SERENA MARTY,

Grievant,

v.

DOCKET NO. 02-ADMN-055

WEST VIRGINIA DEPARTMENT OF

ADMINISTRATION/DIVISION OF PERSONNEL,

Respondent.

D E C I S I O N

Grievant, Serena Marty, filed a grievance against her employer, the West Virginia Department of Administration/Division of Personnel ("Personnel"), on November 15, 2001, as follows:

> Even if the scenario of events as outlined in Ms. Davis' letter of 11/01/01 had been accurate, a written reprimand would have been severe to say the least. However, after investigating Ms. Davis' claims as outlined in her letter to me on 11/01/01, an egregious error of blame perpetrated against me has been promulgated.
>
> Relief sought: I, hereby, respectfully request that the written reprimand dated 11/01/01 be removed from my personnel file.

Subsequently, on January 8, 2002, Grievant filed a second grievance against Personnel, as follows:

> Treating others with dignity and respect are basic tenets of life that were instilled in me at my parents' knees. State Law mandates that anyone serving in a supervisory/managerial capacity just treat all employees equitably. It should be understood that the principles of treating others with dignity and respect go hand in hand with equity and basic human rights. Thegravity of the malfeasance that has been perpetuated against me not only by Ms. Davis but by her predecessors is unconscionable.

Relief sought: Therefore, I respectfully request that the letter of suspension dated 12/27/01 and promulgated against me be denied.

On November 1, 2001, Grievant was given a written reprimand for insubordination for her failure to complete an assigned task. The levels one and two grievance evaluators upheld the reprimand, and Grievant appealed to level three on December 19, 2001.

Grievant was given a letter of suspension for fours days without pay, to be served in January 2002, on December 27, 2001, for her conduct between November 19, 2001 and November 27, 2001. She grieved directly to level two, where the suspension was upheld, and appealed to level three on January 28, 2002.

The grievances were consolidated at level three, and a level three hearing was held on February 6, 13 and 20, 2002. The level three grievance evaluator, John Charnock, upheld the discipline by decision dated February 27, 2002, and Grievant appealed to level four on March 7, 2002. After many continuances were granted at Grievant's request, a telephone conference was held on June 9, 2003, and the undersigned ordered, over Grievant's objection, that the matter be submitted on the level three record. The parties declined to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on June 9, 2003. Grievant represents herself, and Personnel is represented by Amy J. Haynie, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level Three Joint Exhibits

Ex. A -

Division of Personnel Organization Chart.

Level Three Personnel Exhibits

Ex. 1 -

October 1, 2001 memorandum from Mark Isabella to Evelyn Davis.

Ex. 2 -

October 16, 2001 sign-in sheet for Drug-Free Workplace Training.

Ex. 3 -

October 17, 2001 sign-in sheet for Drug-Free Workplace Training.

Ex. 4 -

October 16, 2001 memorandum from Julie Brown to Evelyn Davis.

Ex. 5 -

June -November 2001 Monthly Staff Meeting minutes.

Ex. 6 -

Work Tracking Log.

Ex. 7 -

Phone Tracking Log.

Ex. 8 -

October 11, 2001 memorandum from Evelyn Davis to File.

Ex. 9 -

October 18, 2001 handwritten note to Serena Marty.

Ex. 10 -

November 1, 2001 letter from Evelyn Davis to Serena Marty.

Ex. 11 -

June-November 2001 memoranda from Evelyn Davis to File.

Ex. 12 -

Various memoranda from Evelyn Davis to Serena Marty.

Ex. 13 -

December 27, 2001 letter from Evelyn Davis to Serena Marty.

Ex. 14 -

November 29, 2001 memorandum from Evelyn Davis to File; 1993 Performance Evaluation.

Ex. 15 -

1992-1999 Performance Evaluations.

Ex. 16 -

December 12, 2001 email from Jeanie Bowe to Evelyn Davis.

Level Three Grievant's Exhibits

Ex. 1 -

Memorandum To Whom It May Concern from Serena Marty.

Ex. 2 -

Addendum to Memorandum To Whom It May Concern from Serena Marty, February 13, 2002.

Ex. 3 -

March 9, 2001 email from Evelyn Davis to Serena Marty.

Ex. 4 -

June 4, 2001 Thank-you Card from Evelyn Davis to Serena Marty.

Ex. 5 -

2001 Performance Evaluation.

Ex. 6 -

May 15, 2001 card from Evelyn Davis to Serena Marty.

Ex. 7 -

June 22, 2002 card from Evelyn Davis to Serena Marty.

Ex. 8 -

December 5, 2001 memorandum from Serena Marty to Nichelle Perkins.

Ex. 9 -

January 9, 2002 letter from Jean-Paul Moreau to Heidi Talmadge.

Ex. 10 -

January 9, 2002 letter from Evelyn Davis to Edmonia Woodson.

Ex. 11 -

Application for Leave with Pay for January 29, 2002.

Ex. 12 -

Inventory of Utility Room.

Ex. 13 -

May 29, 2001 memorandum from Jack D. Sells To Whom It May Concern.

Ex. 14 -

1988 Performance Evaluation from Department of Highways.

Ex. 15 -

Handwritten note from Cheri to Serena Marty.

Ex. 16 -

June 28, 1993 memorandum from Steve Stephens to Serena Marty.

Ex. 17 -

June 24, 1993 memorandum from George Mitchell to Serena Marty.

Testimony

Personnel presented the testimony of Mark Isabella, Julie Brown, Lora Gray, and Evelyn Davis. Grievant testified in her own behalf, and presented the testimony of Barbara Jean Bowe, Marsha Holliday, and Jack Sells.

After a careful review of all of the testimony and evidence of record, I find the following facts have

been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by Personnel as an Office Assistant II in its Organization and Human Resources Development Section ("OHRD").

2. In June 2001, Evelyn Davis became Assistant Director for Personnel, and Grievant's immediate supervisor.

3. Mark Isabella is a Senior Development Consultant, and acts in a supervisory capacity when Ms. Davis is out of the office.

4. On September 28, 2001, all staff in OHRD were scheduled to attend Microsoft Microsoft Access training beginning at 3:30 p.m., including Grievant.

5. At approximately 3:45 or 3:50, Mr. Isabella saw Grievant peek into his office, and then continue down the hall. He was on the telephone at the time. Mr. Isabella finished his phone call, went out into the hall, and asked Grievant why she was not in training.

6. Grievant responded that all of the bathrooms in Buildings 5, 6 and 7 were inoperable because of a water problem, and that she would not go to training with the restrooms in that condition.

7. Mr. Isabella told Grievant it was not her decision to make to not go to training, and he told her to go. Grievant did not leave.

8. Mr. Isabella called Ms. Davis at home to inform her of the situation. Ms. Davis called another Assistant Director, Tari Crouse, and found there were workingrestrooms in Building 4. Ms. Davis instructed Mr. Isabella to tell Grievant she had to go to training, and that she could use the Building 4 restrooms.

9. Grievant had also called Ms. Crouse about the restroom conditions. Finally, Grievant went to training, and arrived at approximately 4:25 p.m.

10. Mr. Isabella detailed the events of September 28, 2001, in a memorandum to Ms. Davis on October 1, 2001. LIII R. Ex. 1.

11. Ms. Davis later met with Grievant to discuss the incident, and gave her a verbal warning for refusing to adhere to her supervisor's directive, and not respecting his authority. Ms. Davis put a memorandum in the file to document the verbal warning. LIII R. Ex. 8.

12. One of Grievant's responsibilities is to create a sign-in sheet for individuals who register for training classes. Based upon the number of people signed up for a class, Grievant then determines which meeting room is needed, and informs General Services how to set up the room for the class. It is normal for Grievant to wait until the day before the class to contact General Services with a final head count. She usually faxes a room schematic to General Services.

14. On October 16, 2001, Grievant printed off a sign-up sheet for a Drug-Free Workplace seminar which was scheduled for the next day, October 17, 2001. Grievant noticed it had been printed on the wrong paper, folded it in half and laid it on her computer, intending to reprint it later. Grievant did not look at the content of the sign-in sheet.

15. That evening, around 4:30 p.m., Ms. Davis asked Grievant what else needed to be done before she left for the day. Grievant responded she needed to contact General Services to set up for the Drug-Free Workplace class, and needed to gather someinformation for an upcoming Sexual Harassment class. Ms. Davis told her to contact General Services first, and then, if she had time, she could work on the Sexual Harassment class.

16. Grievant did not contact General Services by phone, nor did she fax a schematic of the room set-up. Grievant did contact the EEO office that evening, as evidenced by her telephone log. LIII Personnel Ex. 7.

17. The next morning about 8:00 a.m., Julie Brown, a Development Consultant, and Coordinator for the Drug-Free Workplace seminar, arrived to find that Room B had not been set up for the seminar.

18. Matt Hill, the registrar, was also there that morning. He saw the folded up sign-in sheet on Grievant's computer, and took it, so they could start setting up the room. The sign-in sheet incorrectly indicated there were 58 people signed up to take the Drug- Free Workplace class. Room B only accommodated about 25 people. All of the OHRD employees know how many people each training room will hold.

19. Mr. Isabella heard Mr. Hill and Ms. Brown talking about the mix-up, and asked Grievant if she had contacted General Services the day before about the room, and she replied that she had not. Mr. Isabella then went to help Mr. Hill and Ms. Brown set up the room.

20. Shortly thereafter, Ms. Davis arrived, and also assisted in setting up the room. The day before, Ms. Davis had pulled the handouts for the Drug-Free Workplace class. She did not have a

roster, but knew that Room B held a maximum of 25 people. She pulled approximately 30 handouts for the class. 21. Ms. Brown was angry about the mix-up with the Drug-Free Workplace class. She had been Coordinator for another class called Personal Accountability the day before, on October 16, 2001. The day before that, October 15, 2001, she had instructed Grievant to make sure a flip chart was in the room for the instructor, but when she arrived the morning of the class, there was no flip chart. Ms. Brown was new to her position, and was concerned that these two mix-ups in as many days would make her look bad to her superiors.

22. On October 16, 2001, Ms. Brown sent a memorandum to Ms. Davis about the flip chart. LIII Personnel Ex. 4.

23. Ms. Davis talked to Grievant about the flip chart. Grievant said she was confused, it was Mr. Hill's job to get flip charts, and it was Ms. Brown's fault for asking her to do it instead of Mr. Hill.

24. Ms. Davis met with Grievant on October 17, 2001, to discuss the room mix- up. She pointed out that Grievant had called the EEO office, but not General Services, despite her direct instructions to do the exact opposite. Grievant did not have any response, and Ms. Davis felt Grievant had simply disobeyed her order.

25. On November 1, 2001, Ms. Davis issued Grievant a written reprimand for failure to obey her instructions, and for causing the mix-up with the Drug-Free Workplace class. LIII Personnel Ex. 10.

26. On November 19, 2001, Ms. Davis instructed Grievant to give her a list of her tasks and responsibilities for each day of the current week. Grievant did not follow this directive. 27. On November 20, 2001, Ms. Davis reminded Grievant about the list, and asked for it again by the end of the day. Grievant did not provide the list, nor did she follow-up with Ms. Davis to explain why not.

28. Grievant was supposed to have materials ready for a November 28, 2001, class, in-stock and assembled by the close of business November 19, 2001. On November 21, 2001, Grievant spoke to Ms. Davis, telling her she thought she had given the request for printing (“RFP”) to Tari Crouse some time ago. Grievant did not follow-up on this request, though, and did not bring it to Ms. Davis' attention until the day the materials were due. Ms. Crouse did not have the RFP, and Ms. Davis asked Grievant if she had the master copy, and she said she did not. That Saturday, November 24, 2001, Ms. Davis checked Grievant's office, and found the master list. Ms. Davis ended up making the copies for the November 28, 2001, class.

29. On November 26, 2001, Ms. Davis asked Grievant to email her a list of the tasks and responsibilities she had worked on that day, and the approximate amount of time each took. Grievant did not email the list.

30. On November 27, 2001, Ms. Davis met with Grievant to discuss her failure to complete requested tasks in a timely manner, while at the same time attempting to do other people's work. In addition, Ms. Davis set forth Grievant's performance deficiencies, gave her directives on how to improve her performance, and instructed her that she must immediately improve her performance. Ms. Davis informed Grievant she was considering a suspension for Grievant's failure to follow her directives. LIII Personnel Ex. 14. 31. On November 29, 2001, Ms. Davis informed Grievant she was delaying a final decision regarding the suspension in order to afford her an opportunity to "appropriately adjust your performance and conduct." LIII Personnel Ex. 13.

32. On December 27, 2001, Ms. Davis suspended Grievant for four days without pay for insubordination, and for failing to improve her performance. The suspension was scheduled to begin January 22, 2002 and continue through January 25, 2002, following which Grievant would be on a thirty (30) calendar-day plan of improvement. LIII Personnel Ex. 13.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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. Dept. 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.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 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 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).

Personnel has proven by a preponderance of the evidence that Grievant was insubordinate to her acting supervisor, Mark Isabella, on September 28, 2001, when she refused to go to the Microsoft Access training class because of restroom problems. He gave her a direct order, and she refused to obey.

Grievant argues that she refused to go to the training class because the restrooms were in a deplorable condition, and no employer should require their employees to workunder those conditions. While the undersigned is sympathetic to Grievant's concerns about inoperable restrooms, the evidence establishes that there were working restrooms within the Capitol Complex which Grievant could use. Moreover, the undersigned quite frankly fails to grasp the connection between the inoperable restrooms and the Microsoft Access training. Grievant did not indicate she was just simply going to go home because of the restroom problem; she just was refusing to go to Microsoft Access training.

Personnel has also proven Grievant was insubordinate with respect to the October 17, 2001, Drug-Free Workplace class mix-up. Ms. Davis had specifically instructed Grievant to contact General Services the afternoon of October 16, 2001, to set up the room, and if she had time, she could follow-up on the Sexual Harassment class. Grievant did precisely the opposite; she phoned the EEO office

about the Sexual Harassment class, and then never faxed or telephoned General Services.

As a result, the room was not set up the next morning. Grievant even admitted to Mr. Isabella that morning that she had not called General Services. During her level three testimony, Grievant recanted that admission, claiming she did call General Services, but other than Grievant's testimony, she presented no witnesses from General Services to support her claim. The fact that the room was not set up the next morning lends more credence to Grievant's original admission that she simply did not contact General Services to set up the room.

Coupled with Grievant's failure to follow Ms. Davis' directive was the mix-up caused by the sign-in sheet Grievant printed which showed 58 people were expected in a classroom that only holds 25. Grievant testified the sign-in sheet was a computer-generated mistake caused by a “double merge,” and there were really only about 25 people signed up for the class. This may be true; however, it was Grievant's responsibility to catch that error, or at the very least, inform Ms. Brown, Mr. Hill, Mr. Isabella, and Ms. Davis that the list was in error, before they rushed around trying to set up the room. She did neither.

Finally, with respect to Ms. Davis' continued attempts to work with Grievant to improve her performance, there is no dispute that Grievant did not comply with Ms. Davis' directive to provide her with a list of her tasks and responsibilities, and continued to have performance deficiencies. Grievant's response is to blame everyone else for her mistakes, and infer some vast conspiracy against her that has been developing for years.

The bottom line is that Grievant has made some mistakes, and been taken to task for them by her new supervisor, Ms. Davis. There is no evidence that Ms. Davis or anyone else is conspiring against Grievant. Indeed, it appears that Ms. Davis was, at least for some period of time, quite fond of Grievant, as evidenced by cards and notes Grievant entered into evidence. Grievant's failure to take responsibility for her mistakes, and insistence on blaming others, only serves to exacerbate her situation, and prohibits her from reflecting on her work habits in a constructive way in order to improve them to her supervisor's satisfaction.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Hoover v. Lewis County Bd. of Educ.,

Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 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 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).

3. Personnel established by a preponderance of the evidence that Grievant was insubordinate in her refusal to obey direct instructions from her superiors.

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 EmployeesGrievance 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, 2003