WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA KOBLINSKY,
Grievant,

v. **Docket No. 2011-0892-CONS**

PUTNAM COUNTY HEALTH DEPARTMENT,
Respondent.

DECISION

This is a consolidated grievance filed by Grievant, Barbara Koblinsky, against her employer, the Putnam County Health Department ("PCHD") Respondent. On December 13, 2010, Ms. Koblinsky filed a grievance, Docket No. 2011-0879-PutCH, stating that on December 13, 2010 she was suspended without good cause. The relief she sought was to be made whole, including any lost wages, plus interest, and any lost benefits restored. Then on December 14, 2010, Ms. Koblinsky filed a separate and distinct grievance, Docket No. 2011-0848-PutCH, stating that her constitutional rights were violated in an investigation over unspecified allegations by a directive stating "you are directed to limit your discussion of this matter to those who are conducting the investigation . . . this includes all forms of news media and any other outside agencies. Any deviation from this directive . . . may be grounds for dismissal." The relief requested was to be made whole, including remedy for any act of reprisal taken against Grievant for exercising her rights. The two grievances referenced were consolidated as Docket No. 2011-0892-CONS on December 21, 2010 for decision at Level 3.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on March 23, 2011. Grievant appeared in person and was represented by Gordon J. Simmons, UE Local 170, WV Public Workers Union. Respondent was represented by Jacqueline Fleshman, PCHD Administrator.

This matter became mature for decision on April 18, 2011, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals. Further, the undersigned is aware and acknowledges *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-1306-CONS (Nov. 8, 2010).[1] It is explicitly recognized that a series of events transpired on February 25, 2010, between and among employees of Respondent, which was of issue and in discussion in the aforementioned Grievance Board Decision. Respondent was specifically made aware of its obligation to allow Grievant, if she makes the request, to have a representative with her in any additional meetings held regarding Grievant's conduct on February 25, 2010. Said decision, among other determinations, made findings of facts pertaining to events of February 25, 2010. Judicial notice is taken of facts established in *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-1306-CONS (Nov. 8, 2010), hereinafter also referenced as *Koblinsky 2.* See Findings of Fact 2-12, *supra.*

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[1] Grievant was involved in an argument with her co-worker, and Grievant's supervisor ordered her to come into the supervisor's office to discuss the situation. Grievant refused to meet with the supervisor without her representative. After repeatedly telling Grievant to meet with her and Grievant insisting that she have a representative present, the supervisor suspended and later dismissed Grievant for insubordination. Grievant was entitled to have a representative with her in a meeting held for discussing or considering discipline, W. VA. CODE § 6C-2-3 (g). It was determined that Grievant did not refuse to meet with her supervisor, she only insisted on having a representative present. Respondent violated Grievant's statutory right to representation. Respondent was Ordered to reinstate Grievant to her position from the date of termination with full back pay and benefits, including statutory interest. *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-1306-CONS (Nov. 8, 2010).

Synopsis

Grievant was involved in verbal confrontations with co-workers. After litigation regarding Grievant's statutory right to representation in any meeting held for discussing or considering disciplinary action, a meeting was scheduled regarding Grievant's workplace conduct. There were inconsistencies in Grievant's rendition of events. Nevertheless, Grievant acknowledged conduct sufficient to warrant disciplinary action. Grievant was suspended for thirty days for misconduct articulated as insubordination.

Grievant contends the disciplinary action(s) taken by Respondent was improper, discriminatory and retaliatory in nature. Grievant has disciplinary history and has received several prior written warnings concerning her conduct in opposition to internal policy or supervisor's directives. Respondent established rational justification for administering disciplinary action. Grievant did not establish unlawful conduct by Respondent. By a preponderance of the evidence, Respondent proved the charges against Grievant and met its burden proving good cause for the suspension. This grievance is DENIED.

After a detailed review of the entire record and relevant decisions, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, Barbara Koblinsky, is a Registered Sanitarian and was, at the time relevant to the instant matter, employed by Respondent. Grievant has been employed by the Putnam County Health Department ("PCHD") Respondent in that capacity for approximately three years.

(*) The findings of facts number 2 through 12 of Public Employees Grievance Board Decision, *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-1306-CONS (Nov. 8, 2010), are acknowledged and set out herein as Findings of Fact in the instant matter:

> 2. On the morning of February 25, 2010, Grievant received an e-mail from her immediate supervisor, Carey Eden, indicating that Grievant had failed to complete a mandatory Electronic Disease Surveillance System report related to an animal bite. Ms. Eden asserted that Grievant had failed to include the bite victim's date of birth on the form.
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> 3. Grievant was concerned about this e-mail because she believed that she had properly completed the form on the previous evening and she had previously expressed her concerns to the PCHD Administrator, Jacqueline Fleshman, that her supervisor was unreasonably critical of her performance.
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> 4. Upon receiving the e-mail, Grievant went to Margaret Crouse, [sic] the office assistant, and asked to see the form. Ms. Crouse [sic] told Grievant that the form did not have the victim's date of birth on it. Grievant showed the form to Ms. Crouse [sic] with the information on it and Ms. Crouse [sic] noted that the information had not been on the form when Ms. Crouse [sic] had left the office the previous evening. The two employees entered into a heated argument about the form and their respective responsibilities in the office. Both of the employees raised their voices and spoke harshly to each other.
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> 5. A co-worker who witnessed the argument called Ms. Fleshman who was on her way to the office and Ms. Fleshman heard some of the argument over the phone.
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> 6. Upon arriving at the office, Administrator Fleshman told Ms. Crouse [sic] and Grievant to go to their respective office and that she intended to talk with both of them individually about the incident.
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> 7. Subsequently, Ms. Fleshman told Grievant to come into Ms. Fleshman's office to discuss the argument. Grievant had been summoned to Ms. Fleshman's Office on previous occasions and received reprimands. Ms. Fleshman anticipated that some form of discipline would be given to Grievant after the meeting based upon what she had observed.
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> 8. Grievant told Ms. Fleshman that she would not meet with her about the incident without her union representative. Ms. Fleshman told Grievant to go back to her office and she would talk to Grievant after she spoke to the Division of Personnel ("DOP").
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> 9. Grievant went back to her office and then went to the rest room where she called her union representative.
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> 10. Ms. Fleshman called the DOP and was advised that the state did not recognize unions for their workers and she did not have to let Grievant have a representative with her during the meeting.

> 11. Once again, Ms. Fleshman instructed Grievant to meet with her in Ms. Fleshman's office and Grievant refused to meet with her without a representative.
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> 12. Ms. Fleshman relayed the information she had received from the DOP representative to Grievant and Grievant repeated that she would not meet with Ms. Fleshman without a representative.

Koblinsky 2, pp 3-5.

13. *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-1306-CONS (Nov. 8, 2010) determined that Grievant did not refuse to meet with her supervisor, she only insisted on having a representative present. Respondent was Ordered to reinstate Grievant to her position from the date of termination with full back pay and benefits.

14. Subsequent to *Koblinsky 2,* released on November 8, 2010, Respondent issued a letter of reinstatement to Grievant dated December 1, 2010. Resp. Ex. 4

15. The December 1, 2010 correspondence signed by Administrator Fleshman instructed Grievant to report for work on December 13, 2010, and further informed her that at "this time you will be meeting me to discuss the incident that occurred on February 25, 2010."

16. On December 13, 2010 Grievant, along with a representative, attended a predetermination meeting held at the Putnam County Health Department. The meeting was conducted by Administrator Jacqueline Fleshman.

17. During the December 13, 2010 meeting, Grievant delivered to Ms. Fleshman a written statement prepared for, or by Grievant, providing her testimony as to the events that occurred on February 25, 2010.

18. Grievant had testified regarding the events of February 25, 2010 on several different occasions, including a prior level three hearing before the West Virginia Public

Employees Grievance Board on May 7 and 27, 2010, cited herein as *Koblinsky 2* and an April 26, 2010 Workforce West Virginia hearing, with exhibits, which was transcribed and is of record.[2] The April 26, 2010 Unemployment hearing is not identified by a level three exhibit number.

19. Grievant's written statements and various sworn statements of record regarding her actions and understanding of the situation on February 25, 2010 are not consistent. There are variations in Grievant's recollection of events. Some inconsistencies are minor elements, while others indicate deviation in conduct, sequence of events and rationale for behavior.

20. Grievant was informed inconsistences in her recollection of events prompted further investigation. Pursuant to a two-page correspondence from Respondent dated December 13, 2010, Grievant was suspended pending further investigation. Resp. Ex. 2.

21. The December 13, 2010 document, among other relevant information, specifically informed Grievant that:

> This suspension is being issued pending the results of an investigation into the allegation of your misconduct on February 25, 2010, related to an altercation with another employee and *your refusal to follow directions on that day in order to avoid other altercations.* (Emphasis added)

22. Trudy Totten, Personnel Manager, Putnam County Health Department, conducted an investigation, inquiring of the events that transpired on or in association with employee conduct of February 25, 2010. Ms. Totten commenced employment with Respondent in April 2010.

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[2] Further, Grievant testified at the instant level three hearing conducted in the Charleston office of the West Virginia Public Employees Grievance Board on March 23, 2011.

23. Ms. Totten's investigation included talking to employees who were at PCHD offices on February 25, 2010, review of subsequent documents pertaining to events, conduct applicable rule, regulations and associated legal proceedings.

24. Ms. Totten wrote and delivered to Respondent an investigative report dated December 17, 2010. Resp. Ex. 1.

25. Administrator Fleshman, in receipt of the investigative report, coupled with *Koblinsky 2*, Division of Personnel Administrative Rules, and her first-hand recollections of events, reached a conclusion regarding agency disciplinary action and Grievant.

26. Pursuant to a January 4, 2011 correspondence, Grievant was informed that Respondent had concluded its investigation regarding alleged employee misconduct and insubordination of February 25, 2010. Resp. Ex. 3.

27. The January 4, 2011 ruling was three pages, it, among other information deemed relevant by Administrator Fleshman, stated:

> . . . The period of your suspension will begin on December 13, 2010, which was the day you were suspended pending this investigation, and end at the close of business on January 11, 2011. You are expected to return to duty on January 12, 2011 at the time of your regularly scheduled shift.
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> This personnel action is in accordance with Section 12.3 of the Division of Personnel *Administrative Rule.* On December 13, 2010, myself along with Trudy Totten, held a discussion with you and your representative, as is your statutory right cited in Judge McGinley's decision dated November 8, 2010; regarding your past and continuing behavior problems. During this meeting, we made you aware there was going to be an investigation into the allegations of your alleged misconduct and insubordination and explained that a suspension without pay was being contemplated. Although we gave you the opportunity during this meeting to provide additional information on your behalf, you stated as you handed me a written statement, that you had nothing further to say and that all of your statements could be read in past testimony given during prior hearings related to this incident. Therefore, absent any additional information from you and considering the findings of the investigation report, I have decided that a suspension is warranted. The

> investigation has established by a preponderance of the evidence that you did engage in a verbal altercation with another employee violating the Employee Code of Conduct Policy; and was insubordinate when refusing to stay in your office as directed, starting a second verbal altercation.

Resp. Ex. 3.

28. Grievant acknowledges that on February 25, 2010 she was directed to go to her office, and stay in the office until further notification.[3] Grievant by her own admission departed the office twice.

29. Grievant was suspended from her position as a Registered Sanitarian with Respondent, a period of thirty days beginning December 13, 2010 until January 12, 2011, for employee misconduct identified as insubordination. In determining the seriousness of the situation Respondent considered Grievant's history with the agency, prior incidents of verbal confrontation and disruption of the workplace environment, including refusing to follow the directives of agency administrative personnel. *See* Resp. Ex. 3.

30. Grievant had been disciplined several times prior to the December 13, 2010 suspension. For example (not intended to be an all inclusive list):

a. On August 13, 2009, Grievant received a letter of reprimand and was instructed to modify her behavior. Grievant had failed to adhere to direct orders given to her. Grievant was informed that failure to adjust her behavior would lead to further disciplinary action. Resp. Ex. 7.

b. On December 9, 2009, Grievant was suspended for three days without pay for failure to follow departmental and state policy. Grievant was warned that any repeat of such an infraction of a similar or different nature would result in additional disciplinary actions, up to and including dismissal. Resp. Ex. 5.

c. On January 26, 2010, Grievant was reprimanded for ignoring a directive from her supervisor by breaking the chain of command set forth by Respondent.

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[3] April 26, 2010 Workforce West Virginia hearing and March 23, 2011 Grievance Board Level 3 hearing. Also documented in the overturned March 2, 2010 discharge correspondence.

The reprimand was accompanied with a warning that failure to change her behavior and adhere to directives could lead to further disciplinary action. Resp. Ex. 6.

d. On February 4, 2010, Grievant was reprimanded for not following the directive of a supervisor. Grievant was informed that failure to change could lead to further discipline up to and including suspension and/or termination.

31. Grievant was aware she was instructed to go to her office. Further, she was aware on February 25, 2010, she was instructed to stay in her office while Administrator Fleshman attempted to access the situation. Despite this knowledge, Grievant departed her office no less than twice. Grievant entered into another verbal confrontation with one or more co-workers while out of her office.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Grievant argues there exists no credible basis for disciplinary action against her stemming from her conduct on February 25, 2010. Grievant maintains "it is disingenuous in the extreme for Respondent to concoct a new charge of insubordination after, and only after the original charge was decisively struck down." Grievant contends the disciplinary action taken by Respondent was improper, retaliation and discriminatory in nature.

Grievant does not dispute that she entered into an argument with Ms. Crouch and that they both shouted at each other. It is understandable that Administrator Fleshman intended to get Grievant's version of the events to determine if discipline would be appropriate. Grievant also spoke loudly to two other co-workers when she incorrectly believed they were talking about her after her altercation with Ms. Crouch. There is no viable dispute that Ms. Fleshman has authority to impose discipline on Grievant, and she is the person who was conducting the interview related to the verbal altercations.

Grievant was notified of the predetermination meeting which is required to be held before an employee is disciplined so the employee may be advised of the charges against her and offer her explanation of the situation. *See Division of Personnel Supervisor's Guide to Discipline.* The subject matter of the meeting was not as limited as Grievant envisioned. Erroneously, Grievant may have been of the belief that her conduct was justified or exempt from further disciplinary action.[4] The ramifications of the heated

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[4] *Koblinsky* 2 did not bar Respondent from scheduling a predetermination meeting with Grievant and a representative of her choosing to determine appropriate disciplinary measure stemming from Grievant's interaction with one or more co-workers on February 25, 2010. It is the undersigned's belief that *Koblinsky* 2 recognized the predetermination meeting as a rational progression of events. Further, *it is not possible to determine what discipline Grievant would have received for the alleged violations of policy if the meeting related to the verbal altercation had taken place* on February 25, 2010. *Koblinsky* 2

argument between Grievant and Ms. Crouch had not been resolved. Further, Grievant was informed that her failure to comply with verbal directives on February 25, 2010 was of issue, citing Resp. Ex. 2. See also Finding of Fact 15 and 21. There existed potential consequences stemming from Grievant's verbal confrontation with two additional co-workers after she had been sent to her office.

Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, 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 following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). Respondent established that Administrator Fleshman gave Grievant a valid directive to stay in her office. Grievant acknowledges this directive then professes justification for her conduct and lapse of judgment.

"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). Grievant's representation that she was unaware that her action of leaving her office was sanctionable is not persuasive. After due consideration of the extensive testimony, as well as the documentary evidence produced, the undersigned is not persuaded that Grievant's actions should somehow be excused in this case.

Grievant contends the disciplinary action taken by Respondent was retaliation. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "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." To demonstrate a *prima facie* case of reprisal the Grievant must establish, by a preponderance of the evidence, the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
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> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence, that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove, by a preponderance of the evidence, that his

protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

It is not established that Grievant's protected activity (filing a grievance) was a 'significant,' 'substantial' or 'motivating' factor for the disciplinary action taken. It was the possibility that disciplinary action would or could be levied that was a crucial linchpin for the successful grievance, *Koblinsky 2*.[5] Grievant is entitled to have a representative with her in a meeting held for discussing or considering discipline, see W. VA. CODE § 6C-2-3 (g). Disciplinary action was on the table prior to the grievance. Grievant's valid position, that she would not meet with administrative personnel without her representative, was not the genesis for the disciplinary action, but a byproduct of an attempt to hold a predetermination meeting. Respondent identified and established reasonable, rational, and just cause for disciplining Grievant, distinct from the grievance filed. It is not established that the discipline levied was issued as a result of retaliation or other improper motivation.

"Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v.*

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[5] The purpose of the meeting was for Administrator Fleshman to obtain Grievant's version of relevant events to determine if discipline would be appropriate. It was alleged that Grievant violated the Department of Health and Human Resources Policy Memorandum 2108, related to Employee Conduct.

Dep't of Justice, 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley, et al. v. Workforce West Virginia,* Docket No. 06-BEP-079 (Nov. 30, 2006). Employees are expected to: . . .refrain from disrupting the normal operations of the agency; refrain from profane, threatening or abusive language toward others. Employee Conduct, Department of Health and Human Resources Policy Memorandum 2108.

Grievant was suspended December 13, 2010 through January 11, 2011 pending Respondent's further investigation of issues pending. See Findings of Facts, *supra*. Grievant was barred from communicating with media during the investigation and directed to limit her discussion of the matter with investigative personnel. Resp. Ex. 2. Grievant challenges Respondent's directive based upon constitutional grounds. Grievant contends that her constitutional rights were violated by Respondent's 'gag order' applicable during the duration of its investigation.

Grievant's supportive argument was sophomoric, underwhelming and unpersuasive. However, the issue is not taken lightly. There are times when it is critical to an investigation that individuals with knowledge, pertaining to a subject matter, not communicate with each other and/or third parties outside of the process. There are recognized personnel situations where access to information is restricted.[6] Conversely, there are times when an individual has every right to freely communicate his or her opinion about a governmental agency. Grievant would have the undersigned believe Respondent unduly restricted her freedom of speech.

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[6] As a general rule, the internal disciplinary proceedings of a state agency are conducted in a confidential manner. Prior to the ultimate ruling, the proceedings of a personnel matter are not public forums.

Both the WEST VIRGINIA CONSTITUTION and UNITED STATES CONSTITUTION grant citizens certain freedoms and inalienable rights. Freedom of speech is a constitutional right. A much cherished freedom. Nevertheless, freedom of speech is subject to numerous constraints that render it a less-than absolute right in practice. 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 v. Crowder*, 315 S.E.2d 593 (W. Va. 1983)(*citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Public employees enjoy the rights established by the First Amendment of the U.S. Constitution; however, these rights may be overridden by the government's interest as an employer.[7] The West Virginia Supreme Court has held that "the burden is properly placed on the public employee to show that conduct is constitutionally protected," and it must be spoken as a citizen on a matter of public concern. *Alderman v. Pocahontas County Bd. of Educ.,* 223. W. Va. 431, 441, 675 S.E.2d 907, 917 (2009). In the instant case, the subject matter in issue and under investigation was not a public concern. In truth, Grievant's right to freedom of speech is not at issue in this case. This is not a case about freedom of expression. Respondent was attempting to provide a level of integrity to the investigation.

Respondent's directive to limit Grievant's communication with third parties was limited to the duration of the investigation. Respondent was confronted with a dubious unresolved personnel matter. Speculation surrounding Grievant's overturned dismissal existed. It is not unprecedented nor nefarious to discourage extraneous statements

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[7] Rights contained in the U.S. CONSTITUTION are applicable to the states by and through the FOURTEENTH AMENDMENT. The West Virginia Supreme Court of Appeals typically interprets the W.VA. CONSTITUTION in a manner consistent with the U.S. CONSTITUTION.

regarding personnel matters under investigation. While it is true that administrative authorities sometimes just do not want their dirty laundry aired in public, it was understandable and perhaps even prudent, in the circumstances of this case, to limit unessential comment on unresolved conflict. Both Grievant and Respondent had experienced media exposure.

The eighteen (18) day restriction was not overly burdensome, unreasonable, nor extreme. Restrictions of this nature are a recognized constraint on freedom of speech. In the circumstance of this matter, it is not found that Respondent's restriction as specified by the December 13, 2010 directive, Resp. Ex. 2, violated Grievant's constitutional rights. Nor is it believed that the restriction had a prejudicial impact on the ultimate outcome.

Finally, Grievant argues that Respondent has unfairly sanctioned her while the co-worker who was involved in the initial verbal dispute was not disciplined. This is factually incorrect. Margaret Crouch was verbally reprimanded for her conduct. The disciplinary action wasn't as severe as that ultimately experienced by Grievant, but Grievant's position that no corrective action was taken by Respondent toward employee Crouch is erroneous.

Grievant has not met her burden of proving she was unlawfully treated differently than her co-worker(s). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). Grievant has failed to demonstrate that she is similarly situated to the co-worker who received a verbal reprimand. Grievant had been repeatedly disciplined for inappropriate conduct. Grievant initiated the confrontation in review. Grievant compounded the issue with actions that thrust her into a subsequent verbal exchange with additional co-workers. Grievant is not similarly situated to employee Crouch. The difference in discipline is easily explained by the facts of this matter.

Respondent established a credible basis for disciplining Grievant. Further, Grievant was on notice to conform her office conduct. Grievant was aware or should have been aware that her conduct of leaving her office on February 25, 2010 against the explicit directions of her immediate supervisor was rationale for disciplinary actions. Grievant was insubordinate on February 25, 2010. This is not the first time Grievant has substituted her perception or rationalization of events to override explicit instructions. *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-0824-PutCH (May 4, 2010). Respondent has attempted to emphasize the importance of proper workplace conduct, but the import of this rational message is not being adequately comprehended by Grievant. See Resp Ex. 3.

Investigation of Grievant's conduct with regard to the February 2010 incidents also included a review of Grievant's employment history. Considerable deference is afforded the employer's assessment of the seriousness of an employee's conduct and the prospects for rehabilitation. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). The events of this matter were avoidable and regrettable, but the undersigned does not find that discipline was unlawful. Respondent

had discretionary options in the circumstances of this case. Nevertheless, given the considerable deference afforded to employers in disciplinary situations, the undersigned is without sufficient justification to rule that the discipline imposed was unwarranted or excessive. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

Respondent proved by a preponderance of the evidence that Grievant was insubordinate by not complying with clear instructions from an individual with due authority to direct Grievant's conduct.

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. 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. "[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." 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 v. Crowder*, 315 S.E.2d 593 (W. Va. 1983)(citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

3. In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-0824-PutCH (May 4, 2010); *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

4. "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); *Lilly v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-387 (June 6, 2008).

5. Respondent proved by a preponderance of the evidence that Grievant was insubordinate by not complying with clear instructions of a superior entitled to give such orders.

6. To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. It was not established that Grievant's protected activity was a 'significant,' 'substantial' or 'motivating' factor for the disciplinary action taken.

8. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgment for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

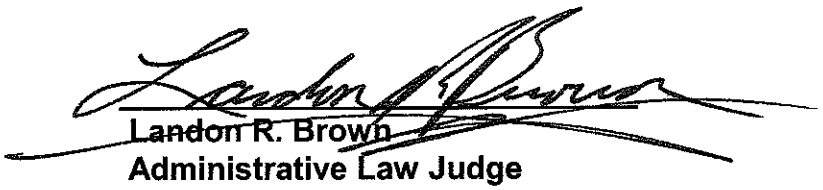
9. Respondent established a credible basis for disciplining Grievant. It is not established that the discipline levied was issued as a result of improper motivation. Grievant demonstrated insubordinate conduct on February 25, 2010. Given the charge proven against Grievant, the disciplinary action taken by Respondent is not unlawful.

Accordingly, this grievance is **DENIED**.

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).

Date: September 14, 2011



Landon R. Brown
Administrative Law Judge