THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LARRY J. RICHARDS,
Grievant,

v. **Docket No. 2009-1639-KanED**

KANAWHA COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Larry J. Richards filed a grievance against his employer, Kanawha County Board of Education, on June 5, 2009. His statement of grievance reads, "Suspension without pay - not notified of non compliance [sic] by any method I could receive such notification. Notified only by e-mail - I do not have computer or skills to use one."

His relief sought is, "Reinstatement of pay and attendance. Change of policy by board to prevent future occurences [sic]."

A level three hearing was held at the Grievance Board's Charleston office on November 11, 2009. Grievant appeared *pro se*, and Respondent was represented by James Withrow, Esquire. This case became mature after the hearing as the parties declined to submit findings of fact and conclusions of law.

Synopsis

Grievant was suspended for one-half day on May 25, 2009, for failing to complete the required staff development for the 2007-2008 school year. Respondent asserts it sent Grievant notice of the staff development to his email account provided by the school board. Respondent avers that there are numerous computers available to its employees. Respondent further argues that when Grievant had not completed the required staff

development, two letters were sent to Grievant's home, and yet he did not complete the required courses.

Grievant asserts he does not know how to use the computer and does not use his email. He further argues that he does not have a computer, and Respondent should send the notice through the mail.

Respondent has met its burden in this matter. This grievance is DENIED.

Findings of Fact

1. Grievant is currently employed by Respondent as a painter. Prior to working as a painter, he was a school bus operator for Respondent and worked in that capacity for approximately fifteen years.

2. Respondent issued email accounts for all its employees several years ago.

3. Respondent has an expectation that all employees will check their email at least one time a day.

4. Grievant received an email account, but has never accessed his email.

5. Each year, staff is required to have staff development training in the areas that include sexual harassment, bullying, safety, code of conduct, and drug-free workplace. This training is offered online.

6. For the 2007-2008 school year, this training was also offered in face-to-face sessions.

7. Respondent has approximately 15,000 computers that can be used by its employees. Employees' email accounts can be accessed from any computer.

8. For the 2007-2008 school year, emails were sent to all of Respondent's employees explaining the need to complete the training sessions by November 1st, along

with information about several face-to-face sessions for the employees who preferred to complete the training by that method. All employees were notified by email on June 11, 2007; August 31, 2007; October 1, 2007; and November 8, 2007.

9. By November 1, 2008, Grievant had not completed the training sessions.

10. Respondent sent a letter to Grievant's home on December 22, 2008, explaining that he needed to complete the training courses, and failure to do so would constitute insubordination and willful neglect of duty.

11. Respondent sent a letter to Grievant's home on March 9, 2009, stating that Grievant still had failed to complete the staff development for the 2007-2008 school year, and since no satisfactory explanation was given, Ronald E. Duerring, Superintendent, was recommending Grievant be suspended one-half day.

12. On May 22, 2009, Grievant was informed that the Board of Education had voted to suspend him without pay as a result of his failure to complete the required training.

13. Grievant received both of these letters.

14. The staff development training had been mandatory for two years prior to the 2007-2008 school year, and all Respondent's employees were notified by email the prior years.

15. In the prior years, Grievant had completed the training.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is of greater weight or more

convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

This specific staff development has been a required component of Grievant's position for at least two years prior to the 2007-2008 school year. Grievant even conceded that he was aware of it and had completed it in years prior. However, Grievant testified that during the 2007-2008 school year, he had many personal issues to deal with and forgot to complete the required courses. It is undisputed that Respondent sent emails to all its employees on June 11, 2007; August 31, 2007; October 1, 2007; and November 8, 2007.

The crux of the issue is whether Grievant's failure to complete the staff development was "knowing and intentional" when he never received the email notifications because he does not check his email account. Unfortunately for Grievant, the answer is yes.

Email is an acceptable mode of communication, and in the business world many informative emails are sent by employers to employees. Respondent is no different. While the undersigned can appreciate not having a computer at home, Carol Thom, Director of Professional Development, testified that Respondent has 15,000 computers employees can use. Ms. Thom testified that Grievant's home base is the Crede Warehouse, and there are numerous computers there for employees to access. Also, Grievant's email account is accessible from any computer, including those at the local library.

Grievant contends that he is a painter, and his job description does not require him to operate a computer.[1] However, given the computer age, it is not unreasonable for Respondent to expect its employees to access their email for important reminders and notices. Email is clearly the easiest and most efficient way of providing information to a large number of employees. Grievant asserts that he does not know how to log on and check his email account. The undersigned is sure Respondent would show him how to do this so no more important reminders are missed. However, Grievant has to ask for help and be willing to learn.

It is imperative to mention that Respondent also attempted to contact Grievant by sending letters through the United States Postal Service. Grievant does not dispute that he received these letters. He testified that, upon receipt of them, he went to the Board

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[1]Grievant did not provide a copy of his job description.

office to attempt to correct the issue. Grievant testified that he was told it was too late for him to take the staff development courses. Unfortunately, he was unable to provide specific information concerning with whom he spoke. Ms. Thom indicated that she was unaware of Grievant receiving this information from her office.

When Grievant received the December 22, 2008, letter from Respondent, he was given an opportunity to provide Respondent with any information he wished to be considered. Grievant provided nothing in writing, and without specifics concerning whom he spoke with, little weight can be given to this testimony.

Respondent has met its burden of proving Grievant was insubordinate by failing to complete the staff development.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1,

1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

3. Respondent has met its burden of proving Grievant was insubordinate by failing to complete the staff development.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) 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 (2008).

Accordingly, this grievance is **DENIED**.

DATE: January 12, 2009

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Wendy A. Elswick
Administrative Law Judge