THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

D. SCOTT SPEEDY,
Grievant,

v. **Docket No. 2011-0313-DEA**

DIVISION OF CULTURE AND HISTORY,
Respondent.

DECISION

Grievant, Scott Speedy, filed this grievance against his employer, West Virginia Division of Culture and History, on September 9, 2010, alleging that he "was improperly discharged from my position; due process was not followed. I also feel this was a set up by Site Manager, David Rotenizer and Division Commissioner, Randall Reid-Smith." Grievant seeks to return to his employment as Archaeologist II, Curator of Collections. This grievance was filed directly to level three. A hearing was conducted before the undersigned Administrative Law Judge on June 30, 2011, in the Grievance Board's Westover office. Grievant appeared in person and by his counsel, H. John Rogers, Esq. Respondent appeared by its counsel, Gregory G. Skinner, Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on August 8, 2011.[1]

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[1]Gordon Simmons, UE Local 170, submitted proposals on behalf of Grievant.

Synopsis

Grievant was dismissed from his employment at the Grave Creek Mound Archaeological Complex for insubordination after he continually engaged in disruptive and insubordinate behavior toward his supervisor. The termination followed progressive disciplinary measures for insubordination and other infractions. Respondent met its burden of proving good cause for the dismissal, and the grievance is denied.

The following findings of fact are based upon the record developed before the Board of Review, WORKFORCE West Virginia, on December 2, 2010, and the record further developed at the level three hearing.[2]

Findings of Fact

1. Grievant was employed by the West Virginia Division of Culture and History as an Archaeologist II, and worked as a curator at the Grave Creek Mound Archaeological Complex ("Complex"), located in Moundsville, West Virginia.

2. During Grievant's employment, David Rotenizer was the Director of the Complex, and the Grievant's supervisor.

3. Grievant was verbally reprimanded in 2009 by his supervisor for using abusive language against a co-employee while on the job.

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[2]Prior to the hearing on June 30, 2010, the parties jointly submitted the record of this case developed before Charles E. Anderson, Administrative Law Judge, Board of Review, WORKFORCE West Virginia. The parties acknowledged that witnesses relevant to the issues in this grievance were under oath, and subject to cross examination. In the interest of judicial economy, the undersigned gladly granted the request to forego the necessity of taking the testimony of the same witnesses and reviewed the transcript of the record developed before Judge Anderson.

4. Grievant was suspended for three working days on February 10, 2010, for engaging in disruptive and insubordinate behavior.

5. The suspension resulted from an incident occurring on January 28, 2010, when Grievant was abusive, confrontational, and aggressive to visitors of the museum. While on a tour of the facility, U.S. Army Corps of Engineers employees, Mr. Aaron Smith and Mr. Brantley Jackson, were introduced to Grievant. After the introduction of Mr. Jackson, Grievant inexplicably handed Mr. Jackson his resume and commented that this was his resume and he should read it before trying to ruin his reputation. Grievant also commented that if he did not do so, he would be speaking to his attorney. This behavior did not cease, despite his supervisor's request, but instead escalated into further confrontation concerning Grievant's accusation of Mr. Jackson somehow ruining his reputation. Grievant ended the episode by calling Mr. Jackson a weasel.

6. On March 1, 2010, Mr. Rotenizer directed Grievant and another Complex employee to stagger their lunches so that at least one of the two employees were on duty at all times. Grievant responded by telling his supervisor that he was tired of the micromanagement. He indicated that they were all adults and enough is enough.

7. On June 16, 2010, Grievant was questioned about the possibility that he was late for work. In response, Grievant entered Mr. Rotenizer's office, banged his fist on his supervisor's desk, and yelled that he was tired of being micromanaged. During Grievant's outburst, he laced his comments with profanity directed at his supervisor, this all occurring in the presence of other employees. Mr. Rotenizer explained to Grievant that if he felt a mistake had been made concerning his reporting to work time that he would meet with Grievant to address his concerns.

8. Grievant and Mr. Rotenizer traveled to the Division's Independence Hall to monitor pipeline construction. Grievant followed the general contractor performing the work and was heard saying, "Why does it take ten goddamn minutes for my hot water to reach my sink? It's fucking ridiculous." Grievant abruptly left the work site. WORKFORCE Hearing Testimony of Rotenizer and Travis Henline.

9. Mr. Rotenizer directed Grievant to submit a report regarding the status of construction work at Independence Hall on July 14, 2010. Grievant replied that he was not paid to write reports, he was a curator. Mr. Rotenizer directed the report be completed as an additional duty. Grievant did not complete the directive.

10. During a weekly staff meeting at the Complex on July 26, 2010, Grievant used abusive language directed at Mr. Rotenizer in front of other Complex employees. Grievant again accused his supervisor of micromanaging. Grievant stated, "I work for the Citizens of the State and not the Commissioner, go ahead and fire me; I'm ready to go now." WORKFORCE Hearing Testimony of Rotenizer, Andrea Keller, and John Beucke.

11. Mr. Rotenizer requested Grievant to cease such conduct. Grievant informed his supervisor that he could point his finger at anyone he wanted. Grievant ultimately pushed his chair into the conference room table in a forceful manner, and exited the room. WORKFORCE Hearing Testimony of Rotenizer, Andrea Keller, and John Beucke.

12. Grievant disputed few, if any, of the allegations leading to his termination during the WORKFORCE hearing which was submitted as part of the record of this grievance. Specifically, Grievant stated the following during that hearing:

"I was furious about being accused of being late." Transcript Page 393.

> "When you're pushed into a corner you become mad and for four years they pushed me into a corner." Transcript Page 396.
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> "I just snapped." Transcript Page 402.
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> "When I read the thing I just blew up and went into his office and just screamed at him [Rotenizer]." Transcript Page 405.
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> "I slammed the door with my fist - not my fist, my hand when I went in, just slapped it and went in and put my hand on the desk . . . I was extremely mad." Transcript Page 405.
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> "I probably pointed - yeah, I was angry." Transcript Page 425.
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> "No- I'm not being insubordinate. I'm trying - we're trying to do our work, you know. Don't tell us what to do - he's [Rotenizer] not educated enough to tell us what to do." Transcript Page 409.

13. Grievant was terminated on August 26, 2010, based upon a charge of insubordination.

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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

Respondent asserts that it has proven by a preponderance of the evidence that it dismissed Grievant from employment for good cause. Grievant's counter argument is that there is "evidence that Grievant complained of being micromanaged by site manager David Rotenizer, but no evidence was offered that Grievant was deficient in performing his job duties as curator, or that his conduct in voicing criticism of management produced anything beyond a momentary experience of discomfort. Respondent has failed to meet it burden in proving Grievant was willfully insubordinate, disrupted the workplace or posed any credible threat of physical harm."[3]

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

[3]Grievant's Proposed Findings of Fact and Conclusions of Law, page 7.

(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).

"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).[4]

The underlying facts of this grievance are basically undisputed. The undersigned sees no need to repeat the facts set out above. Respondent met its burden of proof in this case. Grievant's long pattern of insubordinate work conduct and the continual refusal to follow the specific directives given to him by his supervisor demonstrated conduct that rose above mere technical violations of job responsibility. This pattern of conduct clearly demonstrates willful action on the part of Grievant. An employee's job is to perform the duties of the position, not to convert his job into a continuing confrontation with management. *Casto v. W. Va. Dep't of Educ.*, Docket No. 00-DOE-143 (Aug. 28, 2000).

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[4]No evidence or argument was offered to address Grievant's due process claim which appears on his grievance form. That assertion in the original Statement of Grievance need not be addressed. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed, will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

In addition, this Board has previously noted that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988). This Board has found that uttering abusive language to a supervisor may constitute insubordination. *Payne v. W. Va. Dep't of Transp.*, Docket No. 93-DOH-454 (Apr. 29, 1994).

The Respondent appropriately engaged in progressive discipline in regard to Grievant before his termination, having previously reprimanded Grievant, followed by a suspension. Respondent has proven by a preponderance of the evidence misconduct of a substantial nature directly affecting the rights and interest of the public. As part of this offer of proof, Respondent established on the record, a pattern of misconduct that was insubordinate. Grievant was dismissed for good cause.

The following conclusions of law support this decision.

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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1,

Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. 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).

4. Respondent met its burden of proving Grievant's actions were insubordinate. Respondent has proven by a preponderance of the evidence misconduct of a substantial nature directly affecting the rights and interest of the public. Grievant was dismissed for good cause.

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: August 24, 2011

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Ronald L. Reece
Administrative Law Judge