THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MAUREEN CLEMONS,
Grievant,

v. **DOCKET NO. 2009-0138-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant Maureen L. Clemons filed this grievance on August 5, 2008 seeking to have a letter of reprimand rescinded, alleging it was retaliation for filing a previous grievance and for submitting a legislative suggestion about her section. Her stated relief sought is "to be made whole by the rescinding of the July 23, 2008 letter from Mr. Joins to me and my personnel files being expunged and for my workplace to no longer be a hostile environment."

A level three hearing was held in the Grievance Board's Charleston office on September 28, 2009. Grievant was represented by Fred Tucker, and Respondent was represented by General Counsel Raymond S. Franks, II. The matter became mature for decision October 30, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was reprimanded for failure to remove clutter from her office that was causing a safety hazard, after repeated directives from her supervisor to do so. She alleged his reprimand was retaliatory for a grievance she filed in 1995 or for a suggestion

she sent to the legislature that may have affected her supervisor's job. Respondent met its burden of proof; Grievant did not. The grievance is, therefore, denied.

Findings of Fact

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

1. Grievant is employed by Respondent as an Office Assistant 3 at its Elkview office. Her immediate supervisor is Rusty Joins.

2. In March 2008, Tammy Canterbury, the Department of Environmental Protection's (DEP's) Safety and Loss Control Officer performed a safety inspection of the Elkview Office, and noted violations of the DEP Safety Policy. Among the violations she noted was the extreme clutter in Grievant's office.

3. Grievant's office had papers and boxes piled along the walls such that the door would not open all the way. She observed that not all of the clutter was work-related; and she observed a cockroach in the office.

4. Ms. Canterbury makes annual inspections of all the DEP facilities, and Grievant's office is one she writes up annually.

5. Mr. Joins is the facility manager for the Elkview Office, and took over those duties in January, 2008. The report Ms. Canterbury generated was routed to him for action, and he met with Grievant privately on May 9 to discuss her office.

6. He also inspected Grievant's office himself, and observed a number of things not necessary for her job, such as numerous personal photographs on surfaces, a television, DVD player and DVDs, plastic storage bins beside her desk and under a table.

7. After their meeting, Mr. Joins gave Grievant until May 30 to de-clutter her office, but did not give her any specific directions on how to do so.

8. On May 30, Grievant had not done anything to tidy her office, but Mr. Joins took no action at that time.

9. Ms. Canterbury was slated to make a re-inspection 90 days after her first one, and so Mr. Joins, on July 11, 2008, gave Grievant a verbal reprimand about her still-cluttered office, and gave her seven days from that date to fix it. On that day, Grievant's brother-in-law came to the office to remove the television, and Mr. Joins helped him carry it out.

10. After seven days, Mr. Joins checked her office and saw very little progress, so he called his supervisor for direction.

11. After speaking with his supervisor, someone in the personnel department prepared a reprimand letter for Mr. Joins' signature, and he delivered the reprimand to Grievant on July 23, 2008. He cited her failure to comply with his earlier directives as insubordination as well as her violation of DEP's safety policy. This letter also noted some performance issues that are not at issue in this Grievance.

12. On July 24, Mr. Joins and the building's custodian helped move all the clutter out of Grievant's office, and when Ms. Canterbury returned on July 25, she found no issues with the office.

13. Ms. Canterbury, on her second visit, did write up another employee's office that she had not seen on her first visit, also for being cluttered with personal, non-work-related items. She found Grievant's office to be acceptable on her second visit.

14. Grievant filed a grievance in 1995 over an incident with Mr. Joins, who was not then her supervisor, because he had an angry outburst at the office that caused a computer monitor to fall on Grievant. The matter was resolved at level one when their supervisor agreed to have Mr. Joins attend an anger management program.

15. On an unspecified date, Grievant sent a suggestion to the legislature intended to save money by reorganizing her department's staffing. The suggestion was sent back to her with a direction that it be routed through her chain of command. At the time, Mr. Joins was not her supervisor, the suggestion was apparently not implemented, and Mr. Joins did not learn of it until August, 2008, after the events upon which this grievance is based were over.

16. Grievant does have a medical condition that limits her mobility and ability to lift heavy objects, but she never requested any specific assistance or accommodations.

17. At one point, Grievant did ask Mr. Joins how many personal decorations she was allowed to have, and after looking in everyone else's offices and counting theirs, he told her 25, which was the most he counted elsewhere.

Discussion

As this grievance involves a disciplinary matter, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. [1] Respondent must therefore prove, by a preponderance of the evidence, that the written reprimand issued to Grievant was justified.

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

Respondent met its burden of proving the reprimand was justified. Grievant's office was a safety hazard, as it perpetually was, and she was given directions to clean it up on multiple occasions. Although she needed help, she never told Mr. Joins she could not move all things out of her office or that she wanted someone to help her do so. She was told specifically what was wrong with the clutter, but still appeared confused by the problem. Mr. Joins could not reasonably be expected to point out every little thing that needed to be done – Ms. Clemons should have been able to judge for herself.

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions."[2] 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.[3] Grievant has also alleged that the action taken by Mr. Joins was retaliatory. "Reprisal" is "the retaliation of an employer 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."[4] Since these charges are wholly unsupported by the evidence, they need not be discussed in detail. The legislative suggestion Grievant made was unknown to Mr. Joins, so it could not have been the basis for any action he took. The connection to Grievant's prior grievance, filed fourteen years ago, is simply too remote to be considered as a motivation now. Further, Mr. Joins had

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[2]*Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

[3]*See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

[4]W. VA. CODE § 6C-2-2(o); *Morral v. Div. of Highways*, Docket No. 2008-1334-DOT (June 22, 2009).

nothing to do with Ms. Canterbury's inspection or her findings and the negative report she made that caused Mr. Joins to take action.

The following conclusions of law support this discussion:

Conclusions of Law

1. As this grievance involves a disciplinary matter, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. "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. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

3. Respondent met its burden of proving Grievant disobeyed or ignored clear, lawful directives from her supervisor on multiple occasions. A written reprimand is the appropriate, if not lenient, response to this inaction on her part.

4. "'Reprisal' is 'the retaliation of an employer 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.' W. Va. Code § 6C-2-2(o)." *Morral v. Div. of Highways*, Docket No. 2008-1334-DOT (June 22, 2009).

5. Grievant did not show that the disciplinary action taken against her was reprisal for anything.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty days of receipt of this Decision. 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).

November 20, 2009

M. Paul Marteney
Administrative Law Judge