CHARLES D. BOURNE,

Grievant,

v. **Docket No. 00-T&R-171**

WEST VIRGINIA DEPARTMENT OF TAX & REVENUE/

WEST VIRGINIA LOTTERY COMMISSION,

Respondent.

D E C I S I O N

Grievant, Charles D. Bourne, employed by the West Virginia Department of Tax and Revenue/ West Virginia Lottery (Respondent) as an Investigator II, filed a grievance directly to level four, as is permitted by W. Va. Code §29-6A-4(c), on June 9, 2000, following notification of his dismissal. Grievant requests reinstatement with back pay, attorney fees, and costs. Following a number of continuances, an evidentiary hearing was conducted in the Grievance Board's Wheeling office on December 13, 2000. The matter became mature for hearing with the submission of Grievant's final post-hearing filings on February 7, 2001.

The essential facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant was initially employed by Respondent effective January 1, 1998, and held the classification of Investigator II, until his dismissal on June 1, 2000.

2. Respondent employs six Investigators to monitor Lottery security and licensing interests throughout the state. Four of the Investigators are assigned to theCharleston office, and two are assigned to the State's panhandle regions. Doug Fletcher works in the Eastern Panhandle at the Charles Town Race Track, and Grievant was assigned to the Northern Panhandle and worked out of his home, primarily covering a seven county region, including the Mountaineer Park and Wheeling Downs racetracks.

3. In late October or early November 1999, Grievant contacted Terri Martin, Administrative

Services Assistant, to inquire about a leave of absence to allow him to run for political office. Ms. Martin advised him of changes in benefits, etc. When Grievant inquired regarding returning to work, Ms. Martin specifically stated that he would be guaranteed a position of comparable pay and duties, but that he could be reassigned to the Charleston office.

4. Grievant subsequently requested, and received, an unpaid leave of absence to run for the position of Magistrate. The leave became effective the day Grievant filed as a candidate, January 28, 2000, and was to expire on May 9, 2000, if Grievant lost the primary election, or on November 7, 2000, if he should win the primary, but lose the general election.

5. By letter dated February 18, 2000, Lottery Director, John C. Musgrave, notified Grievant that in compliance with his request, a letter of reprimand issued by Deputy Director Alvin Rose on October 28, 1999, was removed from his personnel record and destroyed.

6. The letter of reprimand had been issued after Grievant declined to work on a Saturday based upon his recent conversion to the Seventh Day Adventist church, which observes Sabbath from sundown Friday to sundown Saturday. 7. The job description for Investigator II developed by the Division of Personnel provides that “[e]mployee is subject to on-call status during non-business hours,” and Mr. Rose was unaware of Grievant's change in religious status when an employee was needed for an emergency in October 1999. Since Grievant was the sole employee assigned to the Northern Panhandle, the closest co-worker was 180 miles away.

8. Grievant lost the May 9, 2000 primary election.

9. Grievant reported to Respondent's Charleston office on May 10, 2000, to collect his state car and work related paraphanalia. At this time he was advised that his assignment had been changed from Wheeling to Charleston. Grievant verbally declined the transfer and commented that they “would see just who had the most political power.”

10. Grievant subsequently sought assistance from Robin Capehart, then Secretary of Tax & Revenue, and Director Musgrave's supervisor; however, Secretary Capehart declined to intercede in the matter.

11. On May 11, 2000, Grievant telephoned Respondent's Charleston office and notified secretary Patricia Johnson that he would not come to Charleston as directed, but was at his home field office ready to work.

12. By letter dated May 12, 2000, Director Musgrave notified Grievant that effective June 1,

2000, his official headquarters would be in Charleston, explaining in part,

The Lottery had no way to know whether you would ever return to work once you were on personal leave, and there were no co-workers in your region of the State to fill in for you up to the potential ten months of your candidacy for elective office. Your area of service at the time of your personal leave of absence included both Mountaineer Park and Wheeling Downs racetracks where over two thousand video lottery terminals are now in operation and where those numbers of video lottery terminals are projected to increase. Because ofyour unavailability, it was necessary for the security and integrity of the video gaming system to post a new position for Investigator II to meet the needs of the Lottery in the northern geographical area. Once that job was filled, your Investigator II position was reassigned to Lottery headquarters as are most of the other Investigator II positions.

Grievant was further advised in this letter that if he refused to report to work in Charleston on June 1, 2000, the Director would have no choice but to dismiss him from employment with the State.

13. Grievant failed to report to work in Charleston on June 1, 2000.

14. Director Musgrave notified Grievant by letter dated June 2, 2000, that he was dismissed from his position effective June 19, 2000, as a result of his insubordination as demonstrated by his failure to report for work as scheduled on June 1, 2000.

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).

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 employermust 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).

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.

Grievant concedes that he refused to report to work in Charleston as directed, but argues that the transfer of his work location halfway across the state was so intolerable itshould be considered a "constructive discharge." In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause him to quit. Slack v. Kanawha County Housing, 188 W. Va. 144, 423 S.E.2d 547 (1992); Preece v. Public Service Comm'n, Docket No. 94-PSC-246 (Apr. 25, 1997); Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

When determining whether an employee was subject to constructive dismissal, the surrounding circumstances must be examined in order to measure the ability of the employee to exercise free choice. McClung v. W. Va. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989); See Adkins v. Civil Service Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled not to report to work. Bristow v. Daily

Press, Inc., 770 F.2d 1251 (4th Cir. 1985). See J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W. Va. 1986). A grievant alleging a constructive discharge or demotion has the burden of proving his or her allegations by a preponderance of the evidence. McClung, supra. See Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

Grievant argues that to accept the transfer would have required that he leave his "almost $400,000.00 worth of [real] property", have his wife abandon a thirty-plus year career at the Ohio Valley Medical Center, and withdraw his child from college. While these are very dramatic personal choices which were available to Grievant, it does not mean thatthey were the only choices, or that the working conditions were intolerable such that a reasonable person would be compelled to abandon his position. Grievant could have elected to work in Charleston during the week. While perhaps not the optimal situation, Grievant's family would not have been disrupted, and he could have remained employed until another opportunity was available to him. By his own actions and comments, Grievant made it perfectly clear that he would work no where other than Wheeling, and believed that he had the political clout to enforce that desire. When Secretary Capehart did not intervene on his behalf, Grievant knowingly and willingly refused to report to work as directed. Grievant has failed to prove constructive dismissal.

Grievant also relies upon Division of Personnel Administrative Rule, Section 15.8(d)(1), which states, "[a]t the expiration of a leave of absence without pay, the employee shall be returned to duty to either his or her former position, or one of comparable pay and duties, without loss of rights, unless the position is no longer available due to a reduction in force." Grievant's claim that he suffered a loss of rights is without support because a State employee has no right to be assigned to any particular location.

A state agency is permitted to transfer an employee from one geographic location to another, within the same agency, at any time. Sharifpour v. Div. of Trans., Docket No. 99- DOH-089 (July 28, 1999).

The West Virginia Division of Personnel (DOP) Administrative Rule, Section 11.06(a) states:

Appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational sub-division of the same or another agency at any time. In the case of inter-agencytransfers, annual and sick leave and all seniority rights shall be transferred with the employee.

The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Resources, Docket No. 96-HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Serv., Docket No. 91-DHS-111 (May 31, 1991). No particular justification for such a transfer is required under DOP's rule. Therefore, pursuant to the provisions of this rule, Respondent had no obligation to retain an employee in an area where one was not needed.

Grievant also proposes that the transfer creates a chilling effect upon the Constitutional rights of a State employee to run for political office. In support of this claim, he states that had he known for certain that he would be transferred upon his return to work, he would have never run for office. This claim is totally without merit. By his own admission, Grievant was aware of the possibility that he could be transferred upon his return to work, he simply chose to ignore it. After granting a leave of absence, Respondent was required to continue the State's business. In this case, it meant that an employee had to be assigned to a geographic area which is served by one employee. Thus, at the time the leave of absence ended, the position previously held by Grievant was no longer available, and a transfer was implemented. Grievant argues that Respondent could haveallowed him to remain in Wheeling anyway. Respondent has no such obligation, and would be remiss if it conducted business in a manner which was less than efficient. (See footnote 1)

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 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).

2. 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 ofinsubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

3. Respondent has proven by a preponderance of the evidence that Grievant engaged in insubordination when he refused to report to work as directed at the end of a leave of absence.

4. A grievant alleging a constructive discharge or demotion has the burden of proving his or her allegations by a preponderance of the evidence. McClung, supra. See Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

5. In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Slack v. Kanawha County Housing, 188 W. Va. 144, 423 S.E.2d 547 (1992).

6. Grievant has failed to prove by a preponderance of the evidence that his working conditions were so intolerable that a reasonable person would refuse to report to work.

7. Grievant has failed to prove by a preponderance of the evidence that he was constructively discharged from employment.

Accordingly, the 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: February 27, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Respondent advertised four Accountant/Auditor II positions in November 2000, one of which would be assigned to the Wheeling area; however, Grievant was not qualified for the position.