THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANDREW FIZER,

Grievant,

v. **DOCKET NO. 05-ADMN-398**

DEPARTMENT OF ADMINISTRATION,

Respondent.

DECISION

Grievant Andrew Fizer filed this grievance on October 14, 2005 , claiming he was terminated from his employment in violation of his due process, statutory and civil service rights. A level four hearing was held in the Grievance Board's Charleston office on January 25, and April 25, 2006. Grievant was represented by Benjamin Bryant, Esq. and Michael Carey, Esq., and Respondent was represented by Karen O'Sullivan Thornton, Esq., Assistant Attorney General. The matter became mature for decision on June 9, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant alleges he was improperly terminated, but Respondent contends he was terminated for good cause, specifically insubordination, insufficient leadership, inadequate record-keeping, and poor attendance.

Summary of Evidence

At the level four hearing, sworn testimony was heard from the following witnesses:

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1 1. Lora Reese

2 2. Regina Tucker

8 8. James Wells

9 9. Robert Ferguson

3 3.

Lisa Worledge

4 4.

Christine Sforza

5 5.

Janie Belcher

6 6.

Roscoe Taylor

7 7.

Heather Connolly, Esq.

10 10.

Michelle Fizer

11 11.

Andrew Fizer

The following exhibits were admitted into evidence:

1 Respondent's 1

Collection of Applications for Leave With Pay

2 Respondent's 2

Personal Time sheets for Andrew Fizer

3 Respondent's 3

Statement of Chris Sforza

4 Respondent's 4

Employee Handbook

5 Respondent's 5

Employee Acknowledgment

6 Respondent's 6

Statement of Janie Belcher

7 Respondent's 7

Entry Logs

8 Respondent's 8

Summary of Entry Logs

9 Respondent's 9

Spreadsheet of Entry Log Data

10 Respondent's 10

Calendar

11 Respondent's 11

Calendar

12 Respondent's 12

Calendar

13 Respondent's 13

Memorandum 9/19/2005

14 Respondent's 14

Memorandum 9/30/2005

15 Respondent's 15

Termination Letter 10/6/2005

16 Respondent's 16

“Guiding Principles”

17 Respondent's 17

Memorandum 07/22/2005

Grievant's 1 Calendar

Based on a preponderance of the credible evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent as Director of the Division of Finance, a position in the classified service. As such, he was the comptroller for the State of West Virginia, and his immediate supervisor was Robert W. Ferguson, Jr., Secretary of the Department of Administration.

2. Grievant was originally hired by Respondent on March 15, 2000, as Deputy Director of Finance, under then-Secretary Greg Burton. He was promoted to Director in June, 2001.

3. Secretary Ferguson established a regular meeting every Wednesday with his division directors to discuss current issues and for professional development presentations. All directors, including Grievant, were required to attend. Grievant did not regularly attend.

4. Secretary Ferguson recognized that Grievant's absence from the meetings was part of a pattern of unavailability that he had personally observed when he tried to contact Grievant during work hours. Three or four times per week, when Secretary Ferguson would call to talk to Grievant about various matters, he was unable to reach him and Grievant's staff was unable to tell him where Grievant was, but they were able to reach him and have him call back.

5. In an effort to increase Grievant's attendance at work, Secretary Ferguson began requiring him to attend daily “hot-topics” staff meetings each morning in his office. Grievant was not actually needed at these meetings, and he was not told his presence was required simply to get him to come to the office on time. Grievant attended most of those meetings, but he would not always go back to his own office afterwards, according to Deputy Finance Director Ross Taylor, Grievant's second in command.

6. After learning that the morning meetings were not increasing the likelihood that Grievant would be available in his office the rest of the day, Secretary Ferguson consulted John Poffenbarger, who had previously served as Secretary of Administration and who was serving as general counsel. Mr. Poffenbarger confirmed that Grievant's attendance was a long-standing problem, and suggested having Grievant park outside Secretary Ferguson's window. 7. Shortly after talking with Mr. Poffenbarger, on July 22, 2005, Secretary Ferguson memorialized in writing a meeting he held with Grievant regarding his “frequent absenteeism and the perceived corresponding degradation of morale in his division.” At the meeting, Secretary Ferguson attempted to instill in Grievant a respect for the professionalism of his position, but he also specifically directed Grievant to be at work from

9:00 a.m. to 5:00 p.m., to call him personally if he was going to be late or absent, and to spend more time with his division staff to help build morale.

8. Mr. Taylor later reported to Deputy Secretary and Assistant General Counsel Heather Connolly that Mr. Taylor had come to her with concerns about problems in the agency caused by Grievant's unavailability. Ms. Conolly reported this to Secretary Ferguson, and he asked her to conduct an investigation in September, 2005, into issues he had identified relating to Grievant's work habits and leadership .

9. Ms. Connolly reported that “a picture has emerged of a director who does not do his job, does not come to work and abuses the leave system.” Her report further concluded, in part, that “Fizer is habitually late for work when he bothers to show up at all. There is no evidence that when he is at work that he performs any necessary functions beyond a required director's signature from time to time. Only rarely does Fizer properly submit leave applications for time missed, and when he does, they are often inaccurate.”

10. Ms. Connolly's investigation relied on discussions with and written statements of four of Grievant's supervisees, electronic door records for Grievant's office building, various calendars, Grievant's annual and sick leave records, and Deputy Director Taylor's notes on Grievant's arrival and departure times. 11. Grievant's staff also had trouble finding him when they needed him. In finance employee Janie Belcher's statement to Ms. Connolly, she stated her office overlooks the parking lot and that frequently workers will come in to use her window to see if Grievant's car is there, rather than go to his office or call all over the place looking for him. Grievant's attendance at work or being in his office became a joke within the office _ his presence being the exception rather than the rule. Ms. Belcher found it hard to take Grievant seriously.

12. Chris Sforza, Assistant Director of the Financial Accounting and Reporting Section, was one of Grievant's close subordinates, and lost faith in his leadership. In her written comments to Ms. Connolly, she stated that Grievant “doesn't even make a pretense of working,” and that she did not trust him or rely on him to provide guidance or support. She stated, “There would be no void if he left because no one relies on him now.”

13. On October 5, 2005, Secretary Ferguson and Jim Wells, Assistant Director of Employee Relations for the Division of Personnel, met with Grievant. Secretary Ferguson informed Grievant that he was considering terminating Grievant's employment, and provided Grievant an opportunity to

explain or discuss the situation. Grievant requested that Secretary Ferguson consider placing him on leave restriction of imposing a suspension. The following day, Secretary Ferguson issued Grievant a termination letter that had been drafted by Mr. Wells prior to the October 5 meeting.

14. The termination letter set out Secretary Ferguson's reasons for terminating Grievant's employment. Specifically, the letter listed: 1) Insufficient leadership; 2) Failure to observe a reasonable standard of conduct in attendance and maintenance of accuraterecords; and 3) Insubordination. The letter further listed examples of conduct supporting each reason.

15. “Insufficient leadership” was supported by a description of Secretary Ferguson's expectation that Grievant, as a high-level manager, set an example for his subordinates. The letter cited Grievant's failure to regularly be present in the workplace as ineffectual supervision and detrimental to his department. The reasons also called into question Grievant's honesty, judgment and trustworthiness. (See footnote 1)

16. The charge related to attendance record-keeping was supported by examples such as Grievant's being absent from work on several dates without submitting leave slips, and being absent from work for extended time periods without charging his absences to accrued leave.

17. The “insubordination” charge was related to Grievant's failure “to provide leadership within [Grievant's] division by keeping regular business hours that at least covered the 9:00 AM to 5:00 PM workday” after being counseled to do so.

18. The Department of Administration does have a work-at-home policy, but it requires prior approval from the employee's supervisor and a history of good work performance and time management. Grievant had neither the approval of his supervisor to work at home or otherwise shift his work schedule, and he did not have a history of good time management. No formal work-at-home agreement had been completed. 19. Respondent does not have in place any method for accurately accounting for Grievant's time worked, such as daily Time sheets or time clock records, and he self- maintained his own leave records and calendar.

20. Mr. Wells assisted and consulted with Secretary Ferguson regarding his treatment of Grievant's case. He ultimately drafted for Secretary Ferguson the letter terminating Grievant's employment.

21. Mr. Wells began drafting the letter after an October 5, 2005, staff meeting that Grievant was required to but failed to attend. Despite being directed to call Secretary Ferguson or his deputy

when he was to be late or absent, Grievant did not, but instead left a message with his office that he had to take his children to the doctor. Grievant's wife met him at the doctor's office at about 8:30 a.m. so he could go to work, but Grievant did not report to work until 11:00 a.m. or 11:30 a.m.

22. The responsibilities of Grievant's position frequently required him to be out of his office, such as when he was at a director's meeting with Secretary Ferguson or was consulting with a state agency at its offices.

23. Grievant, in his entire tenure, never received a performance evaluation from his supervisor and prior to Secretary Ferguson taking over, and was never formally counseled regarding attendance issues.

24. Grievant did not always fill out leave slips if he was absent from the office. If he knew or thought that he would work in excess of forty hours that week, he would not use leave for an absence for things such as mid-day doctor's appointments. He believed an accrued sick leave balance did not cost the state anything and was worthless to him.

Discussion

Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. (See footnote 2) The employer bears the burden of proving the charges against the employee by a preponderance of the evidence. (See footnote 3)

A major issue in this matter is credibility, both of the witnesses and the data they rely on in supporting their arguments. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. (See footnote 4) The undersigned is charged with assessing the credibility of the witnesses. Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *(See footnote 5)* To resolve credibility issues, an administrative judge must

first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and fourth explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors must be considered in making and explaining a credibility determination. (See footnote 6) These include:

(1) The witnesses opportunity and capacity to observe the event or act in question;

(2) the witnesses character;

(3) any prior inconsistent statement by the witness;

(4) a witnesses bias or lack of bias;

(5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence;

(6) the inherent improbability of the witness's version of events; and

(7) the witness's demeanor.

Of the documentary evidence offered by Respondent, Respondent's Exhibits 7 and 8, records of the electronic door locks on Grievant's office building, are not credible as they are unreliable evidence of when he entered or left the building. Although these records appear to be accurate insofar as the limited data they record, they do not record data that can be but circumstantially applied to the question of whether Grievant arrived at a given time or not. The front door of Grievant's building was not a controlled access entrance during business hours, and there was testimony that the back door, nearest the parking lot, was often ajar while people gathered outside in the mornings or afternoons to smoke. Also, it is entirely common for one person to use his keycard for access, and to hold the door for anyone who may be entering at the same time. These documents have not been relied upon for purposes of this decision. Similarly, evidence created by observation of employees in Grievant's office, such as their notations on their calendars as to when Grievant came and went or when he was entirely absent, is only partially reliable. There is no evidence that Mr. Ross made an effort to be constantly apprized of Grievant's whereabouts or his actual hours worked, but instead recorded his observations as he made them. The resulting data set is not very reliable, then, as it is most likely to record only abnormalities, but it does corroborate observations that Grievant was frequently not in his office or available to his staff.

Essentially, the reliable evidence in this case is almost entirely testimonial, being the opinions and observations of the people involved. However, Grievant's own assessment and justification for his work habits set the tone for evaluating the credibility of the observations of his coworkers. Specifically, Grievant stated he believed leave slips were “just paperwork,” and that he was not concerned with his actual work hours because he made sure the office was covered from 8:00 to 5:00, and there was always enough work to fill forty hours per week. The contradiction between Grievant's multiple positions _ that he filled out his leave slips, but they were misdirected or lost by his supervisor, and that he did not need to fill out leave slips because he knew he would work enough hours or that such requirements were intended for positions less professional than his _ render each excuse meaningless and unreliable.

Grievant flatly denies having been counseled by Ms. Connolly in May or June, 2005 about his attendance issues, and stated he would have been offended if he had been. Although Ms. Connolly's documentation of the meeting was made several months after the fact and is therefore suspect, there is no other reason to suspect she made up the incident. Secretary Ferguson testified he directed Ms. Connolly to have the meeting, and she has nopersonal motive for saying otherwise. To the contrary, Grievant has a plain motive for denying he was given notice of the issue at an earlier date. Despite having had later reminders of the meeting, such as during his counseling session and pretermination meeting with Secretary Ferguson, he did not deny it occurred earlier.

Respondent's witnesses, on the other hand, had no inherent credibility problems. Grievant's subordinates provided candid opinions and observations, and they were internally consistent and consistent with each other. None had any apparent motive to fabricate their testimony, as there was no personal animosity apparent other than that which would arise from frustration with Grievant's behavior and its effect on their own jobs. There would be no reason for Girevant's coworkers to have formed their attitudes or impressions unless Grievant's conduct was a cause. There was no testimony or any other evidence to suggest Grievant was not personable, personally liked or provided good service and commendable work when he was present and actually working. Nobody testified to any personal acrimony. The issue is simply failure to meet a reasonable standard for a high- level State executive employee with regards to following rules of the agency and directions of his supervisor, leading his division, and maintaining the trust of his supervisor.

Mr. Taylor could conceivably have a reason for attempting to make Grievant look bad, in that he

was the obvious person next in line to take over the Director's position. However, the evidence based on his statements is consistent with the other employees of the finance division, and is consistent with the independent observations of Secretary Ferguson. Further, the evidence shows Mr. Taylor made efforts to report his concerns in the least damaging way possible, and did not go into specifics until ordered to by Secretary Ferguson. Respondent has met its burden of proving that Grievant failed to lead his department as was reasonably expected, that he failed to accurately or appropriately document and account for his leave use and the work he was paid to do, and that he was not available for work when he was needed. The insubordination charge is proven by Grievant's failure to follow policy and by his failure to follow a direct order when he did not contact Secretary Ferguson directly when he know he would be absent or late.

The proof of these matters, in this case, is a near thing, and the undersigned is mindful of the maxim that "the preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." (See footnote 7) Where the evidence equally supports both sides, the party bearing the burden has not met its burden. (See footnote 8) The most reliable evidence in this matter is circumstantial or based on opinions and impressions, rather than reliable documentation. Nevertheless, it is apparent that these opinions did not arise from a plot or conspiracy or some nefarious attempt to randomly discredit Grievant for some ulterior motive.

In this case, the most succinct explanation is most likely the correct one, and a parsimonious review of the offered facts and explanations by “filtering out” the conclusions that require the most assumptions, is not inconsistent with Respondent's position. It is more likely than not that Grievant failed to meet the standards expected of one in his high- level position, abused the privilege of his rank by failing to be diligent in his time management and accounting, and was insubordinate in following the advice and expressdirectives of his supervisor regarding being available for work and reporting in when he knew he would be absent.

Whether these charges amount to dischargeable offenses is a matter generally left up to the discretion of the employer, but that decision may be mitigated if Grievant establishes the employer's decision is an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." (See footnote 9) Respondent has substantial discretion to determine a penalty in these types of situations, and the

undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. (See footnote 10)

"Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." (See footnote 11) "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similaroffenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." (See footnote 12)

It is clear from the record that Respondent considered both lesser and greater actions than termination. It is also clear that Respondent took into account Grievant's accomplishments and work performance when he was actually working, and weighed those considerations with the importance of his top-level management position. Also entering into the equation were Grievant's cavalier attitude toward his conduct and his apparent prevarication when confronted with the concerns of his supervisor. Mitigation is not appropriate under this set of facts and circumstances.

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).

2. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.'" Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dep't of Finance and Admin*., 264 S.E.2d 151 (W. Va. 1980). 3. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human*

Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99- 26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94- 01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997). 6. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee, supra*.

7. Respondent has met its burden of proving the charges against Grievant by a preponderance of the evidence, and those charges support the dismissal imposed by Respondent.

8. Grievant has not provided good cause to mitigate the disciplinary action taken.

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 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.

August 9, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

One cited example that was referred to in the record and in testimony had to do with Grievant's claim that he was taking his children to the doctor. Secretary Ferguson's assistant, however, heard that Grievant's wife had been seen dropping the children off at the day care located adjacent to the workplace, and went to the daycare to see if the children were there. The day care reported the children as present, and Mr. Greene reported this back to Secretary Ferguson.

Footnote: 2

Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579 (W. Va. 1985).

Footnote: 3

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 4

Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996).

Footnote: 5

See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).

Footnote: 6

Hillen v. Department of the Army, 35 MSPR 453 458 (1987).

Footnote: 7

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Footnote: 8

Id.

Footnote: 9

Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Footnote: 10

Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999)

Footnote: 11

Overbee, supra.

Footnote: 12

Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994).