THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOSEPH JEFFERSON,

Grievant,

v.

DOCKET NO. 07-HE-116

SHEPHERD UNIVERSITY,

Respondent.

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Joseph Jefferson, on March 8, 2007. The grievance challenges a written reprimand Grievant received. His statement of grievance reads:

> On February 22, 2007, I was served with a letter of warning that alleges that I made some inappropriate comments about Dr. Adams, during a closed door and confidential conversation with another employee. I have strongly denied making any such comments and feel that the letter is excessive, unwarranted as well as capricious and based on hearsay.

As relief Grievant sought to have the letter removed from his personnel file.

A level one conference was held on March 9, and Grievant's supervisor denied the grievance on March 13, 2007. Grievant appealed to level two on March 19, 2007, a conference was held on March

27, 2007, and the grievance was denied on March 29, 2007. The parties asked to waive level three, and Grievant appealed to level four on April 4, 2007. This grievance was assigned to the undersigned on October 26, 2007. The parties were allowed to remain at level four at that point, because of the amount of time which had elapsed since the filing of the grievance at level four. A level four hearing was held before the undersigned Administrative Law Judge on December 12, 2007, in theGrievance Board's Westover office. Grievant was represented by Christine Barr, AFT-West Virginia/AFL-CIO, and Respondent was represented by its General Counsel, K. Alan Perdue. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on January 28, 2008.

Synopsis

Grievant received a written reprimand for allegedly making the following statements to a co-worker, regarding his strained working relationship with his supervisor: “[i]f it were not for my wife and kids, it would come to blows,” and “[s]ometimes I am so angry I could come out swinging”. The written reprimand concludes that, “[s]ince you have denied making the remarks, I am unable to ascertain if the remarks were misinterpreted or had another meaning other than the intent to threaten me with physical harm. Remarks of this nature are unprofessional and inappropriate in the work place environment at Shepherd University.”

Only Grievant and the co-worker reporting the incident were present when Grievant allegedly made these statements. The co-worker, Carol Boyd, testified Grievant made these statements to her, and Grievant denied that he had done so. Ms. Boyd further testified that she did not believe Grievant was threatening his supervisor at the time he allegedly made these statements, but later decided she should report this matter. This was a conversation between two co-workers, and Grievant was explaining to Ms. Boyd why it was difficult for him to reconcile with his supervisor. This conversation was blown out of proportion. Grievant was not threatening his supervisor.

The following Findings of Fact are made based upon the record developed at the level four hearing.

Findings of Fact

1. Grievant has been employed by Shepherd University (“Shepherd”), as the Director of

Cooperative Education, within the Career Development Center, Office of Student Affairs, since 2001.

2. John Adams, Ph. D., Assistant Vice President of Student Affairs, was Grievant's supervisor from 2001, until November 18, 2007. (See footnote 1) Dr. Adams and Grievant have not had a good working relationship for quite some time, and this had become apparent to everyone in the Career Development Center.

3. On February 22, 2007, Dr. Adams reprimanded Grievant in writing, and placed the written reprimand in Grievant's personnel file. The reprimand states:

> On February 2, 2007, I was informed by another employee (Ms. Carol Boyd) that you made the following remarks in her presence concerning our workplace relationship. She indicates that following a meeting between the two of us on January 31, 2007 you went into her office and stated: “If it were not for my wife and kids, it would come to blows” and “Sometimes I am so angry I could come out swinging”.
>
> On February 9, I met with you, and you denied making these remarks. I believe, however, the information provided by Ms. Boyd to be accurate and truthful. Since you have denied making the remarks, I am unable to ascertain if the remarks were misinterpreted or had another meaning other than the intent to threaten me with physical harm. Remarks of this nature are unprofessional and inappropriate in the work place environment at Shepherd University.
>
> In the future, you need to refrain from making any future remarks of this type and conduct yourself in the manner stated in the Classified Employee's Handbook. This includes discussions behind closed doors.
>
> You have previously received a written memorandum about the importance of maintaining professional decorum in the work-place. This recurrence isa serious matter and your adherence to standards of professionalism, to include controlling your temper, is necessary in order for you to have successful employment at Shepherd.

4. Carol Boyd is a Program Assistant in the Career Development Center at Shepherd. She has been employed by Shepherd for 16 years, and Dr. Adams is her supervisor.

5. In January and February 2007, there were five employees in the Career Development Center, including Dr. Adams, Ms. Boyd, and Grievant. The other two employees in the Center were Betsy Sheets, Director of Career Services, and Tess Tomsic, who was an Administrative Secretary. Ms. Tomsic was Grievant's secretary.

6. Ms. Boyd believed Grievant wanted to isolate himself from the rest of the employees in the Center from the beginning of his employment there. She based this upon the fact that he did not respond to her when she greeted him in the morning, he did not go to lunch with his co-workers, and he did not attend the office Christmas party. Ms. Boyd was aware, however, that Grievant usually worked out at lunchtime, and that he and Dr. Adams did not get along.

7. In late September 2006, Ms. Boyd brought up an issue about Grievant's appointment calendar in a staff meeting. Ms. Boyd was not responsible for maintaining Grievant's appointment calendar. Ms. Boyd had not talked to Grievant about any issues she had with his appointment calendar prior to the staff meeting. Grievant did not believe his appointment calendar was any of Ms. Boyd's concern, and he did not believe it was appropriate for her to raise issues about how he maintained his appointment calendar in a staff meeting. Grievant sent Ms. Boyd an email sometime after the staff meeting, on September 25, 2006, telling her, “[y]ou should know that you can come and talk to me ona one to one basis if there is something that you may need clarification on.” The email said nothing further.

8. In late October or early November 2006, Ms. Boyd was looking for a better paying job. Dr. Adams did not want to lose her, and was trying to find a way to get her more money. One idea he had was to shift supervisory responsibility for Ms. Tomsic to Ms. Boyd. He consulted Grievant and others regarding this matter. Grievant was opposed to this idea for several reasons, and sent Dr. Adams an email on November 9, 2006, explaining his opposition. One of the reasons for his opposition was that the number of direct subordinates is one factor in determining the proper classification and pay grade for a position, and he was concerned that moving Ms. Tomsic from his direct supervision would affect the pay grade and classification of his position. Grievant also pointed out that others who have supervisory responsibilities have a college degree, which apparently, Ms. Boyd did not have. During a staff meeting, Dr. Adams read to the group that part of Grievant's email which discussed the fact that other employees who have supervisory responsibilities have a college education. Dr. Adams did not identify the author of the email, but it was a small group, and Grievant voiced opposition to the proposal during the meeting.

9. In November 2006, Ms. Boyd and Ms. Tomsic met with the Vice President of Student Affairs, Dr. Kipetz, about the tension among certain employees in the Career Development Center. Ms. Boyd's concern was with Grievant. Ms. Boyd at first testified that she and two other employees in the

office had gone to see Dr. Kipetz, the third employee apparently being Ms. Sheets, but when she was recalled later to testify, shestated she and Ms. Tomsic had gone to talk to Dr. Kipetz. (See footnote 2) No explanation for this discrepancy was offered.

10. Dr. Kipetz brought in a consultant to work with the employees in the Career Development Center. The consultant surveyed all the employees, and concluded that the office climate was very poor and better communication was needed. The consultant met with the staff as a group on two or three occasions. During the second meeting, the group talked about the “elephant in the room.” Ms. Boyd concluded that for most of the group, the “elephant in the room” was Grievant. Grievant concluded that the issue for most of the group was the tension between himself and Dr. Adams.

11. Dr. Adams told Grievant that everyone in the office had gone to see Dr. Kipetz about office tension. Ms. Sheets told Grievant she had never met with Dr. Kipetz to voice concerns about office tension or Grievant. Ms. Tomsic told Grievant she had not met with Dr. Kipetz to voice concerns about office tension.

12. On Wednesday, January 31, 2007, at about 10:30 a.m., Grievant went into Ms. Boyd's office, asked if they could talk, shut the door, and sat down. Grievant brought up the fact that someone in the office had talked to Dr. Kipetz about office tension, and Ms. Boyd acknowledged that she had done so. Grievant told Ms. Boyd she should come directly to him if she had a problem, and criticized her for bringing up issues she had with him during staff meetings. Ms. Boyd told Grievant she did not believe they could not talk through their issues and needed outside help. Grievant talked about the tension between himself and Dr. Adams, and in general, about how it might be harder for some people tolet go of past unresolved issues, based on the longevity of the unresolved issues. Grievant suggested to Ms. Boyd that they should all keep in mind that not everyone has the same experiences. Grievant expressed to Ms. Boyd that “if it wasn't for his wife and kids,” he would not be able to control the frustration he felt with Dr. Adams.

13. Ms. Boyd recalled that Grievant had, at one point in the conversation, punched his open hand with his fist, when discussing his frustration with the situation with Dr. Adams. Grievant denied doing so.

14. Immediately after Grievant left her office, Ms. Boyd made some notes about the conversation. She recorded that Grievant stated twice, “that if it wasn't for his wife and kids he's 'so angry he can't let it go' that 'if it weren't for his wife and kids it would come to blows'” and “'sometimes

I'm so angry I could come out swinging'".

15. Ms. Boyd was upset by the conversation with Grievant, but she was not concerned for Dr. Adams' welfare. She did not believe at the time of the conversation that Grievant was threatening Dr. Adams. That evening she relayed what had occurred to her therapist, who encouraged her to tell Dr. Adams what had happened.

16. Ms. Boyd did not tell Dr. Adams about her conversation with Grievant until the end of the work day on Friday, February 2, 2007. She spoke with Dr. Adams about the conversation with Grievant again on Monday, February 5, 2007.

17. Dr. Adams met with Dr. Kipetz, and relayed what Ms. Boyd had told him. She referred him to the campus police. He spoke with the chief of the campus police, and then to Shepherd's general counsel, Mr. Perdue. Dr. Adams did not talk to Grievant about this incident until Friday, February 9, 2007, over a week after Grievant's discussion with Ms. Boyd. Grievant denied making the statements for which he was reprimanded. 18. Grievant was trying to explain to Ms. Boyd the depth of his problem with Dr. Adams. It was a conversation between two co-workers. Grievant's statements to Ms. Boyd were not a threat against Dr. Adams.

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; (See footnote 3) *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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

This grievance presents two possible issues. The first issue is whether Grievant made the statements attributed to him in the written reprimand. If it is determined that Grievant made these statements, the second issue is whether he was threatening Dr. Adams with physical harm. 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. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health &*

Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Both Grievant and Ms. Boyd appeared credible when giving their testimony, although both had their issues. Grievant and Ms. Boyd had different views of many issues, and Ms. Boyd tended to exaggerate in her perception of events. Ms. Boyd did not view Grievant in a favorable light, and she had some reason to treat him poorly if she had the opportunity. It is likely that Ms. Boyd was uncomfortable when Grievant came into her office and shut the door, particularly when he began the conversation by criticizing her forgoing to Dr. Kipetz, and that the conversation upset her. Grievant was annoyed that Ms. Boyd had dragged the Dean and a consultant into his problems with Dr. Adams, although he seemed unwilling to admit this.

It is hard to believe that Grievant would confide anything in Ms. Boyd, given their differences, and the fact that, by Ms. Boyd's own testimony, he had tried to isolate himself from the other employees in the Career Development Center. Further, at the level four hearing, Grievant presented himself as a man who was confident, well spoken, and who chose his words carefully. The words and phrases attributed to Grievant by Ms. Boyd seem out of character.

It is more likely than not that Grievant did not use the exact words recorded by Ms. Boyd in her notes, but that he made statements and gestures which led her to the impressions she recorded. Ms. Boyd's impressions, however, were likely clouded by her perception of Grievant and Dr. Adams, and her tendency to exaggerate.

The undersigned cannot conclude, however, that Grievant in any way threatened Dr. Adams. The factors relied upon in evaluating whether comments constitute a threat under the West Virginia

Division of Personnel's Workplace Security Policy are useful for reference here. Those factors include, whether the threat seems real, and the nature, likelihood and imminence of the potential harm. *Bowe v. Workers Compensation Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004), (*citing Burkhammer v. Dep't of Health & Human Resources*, Docket No. 03-HHR-276 (Nov. 12, 2003)). In this instance, there was no real threat or imminent potential harm. This entire incident was blown out of proportion. This was, at most, a conversation between two employees about the situation in the office, where one employee, perhaps, became overly animated or dramatic in his attempt to gethis point across. If every employee of Shepherd were reprimanded every time such a conversation occurred, that would likely be a lot of reprimands.

The following Conclusions of Law support the Decision reached.

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. Grievant was not threatening Dr. Adams, and his conversation with a co- worker is not deserving of a written reprimand.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to remove the written reprimand from Grievant's personnel file. 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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: March 12, 2008

Footnote: 1

Grievant is still the Director of Cooperative Education at Shepherd, but his physical location and supervisor in Student Affairs have changed.

Footnote: 2

Neither Ms. Tomsic nor Ms. Sheets was called as a witness.

Footnote: 3

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.