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CHRIS MARTIN

v. Docket No. 89-SFC-145

W.Va. STATE FIRE COMMISSION

DECISION

Grievant, Chris Martin, is employed by the W.Va. State Fire Commission (SFC) as an Assistant Fire Marshall stationed in Beckley. He filed a grievance at Level I February 9, 1989 protesting his eleven (11) day suspension without pay for insubordination. Grievant's immediate supervisor denied the grievance as did Chief Deputy Fire Marshall L. Darl Cross at Level II. After a hearing held March 16, 1989 State Marshall Walter Smittle, III, also denied the grievance at Level III. Grievant appealed to Level IV April 5, 1989 where a hearing was held April 27, 1989. Proposed findings of fact and conclusions of law were submitted by the parties by June 1, 1989.

In October 1988 Grievant received approval from the National Fire Academy (NFA) to attend its Introduction to Fire Safety Education course to be held from January 30, 1989 to February 10, 1989 in Emmetsburg, Maryland. As the number of attendees are

limited at such courses and the quality of instruction is high, SFC considers attendance a significant benefit for both the employee and the agency.[1] On Thursday, January 26, 1989 Mr. Woods sent one of grievant's co-workers to his home with a cash advance for meals and registration, along with a note directing him to use his personal car on the trip to Emmetsburg and request reimbursement from NFA. Grievant expressed displeasure with this request to the co-worker and instructed him to ask Mr. Woods to call the next morning. The testimony is conflicting on a great deal of what was said when Mr. Woods called, but it is undisputed that at the end of the conversation Grievant informed him that he would not attend the class. Grievant's statement was subsequently conveyed to Mr. Smittle who, by letter dated January 30, 1989, informed him of the eleven-day suspension.

According to Mr. Woods, Grievant informed him, during their telephone conversation, that the use of his only personal car would place a hardship on his family during his absence at which time he, Woods, explained that Grievant's assigned state car could be used for travel to the conference. Mr. Woods testified that he then asked Grievant to submit a travel voucher to NFA upon his arrival indicating the travel had been at his own

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[1] NFA apparently conducts different courses in a series throughout the year and allows a limited number of persons from each state to attend. A failure to notify NFA of inability to attend after approval within a specific number of days of the beginning of the course eliminates one from consideration for other courses for at least one year (Employee's Exhibit No.5).

expense and, upon receipt of the reimbursement check, endorse it to SFC.[2] Grievant expressed some concerns over the propriety of the plan and, according to Mr. Woods, then stated he just didn't want to attend the course as its subject matter had no relationship to the duties of his job. Mr. Woods further testified that he conferred with Mr. Cross, who instructed him to inform Grievant he had to attend and, if the proposed reimbursement plan was a problem, then he could use the state car and WFC would absorb the costs. Mr. Woods stated he conveyed this message to Grievant, who at first responded he would think about it but then said he would not go, at which time their conversation ended.[3]

Grievant testified that during this conversation Mr. Woods directed him to make a representation to NFA that his travel had been at personal expense and he communicated his reluctance to do so. He further testified that he told Mr. Woods the plan was a fraudulent means of reimbursement which would be detected when NFA security personnel observed the state car license plate on the vehicle. Grievant denied Mr. Woods ever told him that he could use the vehicle at SFC's expense if that method of reimbursement was a problem. He contends he refused to attend the

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[2]In an attempt to conform to mandated budget cuts, SFC had established 1500 mile per month limits on all assigned state vehicles. Mr. Woods stated it was for this reason that he asked Grievant to file the request for reimbursement.

[3]Later the same day Grievant was directed to report to Mr. Cross' office at 9:30 a.m. the following Monday. The record does not reveal whether this meeting took place.

conference because of his belief that he was being directed to engage in an improper and/or fraudulent act and such refusal did not constitute insubordination. Grievant also asserts that the order to attend was not valid since his job description does not include attendance at training sessions as one of his official duties.[4] Alternatively, he maintains that, if his actions are found insubordinate, SFC's lack of disciplinary policy and his unblemished employment history with SFC require the imposition of a much less severe punishment.[5]

SFC contends there was no impropriety in the reimbursement plan proposed by Mr. Woods and, even if such were conceded, it would be irrelevant as Grievant was given an alternate plan which he had no reason to reject. SFC also refutes Grievant's assertion that the requirement to attend training sessions designed to enhance an employee's ability to perform his duties must be contained in his or her job description and alleges such

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[4]This claim was first made without objection during the Level IV hearing and Grievant did not produce any job description in support thereof. Nevertheless, witnesses for SFC provided sufficient testimony concerning Grievant's job description to facilitate consideration of this claim.

[5]As authority in support of the assertion that an agency's disciplinary measures can be modified, Grievant cites W.Va. Code §29-6A-5(b) which, in pertinent part, provides:

> That in all cases the hearing examiner shall have the authority to provide appropriate remedies including, but not limited to, making the employee whole.

expectations are implicitly contained therein.[6] Finally SFC contends, absent any disciplinary policy, the imposition of an eleven-day suspension should be reviewed in accordance with the holdings in Schmidt v. W.Va Department of Highways, Docket No. DOH-88-063 (March 31, 1989) and found appropriate.

NFA's policy for reimbursement for travel to and from its training sessions in pertinent part provides:

> Use of a State, county or municipal vehicle is reimbursable to the driver only. In order to be eligible for this reimbursement, the driver must present a statement from his/her agency that the use of the vehicle is at the individual's own expense.
>
> Employer's Exhibit No.4

It appears the intent of these provisions is to prevent an attendee of a course from obtaining reimbursement from NFA for travel expenses which another governmental entity was already assuming. The proposal that Grievant use his state car, obtain a reimbursement check from NFA and endorse it to SFC did not entail a double payment to Grievant and most likely was not in contravention of the policy. The provisions are, however, susceptible to other interpretations and Grievant's concern that the representations he was asked to make were improper was justified. His refusal to do so cannot therefore be considered an act of

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[6]This assertion was not explicitly made during the Level IV hearing or in SFC's post-hearing proposals but can be derived from the testimony of its witnesses, including Mr. Cross who expressed his opinion that job descriptions which purported to include every aspect of an assistant fire marshall's job would be extraordinarily long.

insubordination. See generally Webb v. Mason County Board of Education, Docket No. 26-89-004 (May 1, 1989).

The remaining question is whether Grievant was informed he could disregard directions to pursue that method of reimbursement. The testimony of Mr. Woods on this particular point was more credible than Grievant's.[7] His willingness to rescind his previous directive that Grievant use his personal car for the trip and the fact that he conferred with Mr. Cross concerning the objections to seeking NFA reimbursement are indicative of a desire on his part to accommodate the Grievant. Mr. Cross' testimony was also credible and supported Mr. Woods' assertion that attendance at the course was a privilege and something for which SFC was willing to assume traveling costs despite mileage restrictions on state vehicles. See n.2. Grievant's testimony concerning the conclusion of his conversation with Mr. Woods was hesitant and rather vague. Furthermore, he conceded that, upon receipt of his approval to attend in October 1988, he made it clear to his then-supervisor that he simply did not want to attend. Grievant did not dispute Mr. Woods' assertion that he made the same statement in their conversation and it can only be concluded that his refusal to attend the course was not based on any belief that he would be required to commit any improper acts.

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[7]Despite Grievant's testimony that he was not given the second option, his proposed finding of fact number seventeen (#17) states "Woods later did tell Martin [grievant] to attend the academy and the agency would absorb the cost but this was only after Woods also told Martin to obtain reimbursement [by filing with the academy]."

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

FINDINGS OF FACT

1. Grievant, an Assistant Fire Marshall employed by the W.Va. State Fire Commission, was given a direct order on January 26, 1989 by his supervisor Mr. Woods to attend the NFA's Introduction to Fire Safety Education from January 30, 1989 to February 10, 1989.

2. Attendance at such conferences is inherently part of Grievant's job requirements and enhances not only his ability to perform his assigned duties but also his overall employment history as well.

3. Grievant was given three options for travel to the course, namely, use of his personal car at NFA expense, use of his state car at NFA expense or use of his state car at SFC expense. He rejected all three and refused to attend the course.

4. As a result of his refusal to attend, Grievant was barred from consideration by NFA for other NFA courses during the remainder of the 1989-90 fiscal year and fiscal year 1990-91.

5. SFC has no written disciplinary policy for its employees and no evidence was presented to establish the existence of any past unwritten policy regarding insubordination.

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. Schmidt v. W.Va. Department of Highways, Docket No. DOH-88-063 (March 31, 1989).

2. In order to establish good cause for the suspension or demotion of a state employee, the misconduct must directly affect the rights and interests of the public, and be of a less substantial nature than cause for dismissal. W.Va. Department of Corrections v. Lemasters, 313 S.E.2d 436 (W.Va. 1984). "Each case must be determined upon the facts and circumstances which are peculiar to that case". Blake v. Civil Service Commission, 310 S.E.2d 472 (W.Va. 1983).

3. Insubordination may be defined as "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Ware v. Morgan County Board of Education, 719 S.E.2d 351, 352 (Colo. 1985); Webb v. Mason County Board of Education, Docket No. 26-88-004 (May 1, 1989).

4. SFC established that Grievant's refusal to attend the NFA's training course constituted insubordination.

5. SFC also established Grievant's action directly affected the rights and interests of the public in that he was prevented from obtaining valuable training which would significantly enhance his ability to carry out the duties and responsibilities of his position.

6. In the absence of disciplinary policy the West Virginia Education and State Employees Grievance Board will consider the propriety of the penalty imposed by an agency upon an employee to determine if said penalty is clearly excessive or reflects "an abuse of agency discretion or an inherent disproportion between the offense and the personnel action." Schmidt, supra.

7. The imposition of an eleven-day suspension without pay was not clearly excessive or disproportionate to the offense and was not an abuse of SFC's discretion.

Accordingly, the grievance is **DENIED.**

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Raleigh County and such appeal must be filed within thirty (30) days of receipt 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 any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

JERRY A. WRIGHT
Chief Hearing Examiner

Dated: August 8, 1989