THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANA JO BURGESS,

Grievant,

v. **Docket No. 06-WWV-339**

WORKFORCE WEST VIRGINIA,

Respondent.

D E C I S I O N

Diana Jo Burgess ("Grievant"), employed by WORKFORCE West Virginia ("Respondent") as an Office Assistant 2, filed an expedited grievance to level four on October 5, 2006, following her dismissal. For relief, Grievant seeks reinstatement to her position with Respondent, or a similar position with another agency, back pay, benefits, interest, removal of any statements or correspondence regarding this matter, attorney fees and expenses. (See footnote 1) An evidentiary hearing was conducted by Chief Administrative Law Judge Paul Marteney on December 4, 2006, in the Grievance Board's Charleston office. Grievant was represented by Todd Twyman, Esq., and Respondent was represented by Darlene Ratliff-Thomas, Assistant Attorney General. Proposed findings of fact and conclusions of law were due on January 19, 2007. Respondent's proposals were received on January 22, 2007, and no proposals were filed on Grievant's behalf. The grievance was reassigned to the undersigned on or about August 15, 2007, following Mr. Marteney's resignation.

The following facts are derived from a preponderance of the credible evidence made part of the level four record.

Findings of Fact

1. Grievant has been employed by Respondent since October 1, 2003, and has held the classification of Office Assistant 2, assigned to the Administrative Support Section, Fiscal & Administrative Management Division, at all times pertinent to this grievance.

2. Grievant was absent from work from mid-April until mid-August 2006, on a combination of medical and personal leave of absence without pay. Upon her return, Grievant's supervisor, Joe

Creech, ask her to file certain documents, referred to as “re- files.”

3. Grievant responded, in writing, on August 30, 2006, advising Mr. Creech and Jane Looney, Acting Supervisor in Mr. Creech's absence, that

These were here prior to my return. Per Joe's meeting in mid Feb. or Mar., instructions were given as to how refiles are taken care of. Whomever does mail is to take care of it. Since I was not here, I feel it is not my responsibility to catch these up. I did not create the problem, thus it is not in my best interest to fix it.

4. Mr. Creech and Ms. Looney discussed the matter with Tammy Cogar, Assistant Director of the Division, and a meeting was scheduled with Grievant for September 1, 2006.

5. Although she had no accrued sick leave, Grievant called in sick on September 1, and the meeting was postponed until September 5, 2006.

6. Ms. Cogar was ill on September 5, and the meeting was again postponed. Grievant approached Mr. Creech to learn the reason for the meeting.

7. The tone of the conversation between Grievant and Mr. Creech escalated, and upon hearing her name, Ms. Looney intervened. Grievant raised issues including the presence of Ms. Looney's son at work. She also alleged that Mr. Creech was responsiblefor the fact she had not received Workers' Compensation benefits during her leave of absence.

8. Grievant became very agitated during the altercation, left the work area, and went outside to smoke. She was so upset an ambulance was called, and she was taken to a hospital emergency room where it was determined that she had experienced a “panic attack seizure”. She was released and returned home that same day.

9. Grievant did not report to work, and did not call in, the following three days, September 6, 7, and 8, 2006.

10. Respondent attempted to contact Grievant by telephone on September 6, 2006; however, the automated response stated that the party was not accepting calls at that time.

11. When Grievant returned to work on September 11, 2006, Ms. Cogar, Mark Miller, Deputy Executive Director, and Thomas Rardin, Assistant Director, Human Resources, met with her to discuss the events from August 30 through September 11, 2006.

12. Grievant became upset during the meeting, and it was suggested that she take a break. Her behavior outside the building caused such concern that the guard contacted the Division of

Protective Services to provide additional security. Mr. Miller proceeded to the site, and found Grievant hysterically crying, shaking, and unable to complete a sentence. Grievant was verbally suspended, and her mother came to the office and took her home.

13. By letter dated September 11, 2006, Commissioner Ronald E. Radcliff confirmed the suspension for a period not to exceed thirty days, pending the result of an investigation of the allegations of insubordination on August 30, and September 5, 2006, as well as reported multiple outbursts directed at or to visitors or employees in the lobby of or in front of building 4. It is also alleged that you did not telephone your supervisor to inform him that you would be absent from work on September 6, 7, and 8, 2006.

This action is necessary to preserve the integrity of any evidence relevant to these allegations and because Agency employees have expressed fearfulness of your presence in the workplace . . . .

14. Alice McVey, Assistant Director Management Analysis - EO/Internal Security, completed the investigation, consisting of interviews with Grievant, Mr. Creek, Ms. Looney, and several co-workers, on September 20, 2006.

15. On September 21, 2006, Deputy Commissioner Miller submitted a recommendation to Mr. Rardin that Grievant be dismissed, based on the following reasons

Employee was suspended in November, 2005 for ten (10) days as a result of acts of insubordination.

Employee demonstrated insubordination on August 30, 2006, when she wrote a note to Joe Creech, her supervisor refusing to follow a directive given by him to all staff in a meeting earlier that morning. Employee admitted . . . that refusal to do something your supervisor directs is insubordination.

On September 1st, employee called in sick and did not submit the proper documentation to request a medical or personal leave of absence without pay, even though she has repeatedly been made aware of the requirements.

On September 5th, employee was again insubordinate when she initiated a verbal altercation with her supervisor, Joe Creech and then with Jane Looney, a co-worker who serves as back-up supervisor, at which time she demonstrated erratic behavior.

Employee did not report to work or call in to notify anyone that she would not be in on the following

days: September 6, September 7, and September 8, even though she indicated in the investigation that she was aware of the policy for calling in absent and she did not call in intentionally.

On September 11, employee reported to work. At that time, you, Tammy Cogar, and I met with her to discuss the above incidents. Employee again demonstrated erratic behavior both during the meeting as well as in the lobbyand in front of the building during a meeting break. Her actions caused such concern by the guard and others in the area that Division of Protective Services was contacted to provide additional security.

Co-workers of the employee have expressed concern for their safety, which is documented in the investigation.

Not included in the investigation is another report documented by Management Analysis that the employee informed and EO Officer of potential inappropriate acts of another EO Officer. When questioned about the report, Ms. Burgess admitted that she had lied.

In the investigation, the employee admits that she has difficulty taking directives from males due to issues from her past.

16. By letter dated September 22, 2006, Commissioner Radcliff notified Grievant of her dismissal, effective that date, for the reasons stated by Mr. Miller.

17. Grievant had previously been suspended for ten days in November 2005, for tardiness, insubordination, and the use of abusive language towards her supervisor.

18. Grievant had filed a complaint with the West Virginia Human Rights Commission on August 21, 2006, in which she alleged that the November 2005 suspension constituted sexual harassment and a hostile work environment. The Commission served Respondent with a “Notice of Discrimination” postmarked September 19, 2006.

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). (See footnote 2) "The preponderance standard generally requiresproof 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

State employees, such as Grievant, who are in the classified service can only be dismissed 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). Respondent argues that it has established just cause for Grievant's termination by proving that she engaged in insubordination as demonstrated by her willful failure to obey the reasonable orders of her supervisor. Grievant argues that the dismissal was arbitrary and capricious because her actions did not rise to that level of discipline, and was in retaliation for her having filed the complaint with the Human Rights Commission.

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.*, 212 W. Va. 209, 569 S.E.2d 456 (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.

Grievant does not deny that she refused to complete the re-files as directed by her supervisor. Neither does she deny having failed to report off work on September 6, 7, and 8. Respondent has

proven by a preponderance of the evidence that for a second time Grievant was insubordinate, and even the November 2005, suspension did not correct her failure to follow reasonable directives of her supervisor.

Grievant's argument that the level of discipline was arbitrary and capricious is essentially one of mitigation. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached thedecision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE- 081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR- 322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

The argument Grievant's dismissal is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "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).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ*., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the

level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "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 v. Dep't of Health and Human Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

Given Grievant's prior record of insubordination, her blatent refusal to perform a task assigned by her supervisor, her failure to report her absence for three consecutive days, and her overall demeanor described by co-workers, dismissal was not an arbitrary and capricious act by Respondent. Neither was the decision to dismiss clearly excessive, anabuse of the agency's discretion, or disproportionate to the offense. Grievant has failed to prove that mitigation is appropriate in this instance.

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that they engaged in protected activity, e.g. filing or participating in a grievance;

2) that they were 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 employees engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employees' protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). *See Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251(1986).

If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverseaction. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra.*

Notice of the Human Rights Commission complaint was not mailed to Respondent until September 19, 2006. By that date, Grievant had been suspended, and an investigation was in process. It is entirely possible that Respondent had not even received the Notice prior to Mr. Miller's recommendation for dismissal. In this case, the adverse action occurred contemporaneously to the complaint, and did not constitute reprisal.

The above findings of fact and discussion are supplemented by the following conclusions of law.

Conclusions of Law

1. Pursuant to *W. Va. Code* § 29-6A-6, 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. *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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).

3. 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.*, 212 W.

Va. 209, 569 S.E.2d 456 (2002)(*per curiam*).

4. Respondent has proven by a preponderance of the evidence that Grievant, acting willfully and intentionally, engaged in ongoing behavior contrary to the reasonable directives of her supervisor, i.e., insubordination, which is misconduct of a substantial nature directly affecting rights and interests of the public.

5. 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).

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)(repealed) (*but see Executive Order No. 2- 07*, May 8, 2007). 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: SEPTEMBER 20, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Attorney fees and expenses are not available relief at this level.*

Footnote: 2

[2]*In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it*

with the Public Employees Grievance Board. W.Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.