THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LAJENNA KELLEY,

Grievant,

v.

DOCKET NO. 2008-1485-CONS

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

This grievance arises out of two separate disciplinary actions imposed on Grievant LaJenna Kelley. The first disciplinary action involves an oral suspension for 3.5 hours without pay. The second disciplinary action involves a written 3-day suspension without pay. The grievances were consolidated on the motion of Grievant for the purpose of hearing and decision. The initial grievance was filed at level one of the grievance procedure on June 25, 2007, after Grievant was instructed to leave her workplace before the end of her work day. This directive to Grievant from Respondent resulted in 3.5 hours of lost pay. Her Statement of Grievance reads:

> After an immediate oral suspension was imposed on me on May 15, 2007, I requested Jeff Black, Director of Human Resources, conduct an investigation of the suspension. One June 11, 2007, I received an email from Jeff Black stating he has sustained the suspension. This oral suspension was without good cause or due process, and it did not comply with the prescribed DOH Administrative Operating Procedures on Disciplinary Actions. Further, I believe this suspension constitutes harassment & retaliation by my immediate supervisor.

Grievant seeks the following relief:

> Payment for the 3.5 hours of lost pay; reinstatement of the 3.5 hours of lost tenure & leave accrual; removal of all documentation regarding this disciplinary action from my files; and, take steps to ensure that all harassment and retaliation by my immediate

supervisor ceases.

The level one and level two conferences were waived upon the agreement of the parties. Grievant appealed to level three on June 29, 2007. A level three decision was issued on October 11, 2007, denying the grievance. Grievant appealed that decision to level four on October 15, 2007, under the "old" grievance procedure. (See footnote 1)

In the interim, Grievant filed a second grievance on October 1, 2007, in which she challenged a three-day suspension without pay. Grievant sought relief in the form of restoration of pay, benefits, and tenure. Grievant filed a Motion for Default on October 17, 2007, in which she alleged that the level one hearing evaluator denied Grievant's right to call and examine witnesses. The undersigned conducted a hearing on the motion at the Grievance Board's Charleston Office on January 9, 2008. The undersigned ruled that default was not the proper remedy based upon the facts developed at the hearing. The undersigned did remand the grievance to level one to allow Grievant the opportunity to exercise her right to call, examine and cross-examine witnesses during the level one hearing. This proceeding was governed by the "new" grievance procedure more fully set out in W. Va. Code §§ 6C-2-1 to 6C-2-7, and W. Va. Code §§ 6C-3-1 to 6C-3-6.

On April 7, 2008, the parties agreed to transfer the first grievance from level four of the "old" grievance procedure to level three of the "new" grievance procedure. As noted above, the parties requested that the two grievances be consolidated for the purpose ofhearing and decision. A level three hearing was held before the undersigned Administrative Law Judge on May 19, 2008, at the Public Employees Grievance Board's Charleston Office. Grievant was represented by Gordon Simmons, Steward, United Electrical Radio and Machine Workers of America, Local 170. Respondent was represented by Robert Miller, Esquire. This matter became mature for decision upon receipt of the last of the parties' fact/law proposals on June 23, 2008.

Summary

Grievant was suspended by Respondent for two separate incidents. The first suspension was imposed on May 15, 2007, from 12:30 p.m. to 4:00 p.m. The reasons for the immediate oral suspension were as follows:

> Disruption of the workplace which interfered with the orderly conduct of the affairs of the department.

> Rude and disrespectful behavior in the office, failing to maintain a high standard of personal conduct and courtesy expected by the DOH in dealing with the public, fellow employees, subordinates, supervisors, and officials.
>
> Insulting and confrontational language.
>
> Refusal to calm yourself down and regain your composure resulting in your immediate oral suspension.

The second suspension was imposed on September 25, 2007, with the suspension of three working days beginning on October 2, 2007. The letter describes the incident resulting in the suspension as follows:

> On August 14, 2007, in a loud and emotional manner you angrily accused your supervisor of taking a piece of paper from your desk. You were confrontational, disrespectful, accusatory and rude to your supervisor. Other employees were present when you displayed this behavior. Initially, your supervisor had difficulty calming you down to determine what caused your emotional behavior. As it turned out, no employee in the section had takenthe paper from your desk. In addition, no employee in the section had even seen the paper which caused the outburst. Previously, you were issued an immediate oral suspension of three and one-half hours for a similar offense.

Grievant alleges that she was the victim of retaliation because she attempted to report what she perceived as the manipulation and abuse of the leave time reporting process within the agency. Grievant failed to prove these suspensions were related to anything other than her inappropriate behavior. Respondent established good cause for the disciplinary action by a preponderance of the evidence. 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 has been employed by the West Virginia Division of Highways ("DOH") as a telephone operator in the Citizens Request for Assistance Office of the Executive Division since April 11, 2006.

2. Bernard Ferrell is Grievant's immediate supervisor. Ernie Larzo, Executive Assistant to the

Assistant Commissioner of DOH, is Mr. Ferrell's immediate supervisor.

3. On the morning of May 11, 2007, Mr. Ferrell requested that Grievant make a list of the phone books from around the State that they had received in their office.

4. Ryan MacDonald, a Mail Processor with the Office Services Division of DOH, helped Grievant remove the phone books from the shelves, and spread the books out behind her desk. Later that morning, when Mr. MacDonald was on his mail run, Grievant informed him that she was finished with the phone books but didn't know what to with themother than place them back in the cabinet. A co-worker had a conversation with Grievant about the phone books being outdated, and having someone pick them up to discard them.

5. Grievant placed a call to Phyllis Lucas, Director of Office Services, to request that someone pick up the outdated phone books. Ms. Lucas did not answer her phone, and Grievant did not leave a message.

6. Mr. MacDonald and Grievant ride to and from work together, and were scheduled to leave at 1:00 p.m. that day. Grievant had submitted a leave request slip early that morning, and it was approved by Mr. Ferrell that morning.

7. Mr. Ferrell had informed his staff that they were expecting members of the Governor's office to visit on Monday, May 14, 2007. He requested that the staff take the time to clean their work locations to prepare for the visit.

8. When Grievant prepared to leave early on May 11, Mr. Ferrell asked Grievant about the phone books that were still on the floor behind her desk. Grievant informed him that she was unable to reach Ms. Lucas to have someone dispose of them. Mr. Ferrell informed Grievant that they were not finished with the books, but she left while he was trying to talk with her. Grievant left work, and the phone books remained on the floor until Monday morning, May 14.

9. Grievant called Monday morning, May 14, and left word that she would not be coming into work on that day. Mr. Ferrell placed the phone books back on the shelf that morning prior to the scheduled meeting with staff from the Governor's office. The meeting with the Governor's staff was postponed for other reasons. 10. Grievant came back to work on May 15, 2007. Mr. Ferrell called Grievant into his office at approximately 11:30 a.m. The purpose of the meeting was to talk to her regarding the phone books strewn about the floor on Friday, and not being at work to tidy up the mess on Monday. Grievant informed Mr. Ferrell that she had tried to call Office Services, but couldn't

reach them to have the phone books removed. Mr. Ferrell again informed Grievant that they were not finished with the phone books. Mr. Ferrell told Grievant that she did not appear to be focused on her job, and asked if there was something wrong with which he could help. Grievant became angry, and left his office and went back to her work station.

11. During this somewhat heated exchange, Pamela Jarrell, a co-worker, left the office to talk with Ernie Larzo. She informed Mr. Larzo that Grievant was very upset and would not calm down. Mr. Larzo called Mr. Ferrell and asked if he needed assistance. It was decided that Mr. Ferrell would continue to try to solve the situation, but that Mr. Larzo would be available if needed.

12. Grievant remained angry and agitated. Mr. Ferrell called Mr. Larzo back and asked if he could come and help talk with Grievant. Mr. Larzo described her as emotionally out of control, and refusing to calm down. When Mr. Larzo came to the office, he also told Grievant that if she did not calm down, she would have to leave. Grievant did not calm down, and Mr. Larzo told her that if she did not leave he would call security. Grievant was suspended for the rest of the day, and told that she should report back to work on the morning of May 16, 2007. 13. When Grievant returned to work the next day, Mr. Ferrell gave her a letter informing her of the reasons for her half-day suspension without pay. Jeff Black, Director of Human Resources Division, discussed the matter with Mr. Larzo. He instructed Mr. Larzo to prepare the letter confirming the action of sending Grievant home on May 15 constituted a suspension without pay. Grievant met with Mr. Black to discuss the suspension later that same week. Mr. Black informed her that he would look into the incident, and give her a response as to whether or not the suspension would stand. Mr. Black sent a letter to Grievant on June 8, 2007, in which he stated that he found no reason to alter the action of Mr. Ferrell. (See footnote 2)

14. On Tuesday, August 14, 2007, Grievant in a loud and emotional manner angrily accused Mr. Ferrell of removing a piece of paper from her desk. This paper allegedly reflected Grievant's notes on the times of agency employees arriving and leaving the workplace. Grievant was confrontational, disrespectful, and rude to her supervisor. For this second incident, Grievant was suspended for three working days.

15. Grievant appealed this suspension to Mr. Black for review. Mr. Black upheld Grievant's suspension as explained in a letter to Grievant dated September 25, 2007. Mr. Black determined that other employees had observed the inappropriate behavior by Grievant, and that Mr. Ferrell, despite

reasonable efforts, was unable to calm her down. Mr. Black noted that no witnesses existed to confirm the existence of the document that Grievant alleged was taken from her desk.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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 that this disciplinary action was proper in view of Grievant's conduct. Respondent points to the DOH Operating Procedures under Section II, Payroll/Personnel, Chapter 6 Disciplinary Action, which went into effect on April 15, 2007, and provides at page 6:

> An employee may be suspended immediately, upon oral notice, if the employee's performance or conduct constitutes a continuing danger to persons or property or if the orderly conduct of the affairs of the DOH is threatened.

In addition, Respondent relies upon DOH Administrative Operating Procedure under Section II, Payroll/Personnel, Chapter 6 Disciplinary Action, which went into effect on April 15, 2007, in support of suspension for cause. This policy provides in part:

> Examples of poor performance or misconduct that may warrant suspension in response to a single performance issue or instance of misconduct include . . . those for which the imposition of a lesser penalty would be warranted.
>
> Those offenses for which a lesser penalty would be warranted include: insubordination . . . insulting, abusive, threatening, offensive, defamatory . . . conduct or language . . . any similar performance issue or misconduct.

Id. at III B.

Grievant's only contention in her proposals to the undersigned is that the burden of proof has not been met by Respondent in either case. In addition, Grievant asserts that the suspensions were reprisal for her report of perceived abuse of the leave reporting process. Grievant attempts to

establish retaliation through a series of unsubstantiated allegations. Grievant alleges that Mr. Ferrell did not always make employees take leave as required. Grievant reported this to Mr. Larzo. Subsequently, Mr. Larzo reassigned the time-keeping duty from Grievant to Mr. Ferrell. Grievant contends that the documentation of the systematic leave abuse was taken from her locked desk after her disclosure to Mr. Larzo (August 14, 2007, incident). Grievant proposes that "Larzo's dismissal of Grievant's report and refusal to investigate, as well as his subsequent reassignment of time-keeping to the very person charged with wrongdoing, warrant the presumption that Larzo is complicit with the illegal practice reported. Larzo's knowledge of Grievant's whistleblowing [sic] and subsequent suspension of Grievant . . . warrant the presumption that he engaged in reprisal."

As set forth above, Grievant has argued that her conduct in this matter was protected by her right to freedom of speech and by the whistle-blower law. "[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." *Orr v. Crowder*, 315 S.E.2d 593 (W. Va. 1983)(*citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). However,this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . . " *Orr* at 601. Three general restrictions on a public employee's right to free speech have been identified by the courts. For this speech to be protected, it "must be made with regard to a matter of public concern" and statements made "with knowledge [that they] . . . were false or with reckless disregard to whether [they were] . . . false or not' are not protected." *Id.* at 602. Third, statements "about person with whom [the speaker has] close personal contact which would disrupt 'discipline . . . or harmony among co-workers' or destroy 'personal loyalty and confidence' may not be protected." *Id.*

The burden of proof is on a grievant to demonstrate by a preponderance of the evidence that his conduct is constitutionally protected, and that this conduct was "a substantial factor" in the employer's decision to discipline him. *Orr* at 62 (*citing Mt. Healthy City Bd. of Educ. v. Dolye*, 429 U.S. 274 (1977)). However, "[t]he fact that the government may have considered an employee's protected speech or conduct in reaching an adverse decision does not necessarily render that decision constitutionally infirm." *Mazaleski v. Trensdell*, 562 F.2d 701, 715 (D. C. Cir. 1977). In making that decision, the key is "to consider the employee's job performance in its entirely." *Id.* As observed by one court:

> [An employer] has a right to expect [an employee] to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.

Mazaleski at 360-361.

In the instant case, the undersigned cannot find that Grievant's conduct constituted protected speech. The evidence in this case establishes that Grievant did, in fact, make her accusations without consideration of the fact that they may or may not be false. Sometime after Grievant brought her concerns to Mr. Larzo, it is not disputed that he changed the time reporting procedure so that Grievant is no longer involved. As noted above, Mr. Ferrell personally enters the time. The evidence in this grievance does not make it clear whether or not there actually was wrongdoing. Mr. Ferrell did verify that an employee who may have to leave for a period of time during the day, such as for a doctor's appointment, would fill out a leave slip for the entire day. However, sometimes the appointment may not take an entire day, and they would return before the end of the work day. In that instance, the leave slip the employee initially filled out would be destroyed, and a new leave slip reflecting the actual time the employee was gone would be prepared. In addition, the undersigned finds that, in this instance, the Agency's need to properly conduct its affairs far outweighs Grievant's right to make personal and potentially unfounded, damaging accusations against Mr. Ferrell.

A “whistle-blower means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority.” W. Va. Code § 6C- 1-2(g). Information helpful in clarifying this definition is:

> “Wrongdoing” means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest or the public or the employer.

W. Va. Code § 6C-1-2(h).

> “Good faith report” means a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

W. Va. Code § 6C-1-2(d).

> "Appropriate authority" means a federal, state, county or municipal government body, agency, or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

W. Va. Code § 6C-1-2(a).

Additionally, W. Va. Code § 6C-1-3(a) indicates that discriminatory and retaliatory actions against whistle-blowers are prohibited, and states:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

An employer may not retaliate against a whistle-blower, and any such act would be seen as an act of reprisal. W. Va. Code § 6C-1-3. "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." W. Va. Code § 6C-1-4. Finally, "[i]t shall be a defense to an action under this section if thedefendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." *Id.* In this case, the basic element of a "good faith report" is missing. As set forth above, Grievant's allegations were made with reckless disregard of their underlying truth. The evidence in this case is lacking any substantiated facts demonstrating the existence of wrongdoing. Moreover, these statements were angry accusations which resulted in a disruption to "harmony among co-workers." This type of behavior is not protected speech. Grievant's conduct is not protected under the whistle-blower provisions.

The Respondent has met its burden to prove that the action taken in disciplining Grievant was justified. Grievant denies that she was out of control. However, she does admit being upset. Grievant

states that she was upset because Mr. Ferrell kept telling her that she was not doing her job, but did not give her any specifics as to what she was doing wrong or what she needed to do to correct the problem. It is undisputed that the phone books were behind Grievant's desk on the floor on May 11, 2007. It is further undisputed that Mr. Ferrell told Grievant, along with the other employees, to clean their work stations because of the scheduled visit from the Governor's staff the following Monday.

Grievant left early on Friday on approved leave with the phone books still on the floor of her work area. A co-worker, Ms. Jarrell, acknowledges that she did tell Grievant that the phone books were out dated and would probably be discarded. Ms. Jarrell also told Grievant that she should ask Mr. Ferrell what he wanted her to do with the phone books. Ms. Jarrell is not Grievant's immediate supervisor, and Grievant should know to ask her supervisor if she has questions. Grievant did talk with Mr. Ferrell before leaving, andhe tried to tell her that they were not finished with the phone books. Upon Grievant's return to work the following Tuesday, Mr. Ferrell attempted to discuss his concerns that she had left the phone books on the floor when he had instructed all the employees to make sure their areas were tidy. By all accounts, Grievant became upset and disruptive. Regardless of whether Grievant thought she was being disruptive, she had an obligation and responsibility to calm down and speak with her supervisor in a calm and professional manner.

The same can be said for the second incident which took place on August 14, 2007. Sometime prior to that date, Grievant began keeping notes of the comings and goings of the agency employees. Grievant did this because she asserts other employees were allowed to come and go without stating where they were going or how long they would be gone. To the contrary, Grievant was required to give an account of her leave time. On Tuesday, August 14, 2007, Grievant in a loud and emotional manner accused Mr. Ferrell of taking this documentation from her desk. Grievant was confrontational, disrespectful, and accusatory to her supervisor. Mr. Black's review of the matter revealed that no other employee in the section had seen or heard of the documentation which caused the outburst. Regardless of the existence or nonexistence of these notes, Grievant had an obligation to speak with her supervisor in a professional manner. This was the very same type of behavior which led to the immediate oral suspension. The second suspension was a reasonable exercise of discretion given the severity, and similar nature, of the behavior.

The following Conclusions of Law support the decision reached.

Conclusion 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. "[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." *Orr v. Crowder*, 315 S.E.2d 593 (W. Va. 1983)(*citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . . " *Orr* at 601.

3. The burden of proof is on a grievant to demonstrate by a preponderance of the evidence that his conduct is constitutionally protected, and that this conduct was "a substantial factor" in the employer's decision to discipline him. *Orr* at 62 (*citing Mt. Healthy City Bd. of Educ. v. Dolye*, 429 U.S. 274 (1977)).

4. An employer may not retaliate against a whistle-blower, and any such act would be seen as an act of reprisal. W. Va. Code § 6C-1-3. "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." W. Va. Code § 6C-1-4. 5. Grievant failed to establish that her conduct was protected speech, and that she was entitled to the protections of the whistle-blower provisions.

5. Respondent has met its burden of proof by a preponderance of the evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 8, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, 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.

Footnote: 2

Respondent raised a timeliness defense to the filing of the grievance related to this event. As noted in the lower level decision, this argument is without merit. Grievant filed her grievance within the ten-day time period.