EDDIE DYESS,

Grievant,

v.

DOCKET NO. 99-DOA-397

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Grievant, Eddie Dyess, filed this grievance at level four on September 27, 1999, protesting his dismissal from the West Virginia Department of Administration/General Services Division ("Respondent"). A level four hearing was held on November 9, 1999, at the Grievance Board's Charleston, West Virginia, office, and this case became mature for decision on December 1, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Respondent was represented by Jeffrey G. Blaydes, Assistant Attorney General, and Grievant was represented by Mr. Hollie Brown.

SUMMARY OF EVIDENCE

Respondent's Exhibits

Ex. 1 -

September 20, 1999 letter from Joseph F. Markus to Eddie Dyess.

Ex. 2 -

State of West Virginia Department of Administration Employee Handbook.

Ex. 3 -

February 24, 1992 letter from Bill Elswick to Eddie Dyess.

Ex. 4 -

Employee Acknowledgment Form, signed by Eddie Dyess on July 19, 1995.

Ex. 5 -

September 16, 1999 memorandum from Timothy Lee to the Record.Ex. 6 -
Draft letter of suspension.

Ex. 7 -

Classification Specification for Groundskeeper.

Grievant's Exhibits

None.

Testimony

Respondent presented the testimony of Joseph Markus, Raymond Prozzillo, Donald Hill, Tim Lee, Doug Keeney, James Wells, Joe E. Smith, and John Clutter. Grievant testified in his own behalf.

FINDINGS OF FACT

1. Grievant was an employee of Respondent for approximately 18 years. He held the position of Groundskeeper and worked within the groundskeeping section of General Services within the Department of Administration.

2. Tim Lee, Assistant Director of General Services, was hired in April 1999, by Director of General Services Raymond Prozzillo, to oversee the grounds crew, the janitorial staff, and administration of contracts for General Services. As part of his duties, Mr. Prozzillo instructed Mr. Lee to address issues of morale, work efficiency, and productivity with his staff.

3. In order to address the issues of morale and divisiveness within the grounds crew, Mr. Lee, with Mr. Prozzillo's blessing, instituted a “team” building program for the grounds crew in August 1999. (See footnote 1) 4. Mr. Lee instructed his grounds crew that a portion of their regular Thursday staff meetings would include team training exercises. Mr. Lee indicated that all employees were required to attend; this training was not voluntary. (See footnote 2)

5. Grievant did not attend the initial meetings of team training because he was on annual leave. Grievant attended his first team training meeting on September 9, 1999. Because Grievant had not attended the previous meetings, Mr. Lee provided background on the program specifically for Grievant's benefit. Mr. Lee described the past meetings of the group, and in particular, described an exercise in which employees had made a positive comment about actions of another employee. This exercise was intended to improve communication, productivity and allow employees to see how other employees perceived their actions.

6. After Mr. Lee described the exercise, he told the group they would undertake the same exercise again, and asked Grievant to make a comment about any action of another employee that he perceived as positive for the team/workgroup. Grievant refused to participate and said, “I am not saying anything to nobody about nobody.” Grievant indicated he would perform manual labor, but that was “all” that he would participate in. Mr. Lee then asked, “So you don't think the team aspect is an important one?” Grievant did not respond. Mr. Lee again asked, “If I'm hearing you correctly, you are saying you arenot part of this team and you don't want to be a part of the team.” Grievant responded, “If you have some work for me to do, I'll do some work, but I'm not going to do this crap.”

7. Following this confrontation, Mr. Lee instructed Grievant to resume cutting grass. Grievant jumped up, loudly said, “Whatever”, and left the room. He did not participate in the exercise while the remainder of the grounds crew did.

8. Mr. Lee considered taking immediate disciplinary action against Grievant for his insubordinate behavior, but determined for several reasons that he would allow Grievant to leave the meeting and work. Mr. Lee was new with the State and had not dealt with such an issue before within the State guidelines; he did not have a fellow supervisor with him; and he had knowledge of previous insubordinate behavior by Grievant which suggested the potential of Grievant to engage in threatening and violent behavior. In 1992, Grievant had been suspended for three days for being insubordinate to his supervisor, using abusive language and threatening him with a hammer. (See

footnote 3) Further, employees had warned Mr. Lee to “watch his back” with regard to Grievant. With these factors in mind, Mr. Lee allowed Grievant to go out and cut grass while the remainder of the crew participated in the exercise.

9. Following Grievant's departure from the meeting, Mr. Lee asked the grounds crew how they felt about Grievant's actions. In addition to being distracted by the conduct of Grievant, the grounds crew felt “shocked”, “disappointed”, and disturbed. In particular, John Carter was “shocked” because Grievant showed no respect for authority. Groundskeeper Doug Keeney noted that Grievant showed his supervisor no “respect.” 10. Mr. Lee informed Mr. Prozzillo of Grievant's actions following the meeting of September 9, 1999. At Mr. Prozzillo's suggestion, Mr. Lee contacted Jim Wells of the Division of Personnel to discuss what action should be taken. At that time, Mr. Wells, Mr. Lee and Mr. Prozzillo agreed that a three to five day suspension would be appropriate.

11. Mr. Wells requested a summary of events from Mr. Lee in order to begin drafting the suspension letter. They were to meet to finalize the letter on September 16, 1999, after the team training meeting scheduled for that day. R. Ex. 6.

12. On September 13, 1999, Donnie Hill, Grievant's immediate supervisor, returned to work from annual leave. Mr. Hill was informed by other employees of Grievant's actions of September 9, 1999. Specifically, the employees told Mr. Hill that Grievant “had gotten in Tim's face and said if he had anything for him to do he would go on out and do it;” that Mr. Lee “won't do anything to me;” and Mr. Lee is “not my boss.” Grievant boasted that he “had put Tim in his place with the way he talked to him” and did not have “to answer to Mr. Lee,” and referred to Mr. Lee as “the motherfucker.” Grievant also stated to the others that they were a “bunch of suckasses” for obeying Mr. Lee's instructions. Grievant seemed pleased by his conduct and his demeanor was “arrogant.”

13. At no time between September 9 and 16, 1999, did Grievant attempt to discuss any concerns relating to the team training program with Mr. Lee or any other superior.

14. September 16, 1999, was the next scheduled team training session for the grounds crew. Prior to the meeting, Donnie Hill informed Grievant of the time of the meeting and advised him that he should participate in this meeting. Just before the 1:00p.m. meeting, Grievant approached Mr. Hill and indicated he was not going to participate. Grievant specifically stated that he “wasn't going to listen to the motherfucker”, meaning Mr. Lee.

15. Mr. Hill implored Grievant to “[g]o along with Tim, go ahead and do what he wants you to

do." Grievant refused.

16. At 1:00 p.m., the meeting began. All members of the grounds crew, including Grievant, Donnie Hill, and Mr. Lee, were present. Mr. Lee started the meeting as he normally did with a joke and some discussion about how members of the grounds crew and their families were doing.

17. During these introductory remarks, Mr. Lee noticed Grievant was sitting faced away from Mr. Lee, with his head in his hands, so that it appeared as though Grievant was sleeping. Mr. Lee said, "Wake up, Eddie." Grievant responded by saying, "I am awake and I don't have to have my eyes open to hear you and I don't have to look at you to pay attention." At this point, Grievant's tone was "belligerent" and "hateful." Mr. Lee determined at this time to let the comment go, primarily because he knew he would be meeting that afternoon with Mr. Wells to discuss the pending disciplinary action for similar behavior.

18. As the meeting progressed, Mr. Lee introduced the team training exercise the grounds crew would participate in that day. Mr. Lee indicated the crew would divide into two groups and each group was to plan a vacation for the group, write down their plans, and come back and share their plans with the group. Mr. Lee specifically asked Grievant to participate in this exercise. 19. When the crew got up to divide into two groups, Grievant did not move. Grievant, Donnie Hill, and Mr. Lee remained in the room, while the rest of the crew went into another room to work. Mr. Lee stated, "Eddie, this is a team exercise. I do expect you to participate in it." Grievant responded by saying, "I told you last time that I am not doing any stupid exercises." Mr. Lee said, "As your supervisor, I am going to give you a choice. You can either go do the exercise like I asked you to or we will go see Raymond and we will let Raymond decide whether you are going to participate." Grievant responded, "That ain't no choice." Mr. Lee countered, "Your choice is you go do the exercise or you go see Raymond. What is your pick?" Grievant again said, "Ain't no choice." Mr. Lee again directed Grievant to participate or go see Mr. Prozzillo and Grievant again refused.

20. Mr. Lee then directly ordered Grievant to go see Mr. Prozzillo. Grievant turned away from Mr. Lee and simply gestured in a dismissive manner. Mr. Lee then said, "So you are not going to do what I just ordered you to do?" Grievant responded, "I ain't going nowhere and you can't make me."

21. At that point, Mr. Lee excused himself from the meeting, and told Grievant to wait there. Mr. Lee took a twenty to thirty-minute cooling off period, during which he went to the Division of Personnel to seek counsel from Acting Director Joe Smith and Mr. Wells. Grievant and Mr. Hill waited

in Mr. Hill's office.

22. Upon meeting with Mr. Smith and Mr. Wells, Mr. Lee conveyed the events that had just occurred. At that time, Mr. Wells left the meeting to inform security of a potential problem with Grievant. 23. Mr. Lee felt immediate action was necessary and that termination was appropriate at this time. Mr. Smith told Mr. Lee to give Grievant one more chance and to specifically tell him that: he was his supervisor; that as such, he was issuing a directive; that Grievant must follow that directive; that not following that lawful directive was insubordination; and that the consequences for insubordination would be dismissal.

24. Upon returning to the meeting place, Mr. Lee attempted to tell Grievant what his options were. Grievant continually interrupted Mr. Lee in a hostile, belligerent, and loud voice. After three interruptions, Mr. Lee was finally able to carry out the instructions given to him by Mr. Smith and Mr. Wells. Grievant's response to Mr. Lee's directive, was “Whatever.” Mr. Lee reiterated his directive to Grievant three times, to which Grievant responded each time, “Whatever.”

25. At this time, Mr. Lee felt he had exhausted his options, and informed Grievant he was dismissed, and asked him to leave the premises. Grievant refused to leave.

26. Mr. Lee told Grievant he could leave of his own accord, or he could be escorted out by security. Grievant responded, “Whatever.” Mr. Lee called security, and they escorted Grievant off the premises.

27. Only then did Grievant request to see Mr. Prozzillo. Security took him to see Mr. Prozzillo, but he was unavailable at that time. Grievant left before Mr. Prozzillo was available.

28. Grievant was terminated by Department of Administration Secretary Joseph Markus, by letter dated September 16, 1999, sent by certified mail. R. Ex. 1. The letterinformed Grievant he had an opportunity to respond to the charges against him. Grievant failed to do so.

DISCUSSION

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV- 569 (Jan. 20, 1990). State employees, such as Grievant, who are in the classified service (See footnote 4) can only be dismissed for “cause”, meaning “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." Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149, W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

Grievant has been charged with insubordination. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policyor directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989)(per curiam). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, privilege, and authority. . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Mgf. Co., 82 L.A. 1228 (Feb. 2, 1984)).

Grievant maintains that Mr. Lee's order to participate in team building training was not a lawful order, and that the State had no right to require Grievant to participate in training which, in his view, had nothing to do with the specifications and duties of his job as groundskeeper. This argument is

specious. There are many and varied dutiesexpected of every employee of the State of West Virginia, which, arguably, have nothing directly to do with the jobs certain employees perform. Grievant suggests that no other employee of the State was required to take this training. While it may be true that no other employees have been required to take the team training developed by Mr. Lee, the undersigned takes administrative notice that State employees are, and have been, required to participate in team building exercises as Total Quality Management training, sexual harassment training, diversity training, and other types of programs. Grievant was given the opportunity to participate in this training, and then to discuss his dislikes with Mr. Lee and/or Mr. Prozzillo at any time. Grievant failed to do that. Rather, he blatantly and willfully refused to obey a reasonable order of his superior: to participate in team building training, an exercise which in no way can be construed as harmful to Grievant's health and safety.

Grievant further argues that the dismissal should be mitigated, based on Grievant's 18 years of service with the State, and overall satisfactory work record. Certainly, 18 years of employment should be taken into account in a termination case. However, seniority can only carry so much weight. Mr. Smith and Mr. Wells, both seasoned Division of Personnel employees, considered seniority. They also personally like Grievant and counseled Mr. Lee to give Grievant multiple chances to save his job. Still, Grievant chose blatant insubordination. Mr. Prozzillo and Mr. Markus also considered Grievant's seniority in reaching the difficult decision to terminate, and were forced by Grievant's own actions to dismiss him. From start to finish, Grievant had nearly six weeks to consider his actions, and demonstrated no remorse and no intention of conforming with the training exercises. Therefore, the interests of the State must be considered as outweighing any mitigating factors claimed on behalf of Grievant. The impact of returning Grievant to the grounds crew must be considered. Mr. Lee and Mr. Smith indicated that Grievant's conduct essentially obliterated Mr. Lee's supervisory authority, which cannot be condoned .

CONCLUSIONS OF LAW

1. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive

that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

2. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). 3. Respondent has proven Grievant's actions in refusing to obey a reasonable and lawful order of Mr. Lee, his supervisor, constituted blatant insubordination and established just cause for dismissal.

4. Grievant has failed to show dismissal was too severe or arbitrary and capricious, and no mitigation is warranted in this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 16, 1999

Footnote: 1

Prior to coming to the State of West Virginia, Mr. Lee had extensive experience in supervision, personnel issues, and team building programs. Mr. Lee participated in and directed team building programs for the United States Army while in

the armed forces and for the fleet division of Wake County, North Carolina. Mr. Lee had approximately eighty (80) hours of civilian training in addition to his previous military training through seminars and coursework to prepare and implement such training.

Footnote: 2

Mr. Lee informed the grounds crew that he expected his employees to follow any legal direction that he gave them as their supervisor. Secretary Markus and Mr. Prozzillo indicated that a lawful directive of a supervisor is a condition of employment and must be followed by an employee. If an employee objects to a lawful order, Mr. Prozzillo indicated that the employee is expected to perform the order, but is welcome to discuss the situation with Mr. Prozzillo after completion of the task.

Footnote: 3

Grievant did not grieve this disciplinary action.

Footnote: 4

"Classified service" is defined by W. Va. Code § 29-6-2(g) as "an employee whose job satisfies the definition for 'class' and 'classify' and who is covered under the civil service system[.]"