JAMES A. JACKSON,

Grievant,

Docket No. 01-DOA-018

DEPARTMENT OF ADMINISTRATION/

PURCHASING DIVISION

Respondents.

D E C I S I O N

Grievant, James A. Jackson, filed this grievance on May 23, 2000, against his employer, the West Virginia Department of Administration/Purchasing Division ("PD"). His Statement of Grievance reads:

> **The Director of Purchasing suspended Mr. Jackson for three (3) days without pay because of reported insubordination to instructions to renew the systems furniture contract SYSFURN99. Mr. Jackson requested written authorization for contract renewal because he would not be in violation of Code of State Rules 148-1-10. Mr. Jackson is correct in his belief that the contract is being used in a manner to violate WV State Code 5A-3-3/5/10/11, Agency Purchasing Manual, Sections 6.1.3, Section 8.0 Formal Bid Process, Section 13.0 Specifications and any other sections of the WV State Code and Agency Purchasing Manual.**
>
> **The Director of Purchasing accused Mr[.] Jackson of making untruthful statements without any supporting documentation..(sic) No untruthful statements were made by Mr. Jackson.**
>
> **The Director of Purchasing accused Mr. Jackson of rejecting a Regional Jail Authority contract because of a personal dislike for a specific vendor. No untruthful statements were made by Mr. Jackson.**
>
> **RELIEF SOUGHT: The Director of Purchasing is to remove the three (3) day suspension; reinstate the 3 days of pay and benefits; and cleanse the personnel records of this allegation of Mr. Jackson.**
>
> **The Director of Purchasing is to provide a clearly written explanation for allowing state agencies to purchase non-systems furniture from the**

SYSFURN99 contract when non-system furniture is neither specified, nor competitively bid, nor evaluated in the SYSFURN99 contract.

The Director is to provide written documentation of Mr. Jackson's untruthful statements, if any.

The Director is to provide a detailed written account of Mr. Jackson's rejection of the Regional Jail Authority procurement documentation and provide specific individual names of persons who have accused Mr. Jackson of attempting to deny business to a specific vendor.

This grievance was denied at all lower levels. Grievant appealed to Level IV on January 25, 2001. A Level IV hearing was held on April 25, 2001. This case became mature for decision on May 24, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. **(See footnote 1)**

Issues and Arguments

Grievant received a suspension letter on May 3, 2000. While the key and significant reason for Grievant's suspension was the insubordination relating to the refusal to process the SYSFURN99 contract renewal, there were other issues relating to his suspension. The reasons listed in the letter are as follows: 1) Insubordination by refusing to renew the SYSFURN99 contract after being given a verbal order to do so; 2) Insubordination by refusing to renew the SYSFURN99 contract after being given a written order to do so; 3) Insubordination by refusing to comply with the directive of the March 31, 2000 letter to explain explicitly the "illegal actions" of PD in this contract renewal; and 4) violation of W. Va. Code § 6B-2-5(b) "Use of Public Office for Private Gain" in trying to obtain information about state license plates usage for an employee from another agency. This last behavior was also labeled as insubordination and gross misconduct. **(See footnote 2)** **Grievant argues he never expressly refused to carry out the directive of Respondent, but sought to express his concerns and to protect himself and his reputation through his actions. He states his concerns over the contract were real, and he was truthful in his responses to the license plate questions.**

After a detailed review of the record in its entirety, the undersigned Administrative Law

Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by the state for 27 years. Twenty-five of those years have been with PD, the last 15 as a Senior Buyer.

2. Harold "Curt" Curtiss is Grievant's immediate supervisor, and he is the Director of the Acquisitions and Contract Administration Section. Dave Tincher is the Director of the Purchasing Division.

3. During 1998, a contract for modular furniture containing multiple vendors was competitively bid. In late 1998 or early 1999, this contract, denoted as SYSFURN99, went through all the necessary steps for approval, including review by the Attorney General's office.

4. During 1999, Grievant wrote Mr. Curtiss about the problems he saw with the SYSFURN99 contract. Specifically, he believed there was a loophole in the contract allowing agencies to buy wood furniture without competitive bidding.

5. Mr. Curtiss noted the problem and stated the best way to resolve the issue would be at the end of the year when the contract was up for renewal. 6. On December 6, 1999, Mr. Curtiss directed Grievant to renew the SYSFURN99 contract.

7. On December 10, 1999, Grievant requested "written authorization to renew this contract."

8. Mr. Curtiss ignored this request because Buyers do not need written authorizations to process paperwork on a renewal. Buyers are not personally liable for the purchase orders they write, and they are not even required to sign them if they request not to do so.

9. Grievant wrote Mr. Curtiss on December 22, 1999, stating he had received no response to his request for written authorization, and stated "[b]ecause of numerous problems with the structure of the contract, the front office will be required to provide a written request to me to renew this contract. This action is necessary because the contract is deficient and not in the best interest of the State of West Virginia." Grievant went on to delineate the problem areas he saw with the contract.

10. Grievant also stated in this memo, "As you know, Dave Tincher will not

communicate with me and I do not have the authority to award or renew a contract. If he desires to have this contract renewed, I shall require his written directive to renew. As you are aware, I was accused of making an improper award decision in the IS&C presort mail contract. I will not be accused of making an improper renewal of this contract."

11. On December 29, 1999, Mr. Curtiss responded to Grievant's concerns by writing notes on Grievant's memo. He noted that the problems raised could be addressed upon contract renewal. 12. Toward the end of 1999, PD engaged in negotiations with the SYSFURN99 vendors to modify and restrict the contract. Grievant worked on the contract renewal, and approximately half of the vendors agreed to the modification. Two or three vendors did not want the modification, and they called Mr. Curtiss and/or Mr. Tincher to complain about the proposed modification.

13. In order to modify a competitively bid contract upon renewal, all vendors must agree to the changes. Some vendors did not agree to this change. (See footnote 3) Because all the vendors would not agree with the proposed modifications, the contract could not be changed.

14. The SYSFURN99 contract expired on or about January 1, 2000. Without this contract, agencies could not purchase office furniture. Several agencies called asking what they were to do for needed office furniture.

15. Mr. Curtiss went back to check on the status of the contract. He found out Grievant had taken no action, and directed him to renew the contract "as is." That same day Grievant again requested authorization in writing. In response to Grievant's request, Mr. Curtiss sent Grievant the following e-mail on February 18, 2000:

> **Please renew the sysfurn contract as is without limitation and restriction. It's just not worth the effort to fight this out with all four vendors. (See footnote 4) Since this is the last renewal, we can spend this year revising the specifications and place all the restrictions that we now are seeking without major scopechanges. (See footnote 5) I'm concerned also that we are making massive changes to the contract without bidding and the AG may balk. Let's proceed with a straight renewal with the contract as it is. We can[,] through state wide memorandum[,] require agencies to obtain letters from Surplus and PI.**

16. Grievant took no action on the SYSFURN99 contract after he received this e-mail because he believed the memo contained "double talk", was not clear, had no signature, and did not accept responsibility.

17. Grievant did not tell Mr. Curtiss he believed the e-mail was unclear, and that he would not take action to renew the contract.

18. Mr. Curtiss again checked on the status of the SYSFURN99 contract, and found out it had not been renewed. Grievant was again told to renew the contract.

19. Grievant responded to this oral directive with a letter dated February 29, 2000, to Mr. Curtiss. He maintained Mr. Curtiss's instruction to renew the contract without corrections was an "illegal action" and would result in "legal action." Grievant then went on to delineate the reasons he believed the contract was illegal, and the problems that could result. Grievant closed the letter noting he had attempted to correct the problems, but "it is apparent that Capitol Business Interiors has sufficient influence over a public official to cancel any effort to correct the error of this contract." (See footnote 6) **Grievant again requested a written directive.**

20. Mr. Curtiss did not respond to this letter because a written directive was not needed, and he believed his previous directives were clear. Grievant sent another copyof this letter to Mr. Curtiss on March 9, 2000, labeling it a "second request." Mr. Curtiss called Grievant into his office with his secretary as a witness, and informed Grievant his behavior was against the directives he had been given. He told Grievant he would be receiving a letter in a couple of days.

21. During a portion of this process, PD had been in consultation with the Division of Personnel for assistance on how to handle the failure of Grievant to respond to the various directives he was given.

22. On March 31, 2000, Mr. Curtiss wrote Grievant noting his refusal to comply with prior directives. Mr. Curtiss directed Grievant to supply written proof to support his allegations of wrongdoing and explain his refusals to follow Mr. Curtiss's direction to renew the contract. Specifically, Grievant was to explain why Mr. Curtiss's "clear directive was and is illegal and why your refusals to follow the directive should not be considered blatant insubordination on your part."

23. The March 31, 2000 letter noted Grievant had attempted to arrange a meeting with Governor's Underwood's Chief of Staff to discuss the SYSFURN99 contract, and that he was without authority to take this action. The letter also noted Grievant had apparently refused to approve a contract for the Regional Jail Authority because Capitol Business was to be used

as a subcontractor. Several other issues were noted in this letter, and Grievant was asked to respond to them in writing. Grievant was directed to renew the SYSFURN99 statewide contract by April 7, 2000.

24. Grievant renewed the SYSFURN99 contract by this date. Grievant was not required to sign this paperwork, and it was signed by Mr. Curtiss. 25. By letter dated April 7, 2000, Grievant also supplied some of the requested information. His responses about the legality of the contract were labeled as his "opinion." Grievant also stated his belief that "Capitol Business Interiors was dictating the terms and conditions of the procurement of furniture for the entire state of West Virginia."

26. By letter dated May 3, 2000, Grievant was suspended for three days from May 15 through 17, 2000. As a courtesy, Grievant was allowed to take his suspension at this time as a conference was planned and many people would be out of the office.

27. In February 2000, Grievant was asked by an employee in the State Fire Marshall's Office to obtain information about PD's state license plates and their usage This employee believed there might to problems with PD's state plates. Grievant asked a runner from the PD Fleet Division to get him this data. Grievant believed the employee from the State Fire Marshall's Office would use this information to create difficulties for the Purchasing Division. Mr. Tincher found out about the request, came to Grievant's office, and directed him to stay out of the business of the other Sections.

28. Grievant was truthful about the individual who requested this information, even though this employee denied making this request of Grievant.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't ofHealth, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the

evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good 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. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982). Although Grievant was not terminated, this factor will be considered given that Grievant has been employed by the State for twenty-seven years.

In Grievant's suspension letter, he was charged with insubordination. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willfuldisregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This view of insubordination is consistent with the treatment accorded to insubordination by arbitrators in the private sector. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1984) (Holley, Arb.). There, Arbitrator Holley noted:

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.

Burton, supra, at 1234 (citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974)).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin., 36 M.S.P.R. 374 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisorypersonnel which undermines their status, prestige, and authority. . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Mfg. Co., supra). There are few defenses to the charge of insubordination. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997); See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, what an employer must demonstrate to substantiate insubordination, is that the employee was given an order, directive, or rule, which did not entail unnecessary physical risk to himself or other employees, and the employee failed to comply. Hundley, supra. If an employee wishes to question the legality of an order he must do so after compliance. See Surber, supra.

PD, through documentary evidence and the testimony of witnesses has proven the charge of insubordination. Indeed, Grievant's own testimony supports the charge. Grievant was told to renew the SYSFURN99 contract. This instruction was clear. Further, there was no need for PD to supply Grievant with a "written directive" as he demanded. It is noted employees are seldom in a position to demand that their supervisors do something that is not required. Since Grievant was not liable for this renewal, and he did not need to sign the document, there should have been no problem with completing this paperwork as directed. However, Mr. Curtiss did supply Grievant with a "written directive" on February 18, 2000, when he sent the e-mail directing Grievant to renew the contract. Grievant's complaints that the memo was unclear and unsigned are without merit.

Clearly, Grievant believed PD's decision to renew the contract "as is" was incorrect, but this was not his decision to make. It was certainly appropriate for Grievant to informhis supervisor of his concerns, but having concerns is no reason to fail to comply with a directive, that did not entail unnecessary physical risk to himself or other employees. Hundley, supra.

Grievant makes much of the fact that he never said, "I will not renew the contract," and appears to believe that without this direct refusal there can be no insubordination. This is incorrect. Insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer." Sexton, supra. Respondent has demonstrated Grievant was given a directive and engaged in insubordination when he did not complete the assigned task. An employer has the right to expect subordinate personnel to respect supervisory personnel and to not ignore clear instructions. McKinney, supra; Reynolds, supra.

On the secondary issue of whether Grievant was insubordinate or engaged in gross misconduct when seeking information about the state license plates, the undersigned Administrative Law Judge finds Grievant took action he believed would create problems for his employer, but these actions did not rise to the level of insubordination or gross misconduct. (See footnote 7)

While Grievant is a long term employee, PD has demonstrated “good cause” for the three-day suspension of Grievant, as the misconduct was "of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequentialmatters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes, supra; Guine, supra.

Additionally, "[c]onsiderable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

In assessing the above-cited factors and considering the proper standard of review, the undersigned Administrative Law Judge cannot find this disciplinary action is "so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." Overbee, supra. Accordingly, the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested factis more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. The offense of 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 Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

3. Insubordination includes "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).

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

5. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

6. 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). 7. Respondent has proven Grievant was insubordinate when he failed to follow a clearly given directive to renew the SYSFURN99 contract.

8. Respondent has not proven Grievant was insubordinate or engaged in gross misconduct when he sought the state license plate information.

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, 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. Theappealing 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 13, 2000

Footnote: 1

Grievant was represented by Representative Fred Tucker from the United Mine Workers of America, and Respondent PD was represented by attorney Heather Connolly.

Footnote: 2

The evidence submitted by both parties on this issue was quite limited.

Footnote: 3

The number of vendors who did not agree with the contract change varied throughout the testimony.

Footnote: 4

It appears Mr. Curtiss was referring to the complaining vendors.

Footnote: 5

This statement was incorrect. There were two more years remaining on the contract.

Footnote: 6

Grievant was referring to Mr. Tincher.

Footnote: 7

As stated in the Findings of Fact, the undersigned Administrative Law Judge did not find Grievant to be untruthful in this matter.