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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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JERRY DENNIS GILL

v.

Docket No. COMM-88-031

WEST VIRGINIA DEPARTMENT OF COMMERCE

DECISION

By letter of August 19, 1988, Grievant Jerry Dennis Gill, a housekeeping employee of Respondent West Virginia Department of Commerce at Pipestem State Park in Summers County, was suspended by Charles R. Spears, Director, Division of Parks and Recreation, for two days (August 30 and 31) without pay on charges of insubordination and frequent tardiness.¹ The grievance, filed September 2, 1988, was denied at Levels I and II. Grievant appealed to Level III, where no decision was issued, and the grievance was referred to Level IV by Respondent.² A Level IV hearing was held November 23, 1988. Both parties waived the filing of proposed findings of fact and conclusions of law.

¹ One charge, that Grievant was not on duty on August 6, 1988, was dropped at hearing by Respondent. Respondent contended that even with the charge dropped the two-day suspension was appropriate.

² Respondent moved that the grievance be dismissed because it had been untimely appealed to Level III. By Order of October 27, 1988, the motion was denied without prejudice. Respondent did not pursue the issue at hearing.

Grievant does not allege any procedural defect of notice or violation of pertinent Department of Commerce or Civil Service personnel policy. Further, he does not deny that he has a history of tardiness. He denies that he was insubordinate, however, and asks that the charge of insubordination be removed from his personnel file and he be awarded the two day's pay.

Housekeeping Supervisor Virginia Henthorn's testimony supports the charge that Grievant had excessive tardiness. She stated that he had a habit of being late; that from the first of the year to the date of suspension Grievant was tardy 49 times. Further, in support of particular allegations of tardiness specified in the letter of suspension, she testified that, while Grievant was required to report for work at 7:30 a.m., on July 30 Grievant clocked in at 8:02 a.m., on August 3 at 8:00 a.m., and on August 7 at 8:15 a.m.³ Regarding the August 3 incident she stated she called Grievant at 7:40 a.m. and he was still asleep. He never justified that tardiness, but merely responded on the phone that he would be there and he did appear shortly thereafter.

³ She testified that Grievant's tardiness on August 3 was especially problematical since his actions that day held up three employees, so that one and a half hours of employee work-time were lost.

Grievant's testimony does not provide any excuse for the specific instances of tardiness which were the subjects of the letter of suspension on which Ms. Henthorn had testified and he admitted he had a "history of being tardy a few times." While he stated that he was subject to being called to fight fires as a worker for the fire service, he did not indicate that any of the recorded incidents of tardiness were due thereto.⁴ Otherwise, he stated that he had vehicular problems and sometimes did not wake up to the alarm since he had hearing loss in one ear and, although he used two alarms, he could not hear them well when he slept on his bad ear.

Virginia Ann Ward, Acting Assistant Supervisor, testified regarding the first of two incidents alleged in the letter of suspension as establishing insubordination. She stated that on July 30, 1988, at 7:30 a.m., finding the lobby "a wreck" from a large group's usage, she asked Grievant to clean it until the employee responsible for cleaning the public areas, who was occupied at that time with cleaning the game room, could take over. She stated that Grievant pointed at her paperwork and said he was assigned to washing windows and window-washing only. She stated

⁴ Ms. Henthorn stated that by law, if an employee is called to a fire, the employee suffers no penalty for his absence from work. She stated that Grievant did not claim that fire service caused the delay on the days of July 30, August 3 or August 7.

that the lobby was not cleaned until 8:30, when the maids came on duty.

Grievant did not deny the veracity of Ms. Ward's testimony⁵ but maintained that he had been joking, as he tended to do, but she took him seriously. He denied he was refusing to do the job, however, for he went by the lobby to do the work later but did not do so because another employee was already doing it. Ms. Ward denied Grievant was joking.

Ms. Ward also testified regarding the second incident alleged by the letter of suspension as supporting the charge of insubordination. She testified that on August 7 at 11:30 a.m. Dale McLaughlin, Commercial Group Sales Coordinator, called requesting someone from housekeeping to clean a window overlooking the indoor pool of what was thought to be spit. She testified that she told Grievant to clean the window and that it needed to be done "right now." She stated Grievant shrugged his shoulders and did not clean the window.

Mr. McLaughlin testified also. He stated that about 11:00 a.m. he was informed by the woman arranging a private luncheon in the room that the windows were dirty. Upon his inspection, he found what he thought to be spit. He called Ms. Ward, who

⁵ There is no doubt that Ms. Ward had the authority to require Grievant to clean the lobby. She testified that assigned duties can be changed as the need arises, and with a shortage of help at Pipestem, oftentimes jobs come up that need immediate attention.

assured him the window would be cleaned. A half-hour passed and the window was still not cleaned. At that point, although it was not his duty to do so, he cleaned the window and others that were dirty.⁶ He stated that Grievant saw him cleaning the window, since Grievant was cleaning the floors on the landing of the stairs above the window. He stated that he made the complaint around 11:30 a.m. and cleaned the windows about 12:15 p.m.

Grievant testified that he was assigned to cleaning the public areas and was one landing above the area of the window. He testified that Ms. Ward said he should clean the window "as soon as possible," and he thought that that meant the window would have to be cleaned before the function began, which was at 1:30 p.m. He stated that he looked at the window, and seeing only fingerprints, continued his work. Grievant testified that his job requires much discretion as to when and in what order he carries out the various duties. He saw Mr. McLaughlin clean the windows and did not think it was up to him to tell Mr. McLaughlin not to do the job. He stated that it had been his intention to clean the windows but he admitted he had made "a bad estimate" in not cleaning the windows at the appropriate time. He denied that 45 minutes passed between the request that he clean the window and McLaughlin's cleaning the window, stating that the time was ten minutes at most.

⁶ He testified that he cleaned the windows because it had to be done, for people were coming to the private luncheon, and it was embarrassing that the windows were dirty. He stated that the ultimate goal at Pipestem is customer-satisfaction.

Grievant contended he was treated more harshly than two other employees, who were not suspended for being insubordinate. Superintendent of Pipestem State Park Kenneth Caplinger testified that in one of the cases cited the employee was found insubordinate but was merely reprimanded because only one incident of subordination had occurred, compared to Grievant's two, and suspension was further justified in Grievant's case because it was also punishment for Grievant's history of tardiness. He testified that the second employee to which Grievant referred was not insubordinate at all but was reprimanded for misuse of a park telephone.

In addition to the foregoing narrative, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. A preponderance of the evidence established that Grievant had excessive tardiness and Grievant's general statements of difficulties in getting to work on time do not excuse the excessive tardiness.

2. In that Grievant did not clean the lobby when directed to do so on June 30, 1988, but only checked on it an hour later, he intentionally failed to follow Ms. Ward's directive, whether or not he was joking when he spoke to her.

3. While there is some doubt about the amount of time between when Grievant was asked to clean the window and McLaughlin's

cleaning the windows,⁷ Grievant clearly did not feel compelled to clean the window "right now," as Ms. Ward testified, or "as soon as possible," as Grievant testified, for in any case he was acting contrary to her request by continuing to clean the floor.

4. Grievant was not treated dissimilarly from two other employees who were not suspended for being insubordinate.

CONCLUSIONS OF LAW

1. Pursuant to the provisions of W.Va. Code §29-6A-6, 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. See Ramey v. West Virginia Department of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. "Insubordination" is willful failure or refusal to obey reasonable orders of a superior who is entitled to give such

⁷ This is especially true since Respondent submitted a memo written by Mr. McLaughlin on the day of the incident which states,

The Graham family was scheduled to have lunch in the Cardinal Room today at 1:30 PM. I went to the Cardinal Room at about 12:15 PM to check things out and to talk to Jane Humphries, the lady in charge. The windows facing the pool were extremely dirty and it looked as if someone had spit on them. The door windows were also dirty. I called Ann in Housekeeping and she said she would get someone on it as soon as possible. The people were coming into the room, so I hurried and did it myself.

(Res. Ex. 1). This document indicates that little time occurred between the time Mr. McLaughlin called Ms. Ward and when he cleaned the windows and indeed is contrary to both of Respondent's witnesses' testimony that the call to Ms. Ward was at 11:30 a.m.

orders. Ware v. Morgan County School District, 719 P.2d 351, 352 (Colo.App. 1985). See also Sexton v. Marshall University, Docket No. BOR-88-029-4 (May 25, 1988).

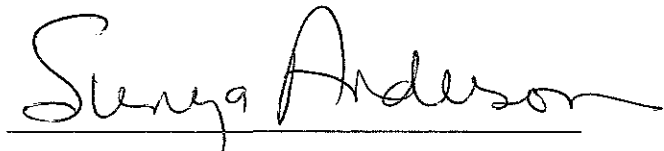
3. While Grievant may not have intended to be considered insubordinate, a preponderance of the evidence established that Grievant did willfully fail to carry out Ms. Ward's directives that he clean the lobby and that he did willfully fail to clean the window "as soon as possible" or "right now." Grievant was therefore properly found insubordinate in both charged incidents.

4. In that Respondent established that Grievant had excessive unexcused tardiness and was twice insubordinate, Respondent properly suspended Grievant for two days without pay.

5. Since Grievant was not treated differently from other employees in being suspended for two charges for insubordination and excessive tardiness, Respondent did not discriminate against him. See W.Va. Code §29-6A-2(b).

Accordingly, the grievance is **DENIED** and the decision of the West Virginia Department of Commerce to suspend Grievant for two days without pay is hereby affirmed.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Summers County and such appeal must be filed within thirty (30) days of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of your intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

A handwritten signature in cursive script, reading "Sunya Anderson", written over a horizontal line.

SUNYA ANDERSON
HEARING EXAMINER

Dated: December 23, 1988