THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CONNIE McMORRIS,

Grievant,

v.

Docket No. 07-C&H-316D

WEST VIRGINIA

DIVISION OF CULTURE AND HISTORY,

Respondent.

DECISION

Grievant is employed by Respondent as an Office Assistant 2. She filed this grievance on October 6, 2006, asserting:

On October 5, Grievant was issued a three-day suspension without pay for “misuse of agency computer” and “agency e-mail address.” The justification give [sic] is a misapplication of agency computer policy, and the disciplinary action taken fails to follow progressive disciplinary practice.

For relief Grievant seeks “to be made whole and that the pay be restored for the three days of suspension.”

This grievance was denied at the lower levels. On June 7, 2007, Grievant alleged default occurred at level three of the grievance procedure. On April 18, 2008, an Order Granting Default was entered. On August 26, 2008, a remedy hearing was held at the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, Steward, UE Local 170, and Respondent was represented by Gregory Skinner, Senior Assistant Attorney General. This case

became mature for decision on October 10, 2008, upon the parties' submissions of Findings of Fact and Conclusions of Law. (See footnote 1)

Synopsis

Grievant asserts Respondent has failed to prove by clear and convincing evidence that she is not entitled to requested remedy.

Respondent argues the remedy Grievant requests is contrary to law and clearly wrong, and therefore this grievance should be denied.

This grievance is denied. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1.

Grievant is employed by Respondent as an Office Assistant 2.

2.

On or about October 5, 2006, Grievant was suspended for three days without pay for using her state computer and e-mail address to espouse her personal political views.

3.

On Sunday July 23, 2006, Vic Sprouse, a State Senator, posted comments on the Patriots for Peace website.

4.

On Sunday, July 23, 2006, Grievant responded to the Senator's comments on the Patriots for Peace website. In her response, she specifically addresses the Senator and said:

As the mother of a female soldier who landed on a dark tarmack [sic] in Iraq within a week of the initial Shock [sic] and Awe [sic]. Any respect I previously held for you before dissolved into thin air as I read your apparently drunken comments. To treat such a horrible situation with the flippancy exhibited here demonstrates why our democracy is in grave danger of being replaced by the tyranny of shallow, greedy capitalist. May you, and those you support, be soundly defeated in your next run for office.

5.

On Thursday, August 31, 2006, Grievant forwarded an e-mail from her state-issued computer and e-mail address to 78 recipients with a link to the Patriots for Peace

website where she had posted her comments.

6.

Some of the recipients of the e-mail were in the legislative branch of West Virginia government.

7.

The e-mail was forwarded to the Governor's Office and then forwarded to Commissioner Randall Reid-Smith's Office. It then was forwarded to Cabinet Secretary Kay Goodwin's Office.

8.

On August 31, 2006, Grievant exchanged e-mails on her state-issued computer from her state e-mail address with Delegate Staton, (See footnote 2) one of the recipients of her forwarded e-mail. In that cyber discussion Delegate Staton admonished Grievant for using her agency-issued computer to espouse such political views.

9.

In response to Delegate Staton's admonishment, Grievant sent an e-mail from her agency computer and state-issued e-mail address to him defending actions. In this e-mail, Grievant included pictures of her daughter purportedly as a military journalist at the scene of combat in the Iraq War.

10.

On September 1, 2006, Grievant sent an apology e-mail to Randall Reid-Smith, Delegate Staton, Gordon Simmons, and several others. This apology was sent from her state-issued computer on her state-issued e-mail computer.

11.

A pre-determination hearing was held on October 4, 2006, by Commissioner Reid-Smith. At this meeting the Commissioner informed Grievant she would besuspended for three days without pay for violating Respondent's written computer policy as set forth in the Employee Handbook.

12.

On October 5, 2006, Grievant was provided with a letter memorializing the meeting held on the previous day.

13.

The Employee Handbook clearly states, “State property is intended to be used in the course of conducting State business **only**.”

14.

On October 2, 2002, Grievant acknowledged receipt of the handbook in writing.

15.

On November 19, 2002, Nancy Herholdt, Commissioner at the time, issued a memorandum to all employees specifically addressing e-mail use from an agency-issued computer and state-issued e-mail. Paragraph 4 in that memo stated, “However, please do not use your work e-mail address as a contact for political campaigns or activities.” (Grievant's Exhibit 1)

16.

Respondent's disciplinary policy is set forth in writing and became effective March 1, 2004. The policy states that “Disciplinary action is usually progressive unless the severity of the infraction or performance is serious enough to warrant more severe disciplinary action.” (Respondent's Exhibit 3)

Discussion

In deciding a remedy for default, it is presumed Grievant has prevailed on the merits of the grievance. W.Va. Code §29-6A-3. (See footnote 3) The burden is on Respondent to prove by clearand convincing evidence that the remedy requested is contrary to law or clearly wrong by evidence substantially greater than a preponderance of the evidence. *Lohr. V. West Virginia Division of Corrections*, Docket No. 99-CORR-157D (November 15, 1999). Respondent may rebut the presumption that the basic facts underlying the presumption on behalf of Grievant are not true. *Roy v. West Virginia Division of Highways*, Docket No. 05- DOH-150D (September 23, 2005); *Bailey, et al. v. West Virginia Department of Health and Human Resources*, Docket No. 03-HHR-167D (June 30, 2004); *Allison v. West Virginia Division of Highways*, Docket No. 02-DOH-256D (March 20, 2003).

An employer seeking to prevent the award of the requested remedy may rebut the presumption established by §29-6A-3(a)(2). The employer must do so by clear and convincing evidence, which is a more difficult standard of proof than the preponderance of evidence standard which ordinarily applies before the Grievance Board. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).

Although the language of § 29-6A-3(a)(2) establishes a presumption that "the employee prevailed on the merits," which would appear to encompass questions of both fact and law, the term "presumption" is generally used in connection with questions of evidence, rather than law. *Lohr, supra*, citing Cleckley, *Handbook on Evidence for W. Va. Lawyers* (1978). "To rebut the presumption created in W. Va. Code §29-6A-3(a)(2), a respondent must present clear and convincing evidence

that the basic facts underlying theasserted presumption are not true." *Lohr v. Div. of Corr*., Docket No. 95-CORR-157D (Nov. 15, 1999).

The underlying facts of this case are uncontested. Grievant used her work computer and work e-mail to forward a link to a political website that contained her personal feelings and comments. This forward also referenced her comments. Clearly this was inappropriate. Respondent has policies in place to ensure employees have a clear understanding what is considered inappropriate when it comes to using the agency-issued computer and e-mail. Grievant was aware of these policies, and violated them on two separate occasions.

Respondent's response, suspending Grievant for three days, was appropriate. While Respondent does abide by a progressive discipline policy, it clearly sets forth the idea that some infractions will warrant stronger discipline. Clearly, Grievant's actions and misuse of agency tools warrants the discipline received. Respondent has met its burden and this grievance must be denied. The undersigned, therefore, makes the following Conclusions of Law.

Conclusions of Law

1.

In deciding a remedy for default, it is presumed Grievant has prevailed on the merits of the grievance. W.Va. Code §29-6A-3.

2.

The burden is on Respondent to prove by clear and convincing evidence that the remedy requested is contrary to law or clearly wrong by evidence substantially greater than a preponderance of the evidence. *Lohr. V. West Virginia Division of Corrections*, Docket No. 99-CORR-157D (November 15, 1999).3.

Respondent may rebut the presumption that the basic facts underlying the presumption on behalf of Grievant are not true. *Roy v. West Virginia Division of Highways*, Docket No. 05-DOH-150D (September 23, 2005); *Bailey, et al. v. West Virginia Department of Health and Human Resources*, Docket No. 03-HHR-167D (June 30, 2004); *Allison v. West Virginia Division of Highways*, Docket No. 02-DOH- 256D (March 20, 2003).

4.

An employer seeking to prevent the award of the requested remedy may rebut the presumption established by §29-6A-3(a)(2). The employer must do so by clear and convincing evidence, which is a more difficult standard of proof than the preponderance of evidence standard which ordinarily applies before the Grievance Board. *Lohr v. Div. of Corrections*, Docket No. 95-CORR-157D (Nov. 15, 1999).

5.

Although the language of § 29-6A-3(a)(2) establishes a presumption that "the employee prevailed on the merits," which would appear to encompass questions of both fact and law, the term "presumption" is generally used in connection with questions of evidence, rather than law. *Lohr, supra*, citing Cleckley, *Handbook on Evidence for W. Va. Lawyers* (1978).

6.

"To rebut the presumption created in W. Va. Code §29-6A-3(a)(2), a respondent must present clear and convincing evidence that the basic facts underlying the asserted presumption are not true." *Lohr v. Div. of Corr*., Docket No. 95-CORR- 157D (Nov. 15, 1999).

7.

Respondent met its burden.

WHEREFORE, based upon the foregoing, the grievance is **DENIED**. Any party 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 § 18-29-7. (See footnote 3). 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. 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: December 19, 2008

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Findings of Fact and Conclusions of Law were not received by the Respondent.

Footnote: 2

Delegate Staton was then the majority leader of the West Virginia House of Delegates.

Footnote: 3

In 2007, the Legislature in S.B. 442 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 being 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. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.