JULIA STARKO,

Grievant,

v. Docket No. 03-HHR-352

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU OF CHILDREN & FAMILIES,

Respondent.

D E C I S I O N

Julia Starko ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Child Protective Service Worker, filed a grievance at level two on September 11, 2003, following her suspension for ten days without pay. Grievant seeks rescission of the suspension, back pay, and benefits. The grievance was denied at levels two and three, and a level four appeal was filed on November 6, 2003. Grievant, representing herself, and DHHR counsel, Robert Miller, agreed that the matter could be submitted for decision based upon the lower-level record. The parties were given the opportunity to file proposed findings of fact and conclusions of law, and DHHR did so on January 22, 2004, at which time the grievance became mature for decision. Grievant elected not to file any additional proposals.

The facts of this matter have been derived from a preponderance of the evidence made a part of the record at level three.

Findings of Fact

1. Grievant has been employed by DHHR since April 2002, as a Child Protective Service Worker in the Fairmont, Marion County, office of the Bureau for Children and Families (BC&F) at all times pertinent to this grievance.

2. On July 21, 2003, Grievant was assigned a case involving a domesticdispute, resulting in a broken car window. The couple's four month old infant daughter (KN) was in the car at the time, but was not physically injured.

3. Grievant met with JN (father) and DH (mother) on July 24, 2003. Pursuant to the advice of Supervisor Carla Harper, Grievant subsequently produced a safety plan which

stated that the infant would remain in the care of her maternal grandparents pending the outcome of the CPS investigation, and that DH and JN would cooperate in that investigation. Further the grandparents were to contact DHHR should DH and JN attempt to remove the infant from the grandparents. DH signed the safety plan, as did her parents. JN did not sign the plan.

4. DH had been living with her parents prior to the incident on July 21, 2003, but had since been living elsewhere. The maternal grandparents had retained physical custody of KN.

5. The grandparents advised Grievant that DH was addicted to crack cocaine and Aderol, and was suspected of breaking and entering a home and stealing a safe and guns. This information was confirmed by local law enforcement authorities.

6. Out of concern that the safety plan developed by Grievant was not enforceable, DH's mother filed a Domestic Violence Petition, and secured a Family Protection Order against DH from Magistrate Court. An Order could not be issued for JN because he was a minor. The Order also gave her temporary custody of KN, but it was not clear whether the custody was limited to DH's rights, or included JN's parental rights.

7. Early on August 6, 2003, DeLena Smith, CPS Supervisor, advised Grievant to file a Forthwith Petition giving BEP legal custody of KN. Grievant opined that KN wasin no imminent danger from the grandparents, and declined to file the petition, asserting that it would be in violation of the Social Workers' Code of Ethics.

8. Later that day, Ms. Smith sent Grievant a memorandum directing her to file the petition. Ms. Smith noted that a threat of harm existed due to the drug usage and possibility of guns. She further noted that the safety plan was not binding, and the FPO would not prevent the parents from attempting to take the child or otherwise cause problems. Grievant did not file the petition.

9. August 7, 2003, Ms. Smith asked Grievant if the petition had been filed. Grievant stated that she had not filed one, and understood that Ms. Smith would do so. Grievant was advised of the possible consequences for her failure to comply with the directive.

10. After conferring with her supervisor, Ms. Smith requested that Grievant think about filing the petition overnight.

11. August 8, 2003, Grievant again did not file the petition, and continued to insist that

KN was in no imminent danger from her grandparents.

12. Ms. Smith completed the petition and another CPS worker signed the document. DHHR subsequently attained legal custody of KN who remains in the physical custody of her grandparents.

13. Because Grievant had expressed concern that filing the petition would require her to engage in false swearing, Region I Director Louis Palma requested Tanny O'Connell, Region I Social Service Program Director, review the facts of the situation to ascertain whether there were any valid ethical considerations which would prevent Grievant from complying with her supervisor's directive. Ms. O'Connell reported that she did notbelieve that any ethical dilemma existed. Ms. O'Connell further stated that the petition citing imminent danger, and requesting forthwith custody, was reasonable and justified considering the chaotic situation and unpredictable actions of the parents.

14. By letter dated August 22, 2003, Mr. Palma notified Grievant that she was to be suspended without pay for ten working days as a result of her insubordinate behavior, i.e., her failure to follow the directive of her supervisor and file a child abuse and neglect petition.

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). "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 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.

State employees, such as Grievant, who are in the classified service can only be suspended for "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); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va.Dep't of Motor Vehicles, Docket

No. 89-DMV-569 (Jan. 22, 1990); Section 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 2000).

Grievant has been charged with insubordination, defined as 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, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 2002)(per curiam). *See* Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); 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).

"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). 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. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

Grievant's explanation for her failure to comply with her supervisor's direction was based upon her perception that the child was not in imminent danger from thegrandparents. Based upon this perception, she believed that filing the petition would be false swearing. **(See footnote 1)**

W. Va. Code § 49-1-3(e) defines “imminent danger” to the well being of the child to mean an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health or life of any child in the home:

(1) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or a babysitter or other caretaker;

(2) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome;

(3) Nutritional deprivation;

(4) Abandonment by the parent, guardian or custodian;

(5) Inadequate treatment of serious illness or disease;

(6) Substantial emotional injury inflicted by a parent, guardian or custodian; or

(7) Sale or attempted sale of the child by the parent, guardian or custodian.

The evidence of record establishes that Grievant did not believe KN to be in imminent danger from or with her grandparents. However, Grievant's supervisorsperceived that KN was in imminent danger from her parents, and were concerned whether the grandparents had full legal custody of the infant. JN was not subject to the domestic violence petition, and had not otherwise relinquished his parental rights. KN had already been exposed to physical violence between her parents, and it was questionable whether either parent was competent to provide adequate nutritional or medical care for the infant. This situation is very similar to that of Cogle v. Department of Health & Human Resources, Docket No. 01-HHR-325 (Sept. 5, 2001), in which the grievant, a Child Protective Service Worker, was terminated after she offered testimony in circuit court proceedings which were her personal opinions, which differed from the conclusions of the agency. Ms. Cogle also cited ethical concerns, but the Grievance Board upheld the dismissal, finding that she was employed by DHHR to represent the position of the agency, and the statement of her personal opinion constituted insubordination.

DHHR has demonstrated 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. Grievant had been given explicit instructions, and four opportunities to comply with those instructions. Grievant's refusal to file the petition constituted insubordination.

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. 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 apreponderance 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).

2. State employees who are in the classified service can only be suspended for "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); W. Va. Code §29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 2000).

3. 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).

4. In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 2002)(per curiam). *See* Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); 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).

5. "Employees are expected to respect authority and do not have the unfettereddiscretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

6. 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. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

7. The employer can meet its burden by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995)

8. DHHR has proven by a preponderance of the evidence that Grievant's failure to file a petition was willful and intentional, and thus constituted insubordination, warranting the suspension.

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§29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: FEBRUARY 25, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Administrative notice is taken of the Social Workers Code of Ethics, Section 4.04, "social workers should not participate in, condone, or be associated with dishonesty, fraud, or deception," and Section 3.09(d), "social workers should not allow an employing organization's policies, procedures, regulations, or administrative orders to interfere with their ethical practice of social work."