MANUEL A. VELEZ,

Grievant,

v. **Docket No. 00-HE-354**

INTERIM GOVERNING BOARD/WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Manuel A. Velez, employed by the Interim Governing Board as a tenured Professor of Oral Medicine and Supervising Dentist at West Liberty State College (WLSC or Respondent), filed a level four grievance appeal on November 13, 2000, in which he included the following grievance statement:

Pursuant to WV Code 18-29-1, I wish to file a grievance for grievable acts committed by a college administrator for deprivation of liberty interests in violation of the Fourteenth Amendment. I seek relief under section 1983, and removal of all letters of reprimand for insubordination from my personnel file.

For relief, Grievant "seeks vindication of his constitutional rights, as well as the removal of all letters of reprimand from his personnel file." (See footnote 1)

Because the record included two level two decisions, a conference call was conducted to clarify the issues. (See footnote 2) Subsequently, Grievant filed A Motion To Amend his complaint, including a charge of reprisal. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on February 26 and March 28, 2001, at which time Grievant appeared pro se, and Respondent was represented by Assistant AttorneyGeneral Beth Ann Rauer. The matter became mature for decision upon receipt of Respondent's response to Grievant's proposed findings of fact and conclusions of law on May 17, 2001.

The following facts have been derived from the record in its entirety, including the level two transcripts with exhibits, and the evidence adduced at level four.

Findings of Fact

1. Grievant has been employed by West Liberty State College since 1989. He received tenure in 1995, and presently holds a dual assignment as a full professor in the School of Sciences,

Department of Health Sciences, and serves as the Supervising Dentist of the Dental Hygiene Program. Additionally, Grievant provides care to indigent patients and coaches a girls' basketball team to fulfill his service obligation, and moonlights as a private dentist when his time is not obligated to Respondent.

2. On April 10, 2000, Grievant became aware that another employee had made comments of a sexual nature regarding him. With a third party as a witness, Grievant confronted the employee who admitted to making the comment, as well as earlier statements. Grievant asked her to stop the behavior, and the conversation ended with both parties becoming upset.

3. Dr. Donna Lukich, Chair of the Department of Health Sciences, became aware of the incident, and interviewed a number of individuals, concluding with Grievant.

4. Grievant was upset with the tone of the meeting, and interpreted the comments made by Dr. Lukich during their meeting to be “biased, prejudicial, opinionated, and sexist,” in effect, placing blame on him for the situation. Consequently, Grievant filed a gender complaint against the Chair on or about April 25, 2000. 5. While the investigation of the gender complaint was pending, Dr. Lukich granted Grievant's request to have a third party present during their meetings. Grievant was not advised when, or if, this right would expire.

6. On May 24, 2000, Brian Warmuth, Respondent's Director of Human Resources, filed a report concluding there was no evidence of gender discrimination by Dr. Lukich in her interaction with Grievant.

7. H. Andrew Cook, Dean of the School of Sciences at WLSC, held a faculty meeting on August 17, 2000. Each school is required to hold this meeting pursuant to Policy No. 205.

8. Grievant left a message on Dr. Cook's office answering machine on August 16, 2000, stating that he would not be attending the school-wide faculty meeting on August 17, 2000.

9. By memorandum dated September 15, 2000, Dr. Lukich advised Grievant that he would no longer be allowed to bring a third party witness to their meetings, but that he would be permitted to use a tape recorder to memorialize their conversations.

10. On September 22, 2000, Grievant arrived for his initial faculty performance planning meeting with a third party witness. Dr. Lukich declined to conduct the meeting with the witness present.

11. Dr. Lukich rescheduled the meeting for October 2, 2000. Although she did not contact

Grievant to confirm his availability, her letter directed that he should contact her if he had any questions.

12. Grievant did not attend the meeting on October 2, 2000, and did not advise Dr. Lukich that he would not be attending. 13. Dr. Lukich issued Grievant a letter of reprimand dated October 3, 2000, citing him with insubordination for refusing to attend his performance planning meeting scheduled for September 22, and October 2, 2000, without a third party present.

14. Grievant's performance planning meeting was scheduled a third time for October 6, 2000, at 11:30 a.m. Grievant called Dr. Lukich at 11:45 a.m. and advised her that he would not appear without a third party witness.

15. On October 9, 2000, Grievant failed to attend an Academic Advisor meeting with the Registrar. By memo of that date, Grievant advised the Registrar that he had a previously scheduled appointment and asked if another department would be scheduling a similar meeting at a time other than noon.

16. Dr. Lukich advised Grievant by letter dated October 12, 2000, that his absence from the Registrar's meeting was in violation of Policy No. 218.

17. Grievant failed to attend a Department of Health Sciences meeting on October 26, 2000, at 4:00 p.m.

18. Dr. Lukich inquired regarding Grievant's absence, leaving a message on his voice mail. Grievant then left a message on her voice mail, stating that he would respond when her request was put in writing. Dr. Lukich sent a letter to Grievant, dated October 31, 2000, notifying him that his failure to request to be excused and absence from the meetings on August 17, October 9, and October 26, 2000, were in violation of Policy No. 218.

19. Grievant responded on November 2, 2000, stating that the noon hour was his time, and any meeting scheduled during that hour, or after 4:00 p.m., would be his option to attend.

20. Dr. Lukich issued a second letter of reprimand on November 13, 2000, charging Grievant with insubordination for his failure to attend departmental meetings on October 9 and 26, and a school meeting on August 17, 2000, as was required by Policy No. 218.

21. Grievant filed grievances on October 4, 6, 14, and 15, 2000.

Discussion

Because Grievant does not dispute the contents of the letters of reprimand, and presents his

complaint as a violation of his Constitutional rights, and reprisal, this matter is not disciplinary in nature. When a complaint does not involve a disciplinary action, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Grievant argues that the Fourteenth Amendment to the United States Constitution guarantees his right to liberty, which he interprets to include the right to have a third party witness present for his meetings with Dr. Lukich. He further argues that the letters of reprimand were reprisal for his attempts to exercise his Constitutional right. Respondent asserts that Grievant has no right to a witness in matters which are not disciplinary in nature, and denies that the letters constituted reprisal. On the contrary, Respondent argues that the letters were a form of discipline imposed when Grievant failed to complete his responsibilities as a faculty member. Grievant's claim of a liberty interest is grounded in the due process clauses of the United States Constitution, and the West Virginia Constitution, which prohibit deprivation of a person's life, liberty or property without due process of law. U.S. Const., Amendment XIV; W. Va. Const., Art. III, Sec. 10. However, Grievant's perceptions regarding his Constitutional rights are overly broad, and misapplied in this situation. While employees of institutions of higher education hold a liberty interest in their employment, it has been defined by the West Virginia Supreme Court of Appeals as "the interest an individual has in being free to move about, live and work at his chosen vocation without the burden of an unjustified label of infamy." Syl. Pt. 2, in part, Waite v. Civil Serv. Comm'n, 161 W. Va. 159, 241 S.E.2d 164, 167 (1978); and See Bd. of Regents v. Roth, 408 U.S. 564 (1972); Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996). Respondent has not acted to deprive Grievant of his liberty right under this definition.

Grievant's expressed concern for his job security is the basis for the requested presence of a witness. Respondent allows witnesses when investigations are pending or in matters which are disciplinary in nature, but does not do so as a daily routine or by custom. Dr. Lukich and Provost John McCullough testified that there are several reasons why witnesses are not customarily used on a daily basis, but primarily, it makes scheduling meetings more difficult, and interferes with the free-flow of communication between two individuals.

While Grievant enjoys many rights, he cannot dictate procedural requirements to his employer for

day to day interactions with coworkers. The evidence of record does not support a finding that Grievant's employment was in any way jeopardized by his April meeting with Dr. Lukich. Further, she has advised him that he may tape record theirmeetings which would provide an accurate account of the proceedings. Grievant's insistance on a witness indicates an attitude of independence, or exemption from daily procedure, and is not a necessary protective measure. In any event, it is concluded that Grievant's interest in retaining a witness for his conversations with his supervisor simply does not rise to the level of a liberty right. See generally Bd. v. Roth, supra; Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).

Next, it must be determined whether the letters of reprimand were in fact reprisal for Grievant having filed grievances. Reprisal is defined by W. Va. Code §18-29-2(p) as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19,1994). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). A grievant may then show the stated reason(s) to be pretextual.

Grievant filed level one grievance forms dated October 4, October 6, October 14, October 15, 2000. The first letter of reprimand was dated October 3, 2000, and while Grievant did not receive it until October 4, 2000, it could not have been drafted as an act of reprisal. The second disciplinary letter was issued on November 13, 2000, less than one month following Grievant's last complaint. Because Dr. Lukich was aware that Grievant had filed grievances, and the letter was issued less than a month later, Grievant has established a prima facie case of reprisal regarding the November 2000 letter.

Respondent argues that the letters of reprimand were not retaliatory, but were disciplinary measures taken when Grievant engaged in insubordination, demonstrated by his failure to attend meetings. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Educ., 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)."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).

Further, an employees' belief that management's decisions are incorrect or the result of incompetence, 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. Dept. 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, supra, (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 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)). 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).

Respondent's Policy 214, “Faculty Evaluation,” requires that each faculty member meet with the department chair to set the year's merit/evaluation performance factors. The individual Faculty Performance Planning Documents are to be completed, approved by the school Dean, and submitted to the Vice President for Academic Services by the end of September. Respondent's Policy 218, “Required Attendance,” provides that faculty attendance is required for “classes/laboratories/clinics (for the full scheduled time), office hours, official committees, college/school/department/program meetings, and commencement exercises.” Absences may be granted by the Chair, or School Dean for valid reasons; however, the faculty member is to notify the Chair in advance, and in writing.

Respondent's Policy 205, “Academic Unit Meetings, Minutes & Personnel Procedures,” requires that “[e]ach School shall meet, as a minimum, in formal session, at the beginning of each academic year, as designated in the opening week calendar.”

Grievant admits that he did not attend each of the meetings cited by Dr. Lukich, but asserts that the reasons are pretextual for the following reasons:

-August 17, 2000 - Grievant transported his son to West Virginia University, and had left a message to that effect on Dean Cook's voice mail.

-September 22, 2000- Grievant arrived at the meeting but Dr. Lukich refused to proceed with a third party witness.

-October 2, 2000-Grievant asserts that his schedule did not permit him to attend the meeting since he was assigned to work in the clinic. Further, he would have brought a witness, and Dr. Lukich would have likely not met with them. Grievant concedes that he should have made a courtesy call to the chair, but asserts that his lack of good judgment does not constitute insubordination.

-October 9, 2000-Grievant states that a student stopped at his office with questions regarding a career in dentistry, and he believed his first obligation was to provide the student with requested information. -October 26, 2000-Grievant refused to attend the meeting because it was scheduled after his work day had concluded, and he was working in his private practice.

Grievant has failed to prove the reasons for the letters of reprimand are pretextual. Not only does he admit that he did not attend the meetings which are required by Policy, but the explanations he provides for his absences are specious, at best. As a faculty member, Grievant's first obligations are to Respondent, and his refusal to comply with reasonable directives, including attending meetings,

constitutes insubordination. Grievant's claim that the lunch hour and after four o'clock p.m. are his personal time, is inaccurate. It is entirely reasonable that meetings be scheduled at noon or at four o'clock in an academic setting, and Grievant is free to pursue his private practice only after his academic duties are fulfilled. Further, he failed to timely, or properly, request that he be excused from attending meetings. In conclusion, Grievant failed to prove that Respondent engaged in reprisal.

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. When a complaint does not involve a disciplinary action, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v.McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. Employees of institutions of higher education hold a liberty interest in their employment, defined by the West Virginia Supreme Court of Appeals as "the interest an individual has in being free to move about, live and work at his chosen vocation without the burden of an unjustified label of infamy." Waite v. Civil Serv. Comm'n, 161 W. Va. 159, 241 S.E.2d 164, 167 (1978). See Bd. of Regents v. Roth, 408 U.S. 564 (1972).

3. Grievant failed to prove that his desire to have a third party witness present for all meetings with his supervisor is a Constitutional right, or that Respondent has otherwise deprived him of his liberty interest.

4. Reprisal is defined by W. Va. Code §18-29-2(p) as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.”

5. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fasce v. Bd. of Directors, Docket No. 94-BOD-1072 (Sept. 13, 1995); Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994).

6. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Connor, supra. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Grievant may then show the proffered reason to be pretextual.

7. Grievant failed to prove the October 3, 2000 letter of reprimand was an act of reprisal.

8. Grievant has established a prima facie case of reprisal by showing that the November 2000 letter of reprimand was issued within close proximity to his filing of several grievances.

9. Insubordination includes the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Educ., Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). An employees' belief that management's decisions are incorrect or the result of incompetence, 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. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). The employee must comply with the directive, and then file a grievance.

10. 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).

11. Respondent has proven that Grievant engaged in insubordination, providing a legitimate reason for issuing the letters of reprimand, and rebutting the presumption of reprisal.

12. Grievant failed to prove that the reason given by Respondent for the November 2000 letter of reprimand was pretextual.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and StateEmployees 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.

Date: June 18, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Initially, Grievant filed at least five grievances, which were consolidated into two grievances at level two, and were appealed to level four as one complaint.

Footnote: 2

The parties agreed to waive review at level one, and both decisions denied Grievant's claims at level two.