JANET BUTLER,

Grievant,

v.

DOCKET NO. 02-DOH-056

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Janet Butler, filed this grievance against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on October 3, 2000, alleging "discrimination (based on gender)/reprisal/harassment/retaliation," resulting from five-day and ten-day suspensions she received following events on May 11 and June 6, 2000, respectively. Grievant seeks to be made whole.

The grievance was denied at levels one and two, and a level three hearing was held on February 13, October 11, and December 13, 2001. Grievance Evaluator Brenda Craig Ellis recommended denial of the grievance by a decision dated February 26, 2002, and her recommendation was accepted by Jerry Bird, Assistant to the Commissioner, on February 26, 2002. Grievant appealed to level four on March 8, 2002. The grievance was set for hearing, but the parties ultimately agreed to submit the case on the record developed at the lower levels of the grievance procedure, and this matter became mature for decision on June 28, 2002, the deadline for the parties' submission of proposed findings of fact andconclusions of law. Grievant was represented by Mr. Kelly Rice, and DOH was represented at level three by Nedra Koval, Esq., and at level four by Barbara L. Baxter, Esq.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

WVESEGB Decision, Butler v. W. Va. Dept. of Transp., Docket No. 99-DOH- 084 (May 13, 1999).

Ex. 2 -

WVDOT/DOH Scheduled Overtime Policy-County Maintenance Organizations.

Ex. 3 -

June 28, 1999 letter from Krista L. Duncan to Sheila Garretson.

Ex. 4 -

WVDOT Equal Employment Opportunity Policy Statement.

Ex. 5 -

WVDOT Sexual Harassment Policy Statement.

Ex. 6 -

Sexual harassment briefing statement.

Ex. 7 -

December 12, 1999 memorandum from Paul Reese re: crew leader training.

Ex. 8 -

Notice of attendees to crew leader training course.

Ex. 9 -

WVDOH Employee's Verification of Disciplinary Action, dated June 23, 2000.

Ex. 10 -

WVDOH Notice to Employee of Disciplinary Action, dated January 28, 2000.

Ex. 11 -

WVDOT Payroll Transaction Form.

Ex. 12 -

February 22, 2000 letter from James E. Roten, Jr. to Janet E. Butler.

Ex. 13 -

WVDOT Request for Payroll Correction, dated March 7, 2000.

Ex. 14 -

Payroll Time Sheet Summary for Janet Butler, dated March 7, 2000.

Ex. 15 -

Samples of Protective Wear.

Ex. 16 -

WVDOH Notice to Employee of Disciplinary Action, dated May 22, 2000.

Ex. 17 -

Handwritten Statement of Lynn Tanner.

Ex. 18 -

Handwritten Statement of John Shaffer.

Ex. 20 -

May 22, 2000 memorandum to Janet Butler.

Ex. 21 -

August 10, 2000 letter from Jeff Black to Janet Butler.

Ex. 22 -

August 17, 2000 letter from Jeff Black to Janet Butler.

Ex. 23 -

WVDOH Employee's Verification of Disciplinary Action, dated October 12, 2000.

Ex. 24 -

WVDOH Notice to Employee of Disciplinary Action, dated June 7, 2000.

Ex. 25 -

October 9, 2000 letter from Janet Butler to James E. Roten, Jr.

Ex. 26 -

Fax Cover Sheet from Janet Butler to James Roten.

Ex. 27 -

Fax Transaction Report, dated October 9, 2000.

Ex. 28 -

Workplace Security Policy, Employee Acknowledgment Form, signed by Janet Butler, dated April 28, 1995.

Ex. 29 -

Employee Performance Appraisal for Janet Butler for the period 01-01-99 to 12-31-99.

Ex. 30 -

29 CFR § 1910.141, Occupational Safety and Health Administration.

Ex. 31 -

Chevron Material Safety Data Sheet.Ex. 32 -
Payroll Time Sheet Summary for Janet Butler; WVDOT Request for Payroll Correction, dated March 7, 2000.

Ex. 33 -

White coveralls.

Ex. 34 -

White coveralls.

Ex. 35 -

Blue denim shirt.

Ex. 36 -

Pink plaid shirt.

Ex. 37 -

Blue denim pants.

Ex. 38 -

Blue denim pants.

LIII DOH Exhibits

Ex. 1 -

WVDOH Notice to Employee of Disciplinary Action, June 7, 2000; handwritten statement of Becky Johnson; handwritten statement of Danielle M. Grogg; January 2, 2001 letter from Jeff Black to Janet Butler.

Ex. 2 -

WVDOH Notice to Employee of Disciplinary Action, May 22, 2000; May 22, 2000 memorandum to Janet Butler; handwritten statement of John Shaffer; handwritten statement of Lynn Tanner; handwritten statement of Janet Butler; August 10, 2000 letter from Jeff Black to Janet Butler.

Ex. 3 -

WVDOH Notice to Employee of Disciplinary Action, January 28, 2000; WVDOH Employee's Verification of Disciplinary Action, February 18, 2000; February 22, 2000 letter from James E. Roten, Jr., to Janet Butler.

Ex. 4 -

WVDOT Employee Evaluation of Janet Butler, dated April 4, 1996; Employee Evaluation of Janet Butler, dated February 24, 1998

Ex. 5 -

WVDOH Notice to Employee of Disciplinary Action, dated September 10, 1997.

Ex. 6 -

Notices to Employee of Disciplinary Action, August 13, 1992; April 3, 1991; March 21, 1991; August 1983; August 1982.

Ex. 7 -

Three page chart of Janet Butler disciplinary actions.

Ex. 8 -

Map of Roane County, West Virginia.

Testimony

DOH presented the testimony of Joan Satterfield, Glenn Hanlin, James Roten, Jr. Grievant presented the testimony of Harold Wolverton, Lynn Tanner, Rebecca Johnson, Billy Watkins, Nolan Ritchie, Roscoe Parsons, and James Roten, Jr.

Based upon a careful review of all of the testimony and evidence of record, the undersigned finds the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by DOH as a Transportation Worker I Craftsworker in District Three, Calhoun County, West Virginia.

2. On February 22, 2000, James Roten, District Three Administrator, issued a letter to Grievant notifying her of a three-day suspension for leaving her assigned workplace without proper authorization on January 24, 2000. Grievant did not grieve this suspension.

3. In February 2000, Glen Hanlin, County Supervisor for Calhoun County, advised all employees by memorandum that they were no longer to stop at any store or school, or make any stops while working on the road, without his permission.

4. Following this directive, on or about May 11, 2000, Mr. Hanlin received a report that trucks had stopped at a store in Minora, and that employees were making phone calls.

5. Mr. Hanlin talked to members of the crew working on May 11, 2000, and determined that Grievant and two people riding with her were the only employees who had left the work site early on May 11, 2000.

6. Mr. Hanlin met with all the employees on the crew, including Grievant, and requested they provide written statements. Grievant provided a statement under protest on May 17, 2000, acknowledging that she did pull off the road to make an emergency phone call at the nearest phone. The phone was busy, and so she drove further down the road, and stopped at the next pay phone. She denied in her statement stopping at any store property or stopping to purchase any items.

7. The statements of the two employees riding with Grievant did not support Grievant's story that there was an emergency, but rather described a situation where shepulled off the road and turned off the truck to kill time, at another point parked the truck and walked back to a store to use the

phone, and later stopped at a car wash to use the phone.

8. Grievant did not contact Mr. Hanlin or the Assistant County Administrator to seek permission to stop and make a phone call, in violation of Mr. Hanlin's direct instructions.

9. The employees in District Three are provided coveralls to protect their clothing while working on the roads. Two different types of coveralls have been provided at various times. Some employees feel the tar does not penetrate the white coveralls as much as the yellow ones, and that is their preferred coverall. Both types of coveralls meet the required State specifications.

10. On the morning of June 6, 2000, Grievant asked the clerk to make a phone call to the Safety Officer in Parkersburg, West Virginia, regarding the coveralls, when Mr. Hanlin interceded. He told her that her concern regarding the coveralls was not a safety issue, and that he would take care of the matter, and told her to go on to work.

11. A few minutes later, Mr. Hanlin walked into the garage, and discovered Grievant and Billy Watkins on the telephone making a call to the Safety Officer. Mr. Hanlin directed her again to go to work, telling her he would take care of the matter.

12. On August 10, 2000, Jeff Black, Director of Human Resources, issued a letter to Grievant notifying her of a five-day suspension for failure to follow instructions on May 11, 2000.

13. Grievant was off work due to an on-the-job injury from August 16 to October 2, 2000. 14. On October 3, 2000, Grievant was informed she would be receiving disciplinary action in the form of a suspension for refusing to leave the garage and go to work on June 6, 2000.

15. Grievant filed this grievance on October 3, 2000.

16. On January 2, 2001, Mr. Black issued a letter to Grievant notifying her of a ten-day suspension for insubordination relating to the June 6, 2000, incident.

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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv.,

Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

This grievance was filed over two separate suspensions given to Grievant, one on August 10, 2000, and the other on October 3, 2000. The charges filed against Grievant by DOH are failure to follow instructions and insubordination, respectively. Grievant alleges she is the victim of discrimination based on gender, reprisal, harassment and retaliation.

With respect to the August 10, 2000, suspension, DOH argues that the grievance is untimely, and that portion of the grievance should be dismissed. As a finding ofuntimeliness would be dispositive of that portion of the grievance, that issue will be addressed first.

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29- 122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). Pursuant to W. Va. Code § 29-6A-3, DOH raised the issue of timeliness at Level II.

A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code 29-6A-4(a). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). There is no dispute that Grievant was notified of the three-day suspension by letter dated August 10, 2000, but did not file thisgrievance until October 3, 2000, and thus DOH has proven the grievance was untimely filed.

However, W. Va. Code § 29-6A-3(a) provides that:

> A grievance must be filed within the time lines specified in section four of this article . . . Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

The evidence shows that Grievant was off work with an on-the-job injury from August 16, 2000 until October 2, 2000. As August 16 fell within the ten-day period for filing a grievance over her five-day suspension, the above statutory provision served to toll the time frame for filing the grievance, and Grievant filed the grievance immediately upon her return to work on October 3, 2000. Therefore, the portion of the grievance protesting the five-day suspension received on August 10, 2000, is determined to be timely filed.

With regard to the May 11, 2000 incident, Grievant's testimony conflicts somewhat with the statements given by Lynn Tanner and John Shaffer, the employees who were riding with her in the truck. While Grievant does not deny making a couple of stops in order to use the telephone, her coworkers indicated that she made more than two stops from the work site to the garage, some of them just to “kill time.” Despite the differences in the witnesses' stories, the material fact giving rise to the disciplinary action was that Grievant did not seek permission from Mr. Hanlin or the Assistant County Administrator before making the calls, nor did she report afterwards that she had stopped to make the calls. Mr. Hanlin gave the employees a directive in February 2000 that, from that date forward, no employee was to make stops at any store or make phone calls without first getting permission. Mr. Hanlin testified that each truck is equipped with a radio, soGrievant could easily have radioed a request to stop and use the telephone. This she did not do, and her actions violated Mr. Hanlin's direct order. Therefore, DOH has proven this charge by a preponderance of the evidence.

With respect to the June 6, 2000 incident, the facts are not in dispute. On the morning of June 6, 2000, Grievant was at the counter adjoining the garage area, asking the clerk if she would page the Safety Officer. Mr. Hanlin came in at that point, and asked Grievant what the problem was. She told him the storeroom did not have coveralls she wanted. Mr. Hanlin told her that was not a safety issue, but a storekeeping issue, and that he would take care of it, and that she should go on to work.

A few minutes later, Mr. Hanlin went into the garage and saw Grievant on the telephone with Billy Watkins beside her. The next day Mr. Hanlin asked Mr. Watkins what they were doing on the

telephone, and Mr. Watkins relayed that they were calling the Safety Officer about the coveralls.

The testimony and evidence indicates that there are two kinds of coveralls provided to DOH workers - white and yellow. Some workers prefer the white coveralls, because they feel the tar does not penetrate as readily as it does the yellow coveralls. Both types of coveralls meet State safety specifications. Apparently on the day in question, the storeroom did not have anymore white coveralls that would fit Mr. Watkins, and Grievant took the matter on herself. Mr. Hanlin recommended discipline for Grievant for insubordination, because he had just moments before told her not to call the Safety Officer, and to go to work, and she had deliberately disobeyed his order. Mr. Hanlin did not discipline Mr. Watkins. Both incidents resulting in this grievance involve acts of insubordination by Grievant, although the first incident is referred to as failing to follow instructions. 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). "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).

DOH has satisfied the test for establishing that Grievant's actions in both incidents constituted insubordination. Grievant had been given explicit instructions, and in both instances, ignored those instructions, and proceeded to do what she wanted. She tried to explain away her actions by claiming in the first incident that she needed to make an "emergency" phone call. Even if that were true, she still could have either sought permission from Mr. Hanlin before making the call, or at the very least, she should have reported to him after making the call that she had an emergency that she needed to tend to. She did neither. In the second incident, Grievant's conduct was even more egregious, considering the short passage of time between Mr. Hanlin's order to her to not call the Safety Officer

and to get to work, and her complete disregard of that order. Here, Grievant claims her conduct was justified because it concerned a safety issue. However, Grievant presented no evidence to demonstrate that the white coveralls are less safe than the yellow ones - it is simply a matter of personal preference among the employees which ones they wear. Both coveralls meet State safety specifications, and Mr. Hanlin told Grievant he would take care of the matter. Again, she ignored him.

DOH presented evidence of prior disciplinary actions against Grievant involving insubordinate conduct, and following progressive discipline, Grievant's five and ten-day suspensions were justified. Thus, DOH has proven the charges against Grievant.

Grievant contends, however, that she is being discriminated against on the basis of gender, as well as being harassed and retaliated against for filing previous grievances. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and (c)

that such differences were unrelated to actual job responsibilities of Grievant and/or the other employee(s) and were not agreed to by Grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). (See footnote 1)

Grievant points to the fact that Mr. Watkins was not disciplined for the June 6, 2000 incident, while she received a ten-day suspension for insubordination. While it is true Mr. Watkins was with Grievant while she made the phone call to the Safety Officer, their similarities in this instance end there. Mr.

Hanlin had just moments before told Grievant not to call the Safety Officer, and to get to work. He had not given any similar order to Mr. Watkins, and indeed, did not even know Mr. Watkins was involved in the coverall issue until he saw him beside Grievant. Grievant was disciplined because she had blatantly violated a direct order of her supervisor, given not five minutes before. Mr. Watkins had not violated any orders, but was merely an unknowing accomplice to Grievant's acts of defiance.

Grievant also contends that she has been discriminated against because of her gender, because she is the only female on the road crew in District Three. DOH presented Grievant's history of disciplinary problems, the majority of which involve some act of insubordination. DOH has shown that Grievant has little respect for authority and has directed vulgar and offensive language to her superiors. Of the 11 disciplinary actions taken in Calhoun County from March 1994 to March 13, 2001, there were 7 suspensions and 5 reprimands. Of the 7 suspensions, 3 were Grievant's. With the exception of those 3 suspensions and 1 written reprimand, the other disciplinary actions were taken against male employees. Given Grievant's record of disciplinary actions and the events leading up to them, the undersigned cannot find that she has been treated any differently than other male employees.

W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Grievant has failed to prove she has been harassed by her employer. Grievant has received disciplinary actions which were warranted by her conduct.

W. Va. Code § 29-6A-2(p) defines “reprisal” as “the 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 establishing:

> (1) that she engaged in protected activity, e.g., filing a grievance;
>
> (2) that 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); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT- 088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. 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, supra.

While the evidence on this issue was scant, Grievant claims she is the victim of reprisal because she previously won a grievance against her employer over an improper job assignment in 1999. However, the end result is the same in this analysis as it was for discrimination and harassment: Grievant engaged in conduct which warranted discipline. She has failed to show a causal connection between her previous grievance and these disciplinary actions.

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. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 20, 1990).

2. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievance must be filed within ten days following the occurrence of the event upon which the grievance is based. W. Va. Code 29-6A-4(a).

4. Grievant was notified of her five-day suspension by letter dated August 10, 2000, but did not file her grievance until October 3, 2000. Therefore, DOH has proven that the grievance was untimely filed.

5. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham

v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). 6. W. Va. Code § 29-6A-3(a) provides that "the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment."

7. Grievant was off work with an on-the-job injury from August 16, 2000 until October 2, 2000. The above statutory provision served to toll the time frame for filing her grievance, and she filed the grievance immediately upon her return to work on October 3, 2000. Therefore, the portion of her grievance protesting the five-day suspension is deemed to be timely filed.

8. 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).

9. "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 andexpresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, DocketNo. 93-HHR-424 (Feb. 28, 1995).

10. DOH has satisfied the test for establishing that Grievant's actions in both incidents constituted insubordination.

11. W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee

must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). 12. Grievant has failed to establish a prima facie case of discrimination with respect to the disciplinary actions encompassing this grievance.

13. W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation,or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

14. Grievant has failed to establish that she has been harassed by DOH with respect to the disciplinary actions encompassing this grievance.

15. W. Va. Code § 29-6A-2(p) defines “reprisal” as “the 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 establishing:

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

(2 that 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); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretailatory reasons for its actions. 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, supra.

16. Grievant has failed to establish that the disciplinary actions encompassing this grievance were the result of reprisal against her for filing previous grievances.

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. 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: July 1, 2002

Footnote: 1

This definition encompasses all types of discrimination, including discrimination based upon gender. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).