LISA GORMAN,

Grievant,

v. **DOCKET NO. 03-BEP-206**

BUREAU OF EMPLOYMENT PROGRAMS/

EMPLOYMENT SERVICES DIVISION,

Respondent.

DECISION

Grievant Lisa Gorman filed this grievance against the Bureau of Employment Programs (Respondent) on July 14, 2003, stating: “Violation of privacy and confidentiality policies, overreaction to offense (should have been written warning as have been given to other employees for more severe offense), religious discrimination.” Grievant stated the relief sought as: “Remove termination from personnel record and put on preference register for rehire. Allow eligibility for Unemployment Compensation Insurance payments.”

Having been filed directly at level four, a hearing was held in the Grievance Board's Charleston office on January 20, 2004. Grievant represented herself, and Respondent was represented by counsel, Christie S. Utt, Assistant Attorney General. This matter became mature for decision on March 1, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1) Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent as secretary to Assistant Director Stephen P. Dailey. She had initially been hired in April, 2002 as a temporary employee, and was hired as a permanent employee in September, 2002.

2. On June 27, 2003, Grievant was notified by Commissioner Gregory Burton that her

employment was terminated effective that day.

3. The reasons cited for Grievant's dismissal were violations of Respondent's Administrative Directives, Computer Software Policy, E-Mail Acceptable Use Policy and Internet Acceptable Use Policy, (See footnote 2) specifically:

1 * You have used foul and offensive language, received and sent offensive graphics via Bureau E-Mail

2 * You have abused the Internet in that you have used it for personal reasons in excessive amounts of time during your scheduled working hours.

3 * You have E-Mailed confidential Employment Service Division information to a non-Bureau employee.

4. These issues became known to Respondent after Mr. Dailey had counseled Grievant on numerous occasions regarding her productivity, and she claimed she was having trouble prioritizing her work. After inspecting Grievant's computer to discover if there was another reason, it was discovered the real reason was she was using her computer on work time for personal business for excessive amounts of time. 5. Respondent inspected Grievant's computer by conducting audits of her computer use over a six-week period.

6. In addition to indicating Grievant spent extensive amounts of time on personal use of her computer, the audits revealed improper content, including emails to and from Grievant's husband, some with sexual content, sexually-explicit chat session transcripts and pictures of men who responded to Grievant from a personals website.

7. The audits also revealed Grievant sent internal, confidential documents to her husband, who apparently would proofread them or check them, and send them back to her. (See footnote 3)

8. Grievant received and signed for copies of Respondent's Computer Software Policy, Internet Acceptable Use Policy, E-Mail Acceptable Use Policy, and Employee Privileged and/or Confidential Information Agreement.

9. Mr. Dailey first noticed in January, 2003, that Grievant's work performance was problematic.

In her January, mid-term evaluation, he noted she needed to improve on entering time for time sheets. In May, 2003, he issued Grievant a reprimand for saying she had sent a fax when she had not.

10. On three occasions, people did not get paid because Grievant had not entered their time in the payroll on time, which is one of her duties. She had been counseled on the need to timely enter this information on a number of occasions.

11. Grievant claimed she simply had a problem prioritizing her work, and she was offered training through the Division of Personnel. 12. Grievant is Wiccan, but Mr. Dailey did not know of this until after he issued the termination letter. Pamela Phillips, Administrative Assistant to Quetta Muzzle, knew Grievant had a “witchcraft-type religion” shortly after she was hired, but had no part in determining the disciplinary action.

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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that “the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

Although not expressly stated as such, Respondent's claim that Grievant violated its computer use and confidentiality policies amounts to a claim that she was insubordinate. “[F]or there to be "insubordination," the following must be present: (a) anemployee must refuse to obey an order (or

rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Governing Bd./Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002). Although the cases are not clear as to what constitutes "willfulness," the cases seem to suggest that for a refusal to obey to be "willful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. *See* Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). *Butts, supra*.

Grievant did not challenge the evidence against her, and did not deny she committed the violations she was accused of. Accordingly, Respondent has met its burden of proving they occurred. Further, Respondent has proven the violations were willful insubordination and of such a nature as to merit termination.

Grievant's violations were willful, in that they were directly contrary to established administrative directives that Grievant acknowledged receipt of. In doing so, she neglected her official duties, with the effect that on more than one occasion, some employees were not paid when they should have been. When given the opportunity to explain her lack of productivity, she concealed the true reason. Her work record reveals the problem had been ongoing despite several counseling sessions and a reprimand. Grievant not only knew of the policies she was violating, she knew her behavior's effect on the agency mission and was untruthful when confronted with the fact her performance was faltering. Her knowing and intentional disregard for these policies coupled with her prevarication about her reasons for poor performance to hide the facts lends great weight to the conclusion that her acts were willful. Grievant's violation of the confidentiality policy, when she sent internal, confidential documents to her husband, was likewise a willful violationof known and acknowledged policy, although there was no evidence she concealed this act.

Grievant's sole challenge to the basis of her termination is that other employees have been given written warnings for more severe offenses. This defense amounts to a claim of discrimination, which is defined 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.” W. Va. Code § 29-6A-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant presented absolutely no evidence of any discipline against other employees, whether for more severe offense or not. She has identified no employees with whom she was similarly situated. Hence, Grievant has failed to make a *prima facie* claim of discrimination with respect to the severity of her disciplinary action.

Grievant's claim of religious discrimination is unsupported by the evidence. No one who had a bearing on the disciplinary action knew what Grievant's religion was, but even so, the action was supported by legitimate reasons. However, even if it were known, the specific acts Grievant complained of all occurred after she was terminated, while being escorted from the building by Capitol security officers. Not only were these acts outsideher employment relationship with Respondent, they were committed by persons not under the control of Respondent.

Grievant's claim of privacy violations are likewise unsupported. These claims stem from her perception that others in the office knew of her acts and pending termination, but she offered no authority, policy, rule or law that she claims to have been violated, even if her claims were proven.

The following conclusions of law support this discussion:

CONCLUSIONS OF LAW

1. 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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The 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. Dep't of Health & 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*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civilservice employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

3. "[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Governing Bd./Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002).

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

5. Respondent met its burden of proving Grievant's insubordination was willful, and of a substantial nature.

6. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d).

7. In order to establish a claim of discrimination, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Grievant did not establish a *prima facie* discrimination claim.

9. Grievant did not meet her burden of proving a violation of privacy or confidentiality policies, or of religious discrimination.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County and 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.

Date: July 16, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Due to a clerical error by the undersigned, it had been recorded that this case had not yet matured, causing the delay in rendering this decision.

Footnote: 2

Respondent attempted to introduce evidence it had discovered after Grievant's dismissal of other acts it deemed to be

dismissible offenses, but this evidence has been disregarded as it did not form the basis for the decision to terminate grievant's employment as challenged here.

Footnote: 3

Although this information was admitted as exhibits at the hearing, the parties are ordered to maintain its confidentiality and are prohibited from further disclosing the information to persons who are not a party to this grievance.