdings in Maxey I and the agency's personnel policies. Arguably, this assertion is a defense to the charge. The contention is better characterized as an attempt to equitably "estop" the agency from levying the discipline based on its failure to abide by its policies. A finding that HHR should be precluded from taking the action on that basis would not be a finding that the grievant did not engage in the conduct for which he was disciplined.

Footnote: 9The "suggestive" nature of HHR's disciplinary policies has been the subject of a number of cases reaching Level IV. The most recent holding that the policies do not mandate that a particular punishment be imposed in a given case was made in Artrap v. W.Va. Dept. of Health and Human Resources, Docket No. 94-HHR-146 (Sept. 13, 1994).