THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MICHAEL KOCH,

Grievant,

v. DOCKET NO. 06-HHR-460

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR PUBLIC HEALTH,

Respondent.

DECISION

Grievant, Michael Koch, filed this grievance on October 6, 2006, challenging a written counseling that he received from his supervisor for insubordination. His stated relief sought is:

I respectively request that the letter of insubordination be expunged and removed form my file with written confirmation to that effect. In the future, any time my supervisor chooses to adjust my schedule; I would prefer to have it in writing to ensure there is clear understanding.

Parties agreed to submit this grievance on the record developed at the lower level. Grievant appeared *pro se*, and Respondent was represented by Jennifer Akers, Assistant Attorney General. The matter became mature for decision on March 31, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts that after meeting with his supervisor Grievant was to keep track of his time and ensure he did not work more than 40 hours a week, adjusting his schedule accordingly.

Respondent argues Grievant's schedule could not be altered without prior approval from his supervisor, and Grievant was aware of this, given that his supervisor met with him and discussed it.

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

Findings of Fact

1. Grievant is employed by Respondent. He is an Engineer, assigned to work in the Office of Environmental Health Services.

2. As part of Grievant's job, he travels to water treatment facilities to conduct surveys and provide math instruction for field operation training sessions.

3. On August 22, 2006, Grievant's supervisor, J.D. Douglas, met with his staff to address a change in flex time policy. Previously, the flex time policy allowed employees to adjust their own work hours to attain 40 hours a week. During the meeting Mr. Douglas stressed that no adjustments would be made to an employee's work schedule without prior approval from a supervisor. This was in compliance with DHHR Policy Memorandum 2102.

4. Grievant was present for this meeting.

5. During the week of September 18, 2006, Grievant was scheduled to provide math instruction at a training session at Cedar Lakes, in Ripley, West Virginia.

6. Mr. Douglas and Grievant met on September 5, 2006, to review Grievant's schedule. Mr. Douglas adjusted Grievant's schedule to account for his teaching and travel itinerary while ensuring he only worked 40 hours that week.

7. On September 5, 2006, Mr. Douglas orally reviewed Grievant's schedule with him, as was the practice. 8. Mr. Douglas and Grievant met again on September 14, 2006, where Grievant's work schedule for the week of the 18th was confirmed.

9. On Monday, September 18, 2006, Grievant was scheduled to report to work at noon. Grievant arrived at work that day between 10:30 a.m. and 10:45 a.m.

10. Mr. Douglas tried to speak with Grievant concerning coming in earlier than scheduled, but each time Mr. Douglas approached Grievant's office, Grievant was on the phone. Mr. Douglas did not bother Grievant because he believed Grievant was conducting personal business.

11. When Mr. Douglas returned from lunch, Grievant had left to teach his scheduled course at Cedar Lakes at 3:30 p.m. Mr. Douglas was unable to speak with Grievant that day.

12. On September 18, 2006, Grievant emailed Mr. Douglas informing him he was altering his work schedule. Mr. Douglas did not retrieve this email until later in the week.

13. On September 21, 2006, Mr. Douglas sent an email to Grievant at 8:05 a.m. stating, “Please see me on Friday morning.”

14. Grievant opened this email at 11:08 a.m. the same day.

15. Grievant did not respond to the email until 7:42 p.m., at which time he sent an email that Friday morning was not good for him. The email was sent to Mr. Douglas and several other superiors.

16. Mr. Douglas did not receive the email.

17. Grievant arrived at the office at approximately 2:30 p.m. on Friday. At that time, Mr. Douglas met with him regarding the problems with the schedule changes. 18. On September 26, 2006, Mr. Douglas issued Grievant a memorandum citing Grievant with insubordination for failure to adhere to DHHR Policy 2102, specifically not gaining approval to adust his schedule. The memorandum constituted a written counseling.

19. On October 30, 2006, Mr. Douglas issued a revised memorandum to Grievant informing him he could request schedule changes by written memo or by email.

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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts Grievant changed his schedule without prior approval from his supervisor. Grievant asserts his understanding was that he was required to keep track of his time so as not to exceed 40 hours.

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. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is

charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, 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 Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

From the testimony presented below, it is clear Grievant is very upset about the current situation, and his emotions cloud his ability to accurately perceive the events giving rise to this grievance. In his Proposed Findings of Fact and Conclusions of Law, Grievant indicated that he believed the hearing examiner below completely ignored his testimony and the testimony of his witness.

What is glaringly obvious to the undersigned is Grievant's hostile attitude toward Mr. Douglas. Grievant continually asserted that Mr. Douglas should have known there was some confusion in reference to Grievant's schedule when Grievant came in around 10:30 a.m. on September 18. Mr. Douglas explained that he believed Grievant was taking care of personal business, the inference being that Mr. Douglas seemed to think Grievant would not claim that time as work time. Grievant's questioning of Mr. Douglas was as follows:Grievant: Okay. When I came in that Monday and I was on the phone, you say talking personal business, and I don't deny that. By the way, I have, I didn't know that it was a problem, but I have since advised my church, and even my wife, not to contact me at work, if that's a problem, but it wasn't ever presented to me as a problem before. So, when I was on the phone, why did you not interrupt me? I mean, if it's that important, if you saw me there at ten forty-five, knowing that, in your mind, I was due in at noon and I was there at ten forty-five, shouldn't that have clued you in that there was something amiss, something wrong?

Mr. Douglas: Well, I did. That's why I wanted to talk to you, Michael, but once I thought you were doing personal business, you were like this, your feet propped up on the desk, turned around backwards _

Grievant: Well, all the more reason. A supervisor should interrupt an employee if they're doing

personal business like that, and say, you know, this is _

Mr. Douglas: Well, see, Michael _

Grievant: Uncalled for _

Mr. Douglas: That's the key. I thought you were doing personal business, and I knew your schedule wouldn't be until noon. I thought you were just coming in to do personal business.

Grievant: Actually, I wasn't doing personal business. I received a phone call from a friend, and I was just sharing _

Clearly, Grievant perceives his supervisor to be deficient in some way, while Mr. Douglas was attempting to give Grievant the benefit of the doubt in this situation. In addition, Grievant initially said he didn't deny he was conducting personal business and then when confronted by that statement, denied it. Clearly, Grievant's frustration with the situation has caused him to be unable to accurately perceive events.

Respondent asserts Grievant was insubordinate. “[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 wilful; and (c) the order (or rule orregulation) must be reasonable and valid.*” Butts v. Higher Education Governing Board/Shepherd College* 569 S.E.2d 456 (W. Va. 2002). Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for a refusal to obey to be "wilful," 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 clearly refused to get prior approval for schedule adjustments even though that request was reasonable and valid. Grievant's refusal is wilful because Grievant's refusal to follow Policy Memorandum 2102 had nothing to do with the reasonableness of the order, but instead, was motivated by a conscious decision by Grievant to modify the policy in a way that best suited him.

While Grievant asserted that he was not aware his supervisor had to approve a schedule adjustment, the undersigned finds this to be disingenuous. Each employee is provided with a copy of the Employee Manual, and contained in that manual is Policy Memorandum 2102. Also, Mr. Douglas

drafted a memorandum on August 22, 2006, memorializing that he met with his staff to discuss the new flex time policy. He then filed this memorandum in his administrative file. Grievant was informed of this policy on at least two separate occasions, and that does not include the meetings he had with Mr. Douglas as Grievant's schedule was being prepared.

Grievant presented testimony from Phil Martino, who works in the Environmental Engineering Division, Certification and Training Section. Mr. Martino is responsible for seeing that certain classes are conducted. Grievant's questioning of Mr. Martino seemsto indicate Grievant is arguing that when he teaches class he is temporarily assigned to Mr. Martino. While Grievant and Mr. Martino did discuss Grievant's schedule, Mr. Martino is not and has never been Grievant's supervisor. Any agreement between Mr. Martino and Grievant to adjust Grievant's schedule is not in compliance with Policy Memorandum 2102. Once again, this argument is without merit. Grievant was fully and completely aware of who had authority to approve schedule adjustments. In this case, Respondent has proven by a preponderance of the evidence that Grievant was insubordinate in failing to comply with Policy Memorandum 2102.

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 Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. 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. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR- 371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to

observe the witness' demeanor. Nevertheless, 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 Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

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 wilful; and (c) the order (or rule or regulation) must be reasonable and valid.*" Butts v. Higher Education Governing Board/Shepherd College* 569 S.E.2d 456 (W. Va. 2002). Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for a refusal to obey to be "wilful," 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*.

4. Respondent proved by a preponderance of the evidence that Grievant was insubordinate by failing to comply with Policy Memorandum 2102. For the foregoing reasons, this grievance is hereby **DENIED**.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: **May 8, 2007**

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Wendy A. Campbell

Administrative Law Judge