WILLIAM M. WALTERS, .

Grievant, .

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v. . Docket Number: 94-BEP-086

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WEST VIRGINIA BUREAU OF EMPLOYMENT .

PROGRAMS / WORKERS' COMPENSATION .

DIVISION, .

Respondents. .

DECISION

William Walters (hereinafter Grievant) was employed by the West Virginia Bureau of Employment Programs (hereinafter Respondent) within its Workers' Compensation Division, Records Management Section, Microfiche Unit, until his suspension on March 10, 1994, and subsequent dismissal which became effective April 12, 1994. Grievant filed the instant complaint pursuant to the state employee grievance procedure provisions of West Virginia Code §29-6A-1 et seq., on March 15, 1994. Thereafter, two days of hearing were held on August 8 and 10, 1994, and the case became mature for decision on September 2, 1994, after receipt of the parties' post-hearing briefs.

Background

The Microfiche Unit (hereinafter Unit) consists of twelve employees, most of whom are classified as Office Assistants. Delores Kuhl is currently the manager of the Records Management Section.

Alma Downey is the immediate supervisor over the employees in the Unit and, Penny Parish, who was a supervisor in the Unit, is now the supervisor over the Create Update Master Section. The Unit is responsible for converting paper documents into microfiche film and storing this end product for later reference. Generally, the employees take hundreds of pictures of documents with microfiche cameras per day. The nature of the various tasks within the Unit is routine, repetitive and non-complex. Because of this, the employees often find it difficult to focus on their assigned tasks, and instead, interact with each other on a personal basis. The record is replete with references to personality conflicts within the Unit.

On February 15, 1994, two employees in the Unit, Terry Graley and Freda Smith, engaged in a physical altercation. The fight resulted from personality conflicts between the two employees as Ms. Smith is described as a religious fundamentalist and Mr. Graley is alleged to be a homosexual. Both employees had been arguing with each other for months. For their respective roles in the fight, both employees were fired after an internal investigation into the event was completed. According to all accounts, Grievant openly acted friendly towards both Ms. Smith and Mr. Graley prior to the fight.

As noted, Commissioner Andrew Richardson requested that an investigation be conducted to ascertain the facts surrounding the fight between Ms. Smith and Mr. Graley. Mr. Richardson assigned two employees, Donald Pardue, Management Analysis Division Director and Sandy Ball, Employment Programs, Specialist, Senior, to the task of performing the fact-finding investigation. Mr. Pardue and Ms. Ball conducted interviews of ten employees, including Grievant, and from notes that they had taken during the interviews, prepared written statements that each interviewee later reviewed and signed signifying that it was an accurate reflection of the oral statement given. The employees were given an oath before being questioned and each employee was also asked to sign a form titled Statement of Truthful Testimony and Confidentiality. The form of this statement is as follows:

> I , understand that my statement/s given to Donald Pardue and Sandy Ball in the conduct of their investigation is voluntary.
>
> I also understand that said statement/s will be truthful to the best of my knowledge and that the content of said testimony will be confidential.

I further understand that giving false testimony and/or my failure to keep said testimony confidential, may lead to civil actions and/or disciplinary action to include, but not limited to, suspension and/or dismissal from employment.

(Interviewee)

Witnessed by:

Donald Pardue

Sandy Ball

Date: Time:

Any other pertinent memoranda or documents related to the incident were included in the investigative file. Commissioner Richardson made the decision to fire both Ms. Smith and Mr. Graley after reviewing the complete investigative file on February 28, 1994. Also, Ms. Downey, Ms. Parish and another employee, Alan Roberts, were issued reprimands as a result of the investigation. The two supervisors were reprimanded for not having dealt effectively with the known and existing personality conflicts within the Unit prior to the fight. It was believed that had the supervisors acted appropriately, the fight could have been avoided.

Respondent believed that one or more of the employees violated the confidentiality of the investigation by making statements to other employees concerning the questions asked by, and the answers given to, the investigators. A second investigation was authorized to determine if one or more employees had breached their promise to keep the nature of the investigation private. The same investigators interviewed and took statements from Ms. Downey, Mike Pritt, Ms. Parish and Grievant between December 8 and 10. Donald Pardue made the following conclusion in the

investigative report: "It has been determined that employees did violate the confidentiality provisions, impeded investigations and caused undue stress on other employees by their actions . . .."

On March 10, 1994, prior to having reviewed the second investigative findings, Mr. Richardson suspended Grievant for thirty days for having failed to keep the substance of the first investigation confidential; for having made statements to his co-workers which were untrue and which led those employees to become defensive during their interviews; and for having contributed to the creation of a hostile working environment (related to the Graley-Smith altercation). The alleged untrue statements attributed to Grievant were discussed in the suspension letter. Grievant met with Executive Secretary John Burdette on March 9, 1994, and with Mr. Richardson on March 17, 1994, regarding his suspension.

Upon reviewing the findings from the second investigation, Commissioner Richardson concluded that Grievant had breached the confidentiality of the first investigation on three different occasions. By letter dated March 28, 1994, Commissioner Richardson notified Grievant of his decision to dismiss him for insubordination; violation of confidentiality of an internal investigation; impeding an investigation; and causing dissention in the work place. It was agreed to by the parties that a meeting concerning Grievant's dismissal would be held on April 13, 1994, one day after the effective date of his dismissal. Thereafter, Grievant's dismissal was affirmed by letter to his counsel.

Parties' Arguments

Grievant denies that he breached the confidentiality of the first investigation. He maintains that he only made one false statement concerning the Smith-Graley altercation, that this statement was made prior to the first investigation, and was neither made to the investigators nor the supervisors of the Unit. Therefore, Grievant argues that Respondent has not met its burdenof proof with regard to either his suspension or dismissal. Grievant also avers that, assuming arguendo, Respondent has proven that he made statements which violated the confidentiality of the first investigation, such misconduct cannot support a finding of just cause for his dismissal. Further, Grievant argues that his termination from employment was not based upon any wrongdoing separate and apart from that relied upon to support his suspension. Finally, he asserts that Respondent did not follow its own progressive disciplinary policy in terminating him.

Respondent maintains that Grievant violated the confidentiality of both the first and second investigations; and therefore, it had just cause to suspend and later dismiss him. It contends that Grievant made false statements to his co-workers and supervisors in order for them to tell him information related to the contemplated discipline of Mr. Graley and Ms. Smith. Respondent asserts that it has proven the facts supporting Grievant's suspension and dismissal by a preponderance of the evidence. Finally, it denies that it failed to comply with its progressive disciplinary policy.

Discussion of Charges

A. Creation of Hostile Work Environment

As was noted, Grievant was both suspended and dismissed for having "contributed to the creation of a hostile working environment" and for "causing dissention in the work place." With regard to these charges, Respondent argued that Grievant's conduct instigated the physical altercation of February 15. It attemptedto establish this through the testimony of Grievant's co-workers and supervisors. Mostly, these individuals provided opinions and speculation as to why they believed Grievant acted as a friend to both Ms. Smith and Mr. Graley in order to "pit" them against each other. The witnesses testified that, at times, Grievant could be seen whispering to one of these employees and then, at different times, to the other. From this it was assumed that Grievant was helping to "fuel the fire" of conflict. At least one of Grievant's co-workers (a witness of Respondent) testified that Grievant actually helped Ms. Smith and Mr. Graley get along better.

The Undersigned has carefully reviewed the testimony of Respondent's witnesses and also the statements presented to the investigators. Unfortunately, it is obvious from even a cursory review of the evidence and of the tone of the witnesses that most of the employees within the Unit continually contributed to the ongoing conflict between Ms. Smith and Mr. Graley. The workers' lack of tolerance for personalities different from their own led to acts of ridicule, verbal abuse, choosing sides, "tattle-telling" and conspiratorial activity. The evidence suggests that both Ms. Smith and Mr. Graley had engaged in inappropriate verbal exchanges as far back as early 1993. All three of the supervisors, Ms. Downey, Ms. Parish and Ms. Kuhl presented evidence from which it can be inferred that Ms. Smith and Mr. Graley have been unmanageable for an extended period of time. Further, it seemed that it was inevitable that a physical altercation would occur at some point.

The evidence simply cannot support a finding that it is more likely than not that Grievant "created

a hostile working environment" through the actions relied upon by Respondent, any more than did various other co-workers of Ms. Smith and Mr. Graley. While it is probably true that Grievant may have done more harm than good through the manner in which he interacted with his co-workers, his conduct is found to have been no worse than that of many of his peers. The truth is that the individuals who had not only the ability but the responsibility to effectively deal with the personality conflicts within the Unit, the three supervisors, through inaction, did more to "fuel the fire" than Grievant could possibly have done. Further, at least one other employee's conduct was far worse than Grievant's in creating the environment which led to the fight and there is no evidence that this employee has ever been disciplined. Unfortunately for Grievant, these two charges are not the only charges upon which his discipline was based.

B. Interference with Investigations

Respondent offered testimony to establish that Grievant made a false statement to Ms. Downey concerning the focus of the first investigation shortly after he was interviewed by the investigators on February 17, 1994. Ms. Downey testified that on this date, Grievant returned to the office after being interviewed and told her that the only thing the investigators were concerned with was how bad she had harassed Ms. Smith and that this harassment had made Ms. Smith "snap." Ms. Downey's statement to the investigators on March 8, 1994, also made reference to this statement attributedto Grievant. Ms. Downey testified that Grievant's conduct caused her to be hostile during her own interview with the investigators and that the interview was unduly long because she believed that they were investigating her conduct. This testimony was corroborated by the two investigators.

Grievant testified that he did not make such a statement to Ms. Downey. He stated that upon his return to the Unit, Ms. Downey questioned him as to whether the investigators had asked questions which would lead one to believe that they were investigating the supervisors. He stated that Ms. Downey told him that she had done nothing wrong and that neither he nor anyone else would cost her her job. Grievant testified that the only statement he did make to Ms. Downey was that he had simply told the investigators the truth and that if it resulted in someone getting hurt that he was sorry.

Respondent also offered the testimony of Ms. Downey and Ms. Parish to support its conclusion that Grievant had violated the confidentiality of the first investigation a second time on March 8, 1994. Ms. Parish testified that on that day, Grievant made a statement to her indicating that the investigators had told him that she had had another employee type a memo for her recommending

that Ms. Smith be fired. Ms. Parish testified that she told Grievant that she was not going to discuss personnel matters with him. Ms. Parish testified that she believed this statement was false because she did not believe that the investigators would tell Grievant such information. Ms. Downey testified that she was speaking with Ms. Parish when Grievant made this statement. Shestated that Grievant also asked her if she had had a similar memo typed and she replied that she had not. Again, the investigation statements and the testimony of the investigators corroborate Ms. Parish's and Ms. Downey's testimony.

With regard to the nature of this allegation, Grievant gave the following testimony:

Q: Did you have a second conversation with Ms. Downey on March 8, 1994?

A: Yes, sir, I did.

Q: Could you relate the substance of that conversation?

A: Again, I had come back from a meeting with the investigators. It was near the end of the lunch period. I came back to the office. Alma was sitting at her desk. I told Alma I was back from my meeting. Alma stated, "Bill, I know they're after Penny and I and I know because Freda Smith and Terry Graley had been terminated. Who else could they be after?"

As Alma was making that statement, Penny Parish overheard it and was approaching us. She, meaning Penny, stated to Alma, "I'll bet they're after Betsy Lambert because Bill told the investigators about Betsy Lambert's typing of your, meaning Alma's, statement even though we, meaning Penny and Alma, both told Bill no such statement existed."

I then stated to Penny Parish, "Since you brought up the subject about Betsy Lambert's typing, who does your typing." Penny Parish turned defensive suddenly and said, "So, now they're asking who does my typing. So now they're after me." She then stated, "I'm not going to tell you, meaning me, anything. That's confidential. Let them find out who does my typing." She then told me to leave her office. I did.

On cross-examination, Grievant was asked about this statement and he replied that Betsy Lambert

had earlier told him that she had typed a letter for Ms. Downey recommending that Ms. Smith be fired and that he had related this information to the investigators on February 28, 1994. Donald Pardue testified that Grievant madereference to this statement in his interview on March 8, 1994, and he also referred to the written statement attributed to Grievant contained in the second investigation. With this statement, Grievant signed the form titled "Statement of Truthful Testimony and Confidentiality", but he did not sign the statement affirming that the written document was an accurate reflection of his testimony because he was suspended prior to it having been completed.

Respondent contends that Grievant made a third false statement which impeded the first investigation. Mr. Pritt had earlier been involved in a dispute about whether he had harassed a co-worker. At hearing in the instant matter, he testified that Grievant told him the investigators (during the first investigation) were going to bring up the issue of whether or not he had acted properly in the past. As a result of this statement, Mr. Pritt testified that he was afraid to give information freely to the investigators because he was afraid of being fired. Mr. Pardue and Ms. Ball verified that Mr. Pritt first refused to give a voluntary statement during his first interview. Mr. Pritt's statement taken during the second investigation contained reference to his conversation with Grievant but there is no mention of this statement in the written statement of Mr. Pritt's testimony from the first interview. Grievant denies that he made such a statement to Mr. Pritt.

Much of this case hinges upon a determination of the credibility of the many witnesses presented by Respondent and of Grievant. Grievant denies having made any of the false statementsattributed to him. He does admit that he made several false statements to a co-worker prior to the initiation of the first investigation. He denies that he made statements which would have caused Mr. Pritt, Ms. Downey or Ms. Parish to be defensive with the investigators. Grievant's testimony is in direct conflict with at least five of Respondent's witnesses.

In determining whether a particular witness's testimony is credible, a number of factors, many of which are subjective, must be assessed. These factors include the following:

The witness's demeanor while testifying.

The extent of the witness's capacity to perceive, recollect or communicate.

The extent of the witness's opportunity to perceive.

The witness's reputation for honesty.

The existence or non-existence of a bias, interest or other motive.

A statement previously made by the witness that is consistent or inconsistent with his or her statements at the hearing.

The existence or non-existence of any fact testified to by the witness.

The witness's attitude toward the action in which he/she

testifies or toward the giving of testimony.

The witness's admission of untruthfulness.

The plausibility of the occurrence of the matters testified to by the witness.

Representing the Agency Before the United States Merit Systems Protection Board, United States Office of Personnel Management, May 1984, p. 152. Grievant admitted that he had lied when he made a statement to Mr. Graley prior to his (Mr. Graley) offering a statement to the investigators. Respondent makes much of this admission on behalf of Grievant. However, one must be careful in assessing another's credibility, even though an individual has not told the truth in one setting does not mean that the sameindividual is not credible during another. See, Wigmore, Evidence § 1008 (Chadbourn rev. 1972). At the time Grievant made this statement to Mr. Graley, he was neither involved in litigation concerning his employment nor was he giving testimony, under oath, before a fact finder in a formal proceeding. It cannot be assumed once it is determined that an individual has

lied, that anything else that individual testifies to is also a lie. With regard to the alleged breaches of confidentiality, the following credibility assessments are made.

The witnesses for Respondent, as pointed out in its post-hearing brief, all testified consistently. However, the majority of the testimony given, especially with regard to the allegation that Grievant was responsible for having created a detrimental working environment, seemed very calculated. Many of the witnesses used the same words or phrases to describe opinions that they had or impressions that they had given. While it is somewhat understandable, the investigators were generally not able to provide independent testimony without resorting to the statements in the investigative reports. Grievant's testimony was clear and specific, to the point that it also seemed rehearsed. None of the witnesses seemed unsure of their testimony or anxious about testifying.

There is no evidence of record to support a finding that any of the material witnesses had a reputation for being dishonest. Also, the testimony of Respondent's witnesses appeared to be consistent with the statements they had given to the investigatorsalthough their testimony was in much less detail. One inconsistency relates to the supervisors' recommendation discussed above. During the second investigation, Ms. Parish made the following statement:

> On Tuesday afternoon, March 8, 1994, Bill Walters came in my office and said that they (I assumed he was referring to the investigators . . .) said that Betsy Lambert had typed a memo saying that Alma and I had recommended that Freda Smith be fired. Alma was standing there and I told Bill that I was not going to discuss personnel matters. I had to tell him three times and he finally left my office.

Ms. Downey stated to the investigators when asked the same question,

> Today, after Lunch, at approximately 1:30 - 2:30 p.m., Bill approached me and said that he wanted to talk to me. Penny Parish walked up and he said, "Oh, no here's Penny, I'll talk to her." I was still there in Penny's office and Bill said, "They wanted to know if you made your recommendations concerning the incident in writing and if you had one of your employees type it for you." Penny told him we do not discuss personnel matters.

At hearing, Ms. Downey stated that she never had a memorandum prepared regarding the events on February 15; however, the investigative file contains a memorandum written by or for Ms. Downey detailing the fight on that date. Further, Ms. Lambert told the investigators during the second investigation that she prepared such a memo. It is true that the memorandum does not contain a recommendation that Ms. Smith be fired. Further, Ms. Parish's statement indicates that Grievant's

statement implies that the investigators knew such a memorandum had been prepared. Ms. Downey's testimony was that Grievant was asked by the investigators if a memorandum had been prepared.

Grievant's testimony appears consistent with the notes taken from the pre-suspension and pre-termination hearings he was afforded. At hearing, Grievant stated that the only false statements he made were to Mr. Graley. This is consistent with all of the accounts of the statements he made prior to April 12, 1994.

It is clear from the record that both Ms. Downey and Ms. Parish believed that Grievant was a troublemaker. With regard to Mr. Pritt, he stated that he believed Grievant was "nosey" but he, otherwise, did not provide any testimony from which it could be determined that he disliked Grievant. Obviously, under the circumstances, both Ms. Parish and Ms. Downey had to have been concerned about the nature of the questions asked of them during the first investigation relating to their performance as supervisors. It is also understandable that they would have been a little reluctant during the interviews to discuss any perceived inability on their behalf to deal with the personnel problems which led to the fight, even if Grievant had not made any statement to them prior to their interviews. It seems unlikely though that both individuals would be so intimidated about the nature of the first investigation that they would individually, or by conspiracy, try to shift the focus of the investigation from themselves to Grievant by creating two false stories. Finally, Respondent's witnesses' version of the events at issue seem plausible given the overriding theme that Grievant was, at least, interested in being involved in the human drama within the work place.

Regarding Grievant's testimony, while the record cannot support a finding that Grievant had a motive to make his co-workers appear to be dishonest, he obviously had an interest in denying the statements that were attributed to him based simply on the nature of the evidence the Respondent presented in this case. Further, given Grievant's theory of the case, Ms. Downey and Ms. Parish would have had to have conspired against him in order for it to be determined that they were lying about the alleged statement made by him in Ms. Parish's office; such a finding, while possible, does not seem probable given the truly inconsequential nature of the statement attributed to him.

Grievant stated that the written statement associated with his testimony in the second investigative report was almost 100% inaccurate. Therefore, not only would Ms. Parish, Ms. Downey and Mr. Pritt had to have lied about statements that he made, but also the two investigators who

questioned him a second time would have to have lied, which seems highly unlikely. If the investigators had wanted to prepare a false statement and attribute it to Grievant, they could have prepared a much more damaging statement. Finally, the responses in this second written statement appear to be consistent with the topic of the questions the investigators said they asked the interviewees during the investigation. Based upon the foregoing, it is determined that Grievant's testimony denying that he made the statements attributed to him by Respondent is not credible.

C. Just Cause for Suspension

An agency's decision to impose discipline on an employee rests upon the agency's consideration of facts. How the agency classifies the facts relied upon is not as important as its ability to prove the facts supporting the adverse action by a preponderance of the evidence. W. Va. Code §29-6A-6; Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). It is hereby determined that Respondent has established that Grievant did make the three false statements at issue. The issue is now whether Grievant's conduct amounted to a breach of the confidentiality of the investigation and also impeded the investigation.

Respondent stated in the two disciplinary records that Grievant's improper conduct related to telling co-workers false statements which made them apprehensive to give willing statements to the investigators. The appropriateness of a penalty, while depending upon the resolution of questions of fact, is by no means a mere factual determination. Douglass v. Veterans Administration, 5 M.S.P.B. 280 (1981) Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Id., citing Kulkin v. Bergland, 626 F.2d 181, 185 (1st. Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596F.Supp. 628 (D.C.Va. 1984). Respondent has characterized Grievant's misconduct as insubordination.

Insubordination is usually defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Department, Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. West Virginia Dep't of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). "Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order.

Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds, citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988); Daniel v. United States Postal Serv., 16 M.S.P.R. 486 (1983); and Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). Further, it has also been stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988), (See footnote 1) citing Weber v. Buncombe County Board of Education, 266 S.E.2d 42 (N.C. 1980). A thorough discussion of what constitutes insubordination was made in In re Burton Manufacturing Company, 82 L.A. 1228 (March 2, 1984). In Burton, the Arbitrator recognized that

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management. In most cases that come before Arbitrators, the employee either denies the alleged subordinate act or gives reasons why it was justified.

Burton, p. 1234, citing Trotta, Arbitration of Labor-Management Disputes, New York: AMACOM, 1974, pp. 282-283. The Arbitrator in Burton went further to state a generally recognized principle of employment relations law that

> Furthermore the company has the right to demand that subordinate personnel not manifest disrespect toward supervisory personnel which undermine their status, prestige, and authority, thus mitigating against plant efficiency.

Burton, p. 1234.

Respondent contends that Grievant was insubordinate because he made false statements to co-workers concerning the substance of the first investigation after having agreed not to breach the confidentiality of the investigation upon express request by the investigators. The question would not be a close one if it had been established that Grievant made statements to his co-workers which contained questions and comments derived from his interview with the investigators. However, the key issue herein is whether Grievant breached any confidentiality by making statements to his co-workers which were not actually discussed during his interview, and whether this can be classified as

insubordination.

Grievant did not breach the confidentiality of the first investigation because he did not relate to his co-workers any of the statements that he had given to the investigators or any of the questions that he had been asked. The substance of the first investigation was not compromised. Further, Grievant did not impede the first investigation because the investigation was successfully completed according to the testimony of the investigators and Respondent's agents. As Grievant's counsel correctly points out, the statements obtained through the interviewing process were declared to be truthful and accurate statements as attested to by the interviewees. Further, there was no evidence that the investigation took longer than expected to complete. The only evidence of any real harm was that Ms. Downey was defensive for the first portion of her interview. Mr. Pritt initially declined to voluntarily give an interview but agreed to do so upon insistence by the investigators.

What Grievant is guilty of is having **attempted** to impede the investigation by make false statements to his co-workers in order to trick them into providing him information so that he would be familiar with the decision-making analysis. Grievant felt that by doing so, maybe he could influence the outcome of the investigation because he was not confident in the abilities of the agents of Respondent to understand all of the relevant and material facts or to assess them properly. Grievant was not insubordinate as that term is normally defined; however, he was, nonetheless, insubordinate in interfering with the official actions of hisemployer and by showing disrespect for his superiors. Grievant, through his actions, attempted to undermine the authority of his superiors and to influence their exercise of discretionary decision-making authority. He was asked specifically not to act in such a manner which would interfere with the investigation and it is expected that all employees should show respect to the authority of their employer to handle an administrative matter.

Upon a thorough reading of the suspension letter, in conjunction with the testimony of Thomas Rardin, Personnel Administrator, and John Burdette, Executive Secretary, it is concluded that the thrust of Grievant's suspension for thirty days was for his insubordinate behavior. Therefore, based upon the discussion above, it is determined that Respondent has met its burden of proof with regard to the charges upon which Grievant's suspension was based even though it was not established that he created a hostile working environment. His dismissal shall now be discussed.

D. Just Cause for Dismissal

Grievant argues that he was suspended and then dismissed for the same charges, therefore,

Respondent did not follow its own progressive discipline policy. This is factually incorrect. Grievant was suspended on March 10, 1994 and his false statement to Ms. Downey and Ms. Parish was made on March 8, 1994, immediately after he returned from his interview in the second investigation; however, Commissioner Richardson did not have knowledge of the March 8 statement until after the suspension. Even though theevents had transpired prior to March 10, 1994, Grievant's termination was based upon additional facts made known to Commissioner Richardson. Grievant's challenge to his dismissal on this basis is not persuasive.

As our Supreme Court recognized long ago,

> In order to support a dismissal of a covered employee, the evidence must show good cause thereof. Such cause must be substantial. 'The cause must be one which specifically relates to and effects the administration of the office, and must be restricted to something of a substantial nature directly effecting the rights and interests of the public. An officer should not be removed from office on trivial or inconsequential matters, or for mere technical violations of statute or official duty without wrongful intention.'

Guine v. Civil Service Commission, 149 W.Va. 461, 468, 141 S.E.2d 364, 369 (1965), citing, 67 C.J.S., Officers, Section 60b. Respondent contends that Grievant's actions were egregious and grossly improper because he tried to impede the official actions of his employer and disrupt the work place by lying to his co-workers and supervisors. It avers that he purposefully ignored directions given to him by his superiors and compromised the integrity of the Bureau. It argues that Grievant's conduct substantially affected the interests of the public by interfering with its efficient and effective operations. Grievant maintains that no harm occurred as a result of his actions and that Respondent cannot prove that he intentionally set out to impede any agency action. He argues that he intended only to help his co-workers and supervisors.

First of all, Grievant's actions were intentional. And while the final result of those actions was that only minimal harm occurred, his conduct exhibited a lack of honesty and integrity tothe extent that the employer now has no confidence in his ability to perform as an effective employee. Grievant's actions did create controversy and anxiety among his co-workers, if only for the express purpose of him being involved in or informed of agency decisions which he had no right to influence. Grievant demonstrated a lack of respect for the authority of Respondent's agents and a contempt for the investigative process which it used to impose discipline on other employees.

However, even after recognizing that Grievant's actions were improper, it is not concluded that

Grievant's misconduct directly, negatively affected the rights or interests of the public to the extent that just cause for his dismissal exists. Grievant's insubordination did not result in Respondent being unable to adequately support its decision to fire Ms. Smith or Mr. Graley nor did it prevent Respondent from gathering sufficient information upon which to reprimand other employees. Further, these investigations never "stalled" as a result of Grievant's actions. While Grievant's behavior cannot and is not condoned, it was not egregious enough to warrant his dismissal.

Respondent's Administrative Directive, section 6400.20 entitled Employee Responsibilities, establishes its recommendations for progressive discipline. This policy states, in pertinent part,

> It should be recognized, however, that disciplinary actions, will be tailored to suit the circumstances of the misconduct, its seriousness, and the employee's past record. The same disciplinary action may in some cases, therefore, not be taken for similar infractions. . . . Except in cases of flagrant violations of acceptable behavior, an attempt will be made to apply discipline in progressive steps in order that an opportunity forcorrective action is available to the employee. Employees will be disciplined generally as follows:
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> A) Oral reprimand - . . .
>
> B) written reprimand - . . .
>
> C) Suspension - . . . A suspension may also be considered as the first step if the employee is guilty of serious offenses, such as, failure to report to work without notification for 3 or more days, use of foul language or abusive language, failure to comply with regulations, falsification of records, or illegal political activity.
>
> D) Demotion or Dismissal - . . .
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> Flagrant misconduct which may result in demotion or dismissal without previous disciplinary action includes: gross misconduct, theft, conviction of a felony related to the job, use of political influence to gain employment advantage, intoxication or use of unauthorized drugs on the job, insubordination, or willful destruction of property.

Grievant's conduct is more comparable to the type of misconduct associated with suspension than

with demotion or dismissal. His conduct was not nearly as serious as theft, conviction of a job-related felony or willful destruction of governmental property. It is recognized that insubordination may be grounds for dismissal; however, insubordination is a term which can be used to define numerous types of misconduct of varying severity. Therefore, Grievant's dismissal may not be upheld simply on the basis that this section contains reference to insubordination.

During the period of over two years Grievant worked with Respondent, he was not disciplined in any manner. He was also given performance evaluations within the "good" rating. Although Respondent attempted to demonstrate that Grievant had previously engaged in similar conduct with regard to an earlier investigation in January 1994, he was never disciplined for the alleged misconduct. The fact is that no confidentiality agreement was usedduring this earlier investigation. Therefore, the alleged conduct is not of the same nature. Further, no reference was made in either the suspension or dismissal letter to any misconduct attributed to Grievant prior to February 22, 1994. Based upon the foregoing, it is hereby concluded that Grievant's suspension for thirty days was a sufficient penalty to be imposed based upon the misconduct established. Grievant's termination is hereby overturned as it is determined that Respondent abused its authority in exercising its administrative discretion by deciding under the facts as proven that Grievant should have been terminated.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant was employed by Respondent for over two years within its Workers' Compensation Division, Records Management Section, Microfiche Unit, until his suspension on March 10, 1994 and subsequent dismissal effective April 12, 1994.

2. On February 15, 1994, a fight occurred between two of Grievant's co-workers. As a result, Respondent initiated a formal investigation into the facts behind the incident. This investigation consisted of employee interviews where the substance of the discussions was to be kept confidential.

3. Grievant was interviewed during this first investigation. After his interview, Grievant made false statements to three of his peers as to the nature of the questions asked of him during his interview. After Respondent discovered the first two of Grievant'sthree lies, he was suspended for

thirty days. Respondent then initiated a second investigation into whether the substance of the first investigation was kept confidential.

4. Respondent learned that Grievant had lied a third time as a result of reviewing the findings of the second investigation. Thereafter, Grievant was dismissed.

5. The first investigation was not compromised in any way by Grievant's misconduct.

6. Grievant contributed to, but certainly was not solely responsible for, the working environment which spawned the fight on February 15, 1994. Grievant's conduct in relation thereto was no more improper than other employees but was less responsible than others who had supervisory responsibility.

7. Grievant did not breach the confidentiality of either of the investigations as he did not make statements to his peers concerning questions he was asked or answers he had given at either of the two interviews at issue.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant's actions on February 22, and March 8, 1994, amounted to insubordination in that he attempted to undermine the authority of his superiors and to influence their exercise of discretionary decision-making authority. See, Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988); In re Burton Manufacturing Company, 82 L.A. 1228 (March 2, 1984).

2. In order to support the dismissal of a tenured public employee, the employer must establish that the employee engaged in misconduct of a substantial nature directly effecting the rights and interests of the public. Guine v. Civil Service Commission, 149 W.Va. 461, 141 S.E.2d 364 (1965).

3. Respondent has not established just cause for Grievant's termination.

4. The thirty-day suspension imposed upon Grievant for his acts of insubordination is consistent with Respondent's progressive disciplinary policy and, therefore, it is upheld.

Accordingly, this grievance is hereby **GRANTED IN PART** and **DENIED IN PART**. It is hereby **ORDERED** that Grievant's termination from employment be nullified and all reference to said adverse action shall be removed from his personnel file. Grievant is to be reinstated to his former position with all benefits, back pay and interest, consistent with the discussion in this Decision, except that

Grievant's suspension on March 10, 1994, for the period of thirty days therefrom, is hereby affirmed.

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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ALBERT C. DUNN, JR.

Administrative Law Judge

January 23, 1995

Footnote: 1 *Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court which reversed the circuit court's ruling. The cite to that Supreme Court case is Sexton v. Marshall University, 387 S.E.2d 529 (W.Va. 1989).*