MONICA COGLE,

Grievant,

v. **Docket No. 01-HHR-325**

DEPARTMENT OF HEALTH and HUMAN RESOURCES,

Respondent.

D E C I S I O N

Grievant, Monica Cogle, employed by the Department of Health and Human Resources (DHHR or Respondent) as a Protective Service Worker, filed a grievance directly to level four on May 15, 2001, following her dismissal. Grievant seeks reinstatement, back pay, assurance that her character and integrity both professionally and personally will not be tarnished in any way within or outside the State of West Virginia, and attorney fees. A level four hearing was conducted in the Grievance Board's Morgantown office on July 27, 2001, at which time Grievant was represented by Christopher D. Janelle, Esq., and DHHR was represented by Assistant Attorney General B. Allen Campbell. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 27, 2001.

The following findings of fact are made from the evidence submitted at level four.

Findings of Fact

1. Grievant has been employed by DHHR as a Protective Service Worker since June 16, 1997. 2. On January 22, 2001, Grievant was assigned a referral for R.B., a sixteen year-old girl who had been sexually abused by her stepfather approximately three years earlier.

3. After finding that R.B. did not wish to speak with her, Grievant continued her investigation with R.B.'s mother and stepfather. Grievant substantiated the reported sexual abuse, and completed an “Initial Assessment and Safety Evaluation Worksheet and Conclusion,” which indicated the risk based on family problems to be in the “significant” category.

4. Grievant advised her supervisor that she did not wish to file a petition seeking custody of R.B. because the family was dealing with the situation in its own way. Specifically, R.B. was out of

the environment, living with her maternal grandmother next door, and because the stepfather was receiving counseling. Because his counselor was also a DHHR employee, further involvement by DHHR would require the counselor-patient relationship be discontinued.

5. After conferring with counsel, Leslie Allen, Child Protective Service Supervisor, directed Grievant to file the petition. Grievant again expressed her disagreement, but filed the petition on February 26, 2001.

6. At a preliminary hearing conducted in the Circuit Court of Berkeley County on March 29, 2001, Grievant testified as follows:

Q: Do you have an opinion as to whether or not this petition should go forward?

* * *

A: As a representative of the Department or as my professional opinion?

Q: Upon your investigation of all the facts and circumstances of this case, do you, sitting here today, in any capacity, have an opinion about whether this case should go forward?

A: I do not feel the case should go forward.

7. By letter dated March 30, 2001, Christopher C. Quasebarth, Assistant Prosecuting Attorney of Berkeley County, notified Fred Boothe, Commissioner of the Bureau for Families and Children, of Grievant's testimony, and expressed his concern that the testimony was contradictory to the DHHR's position, and appeared to place the welfare of the stepfather over that of the victim.

8. Ms. Allen and Kathryn Boylan, Community Services Manager and Grievant's second level supervisor, met with Grievant on or about April 3, 2001. Grievant again stated that she had a conflict, but had testified truthfully. The supervisors reminded Grievant that she was to represent DHHR, and not present her personal opinions in court proceedings. Grievant was advised at that time to consider their conversation a verbal warning.

9. Upon reviewing the incident, Region III Director John Hammer determined that Grievant's actions were so egregious as to constitute insubordination and abridgement of her responsibilities, warranting dismissal.

10. Grievant's employment with DHHR was terminated effective May 3, 200l.

Discussion

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dep't of Health& Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

State employees, such as Grievant, who are in the classified service 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. 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); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 2000).

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). Where an employee has justifiably misunderstood or misinterpreted a superior'sinstruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to establish insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998), citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991).

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. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker

v. W. Va. Dep't 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). "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. 574 (1988)). "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first[,] and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997): See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, supra. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, supra.

Respondent argues that Grievant had received specific training on the difference between giving a personal opinion, and presenting the position of DHHR in legalproceedings. Having that training, Respondent asserts that Grievant engaged in insubordination when she made her stance known to opposing counsel prior to the hearing, and went so far during the proceedings as to provoke the question of what was her personal opinion. Given Grievant's action in this instance, Respondent concluded that her commitment to protect children could no longer be trusted.

Grievant denies that she engaged in insubordination, and argues that she was bound by ethical obligation to exercise independent judgment, and to testify truthfully at the hearing. Because she had determined that the family was dealing with the issue in a healthy and appropriate manner, and further action by DHHR would be disruptive to R.B.'s healing process, she had no choice but to state that she opposed the petition. Specifically, Grievant relies upon the Social Workers Code of Ethics, Section 4.04, “social workers should not participate in, condone, or be associated with dishonesty, fraud, or deception,” and Section 3.09(d), “social workers should not allow an employing organization's policies, procedures, regulations, or administrative orders to interfere with their ethical practice of social work.”

Grievant does not deny that she was aware of DHHR's position in the R.B. case, or that she presented her personal opinion, which was contrary to that of her employer, during court proceedings. While Grievant clearly believes she acted in compliance with the Social Workers' Code of Ethics, as an employee, her failure to represent the position of DHHR constitutes insubordination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

2. State employees, such as Grievant, who are in the classified service 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. 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); W. Va. Code §29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 2000).

3. 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).

4. 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).

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

6. 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. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

7. The employer can meet its burden by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

8. DHHR has proven by a preponderance of the evidence that Grievant's failure to present the Agency's position during court proceedings was willful and intentional, and thus constituted insubordination, warranting dismissal.

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 §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 5, 2001 _____

Sue Keller

Senior Administrative Law Judge