

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA JEAN KOBLINSKY,
Grievance,

v.

Docket No. 2010-1306-CONS

PUTNAM COUNTY HEALTH DEPARTMENT,
Respondent.

DECISION

Grievant Barbara Koblinsky was employed by the Putnam County Health Department (“PCHD”) as a Registered Sanitarian. Ms. Koblinsky filed a grievance form dated February 26, 2010, claiming that she had been “suspended without cause and denied [her] statutory right to representation.” As relief she sought:

to be made whole, including restoration of all lost pay with interest, benefits and tenure and remedy for denial of statutory rights as a public employee.

Ms. Koblinsky filed a second grievance form dated March 9, 2010, alleging that her employment was terminated without cause. In this grievance, she also asked “to be made whole, including all back pay with interest and lost benefits restored.” As allowed by W. VA. CODE § 6C-2-4 (a) (4), Grievant waived levels one and two and filed both grievances directly at level three. These two grievances were consolidated by Order dated April 8, 2010.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on two days; May 7 and 27, 2010. Grievant appeared in person and was represented by Gordon J. Simmons, UE Local 170, WVPWU.¹

¹ West Virginia Public Workers Union.

Respondent PCHD was represented by Rosalee Juba-Plumley, Esquire. After the presentation of the evidence, the parties agreed to submit Proposed Findings of Facts and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on July 29, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant was suspended and dismissed for insubordination. After Grievant was involved in an argument with her co-worker, Grievant's supervisor ordered her to come in to 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 the Grievant insisting that she have a representative present, the supervisor suspended Grievant for insubordination. The supervisor subsequently dismissed Grievant for the same reason.

Grievant is entitled to have a representative with her in any meeting held for discussing or considering discipline.² Grievant did not refuse to meet with her supervisor, she only insisted on having a representative present. Respondent failed to prove insubordination and violated Grievant's statutory right to representation. The grievance is GRANTED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

² See W. VA. CODE § 6C-2-3 (g).

Findings of Fact

1. Grievant Barbara Koblinsky is a Registered Sanitarian and has been employed by the PCHD in that capacity for approximately two years.

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.

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.

4. Upon receiving the e-mail, Grievant went to Margaret Crouse, the office assistant, and asked to see the form. Ms. Crouse told Grievant that the form did not have the victim's date of birth on it. Grievant showed the form to Ms. Crouse with the information on it and Ms. Crouse noted that the information had not been on the form when Ms. Crouse 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.

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.

6. Upon arriving at the office, Administrator Fleshman told Ms. Crouse and Grievant to go to their respective office and that she intended to talk with both of them individually about the incident.

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.

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").

9. Grievant went back to her office and then went to the rest room where she called her union representative.

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.

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.

13. Ms. Fleshman informed Grievant that failing to meet with her was insubordination and that Grievant was suspended without pay immediately. She further instructed Grievant to leave the building immediately. Grievant complied with this directive.

14. By letter dated March 2, 2010, Administrator Fleshman reiterated that Grievant had been suspended and notified Grievant that she was dismissed from employment. No predetermination conference was held prior to this action being taken, however, the dismissal letter indicated that Grievant could respond to the charges in the letter within fifteen days.

15. Ms. Fleshman did not conduct a predetermination conference because Grievant would not meet with her without a representative. Ms. Fleshman stated that the meeting that Grievant would not attend without her representative would have been her predetermination conference.³

16. The first reason given for Grievant's dismissal and termination was "insubordination" arising from Grievant refusing to meet with Ms. Fleshman regarding the verbal altercation Grievant had with Ms. Crouse. This was the issue that led to Grievant's immediate suspension and was the triggering factor in her dismissal.

17. The additional reasons listed for the dismissal included two prior reprimands for failing to adhere to directives and a three day suspension for failure to follow state policy.

³ Ms. Fleshman testified that she was instructed by a person from DOP that since Grievant refused to meet with her without a representative, that meeting would have been her predetermination hearing. Ms. Fleshman specifically stated: "I would consider my trying to figure out what happened on that day would have stood for the predetermination hearing. I mean, if you have to predetermine if you are going to suspend someone, you have to have the opportunity to speak with them and she refused to do that." Testimony of Fleshman, Level three hearing.

18. No grievance was filed related to the prior reprimands but a Level three decision was entered by the West Virginia Public Employees Grievance Board on May 4, 2010, upholding the suspension.⁴

19. While Grievant had harsh discussions with co-workers, she never made any physical contact with her co-workers nor threatened anyone with violence.

20. Grievant surrendered her keys and credit card related to her employment to the County Health Officer Dr. Henson.

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).

Respondent claims that Grievant's employment was terminated for two reasons. First, it is alleged that Grievant violated the Department of Health and Human Resources

⁴See *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-0824-PutCH (May 4, 2010).

Policy Memorandum 2108, related to Employee Conduct.⁵ Respondent notes that at section VIII, the policy states the following:

Employees are expected to: . . . avoid physical abuse, harassment, or intimidation of residents/patients/clients or fellow employees...

Employees are expected to: . . .refrain from disrupting the normal operations of the agency; refrain from profane, threatening or abusive language toward others: . . .

Respondent Exhibit 4.

There is no evidence that Grievant physically abused anybody. The violation of the policy is alleged to have occurred when Grievant engaged in verbal altercations with fellow employees; the most recent of which was the argument between Grievant and Ms. Crouse which occurred on February 25, 2010. This argument was the reason Grievant was ordered to meet with Administrator Fleshman. Ms. Fleshman intended to get Grievant's version of the events to determine if discipline would be appropriate. Not only did Ms. Fleshman indicate that discipline was likely to result from this meeting, but the incident that the meeting was called to discuss was ultimately cited as a reason for Grievant's dismissal.⁶

Second, Grievant was dismissed for insubordination because she refused to follow Administrator Fleshman's demand that Grievant meet with her regarding the argument without a representative present. Ms. Fleshman was very clear that this refusal to follow

⁵ On September 15, 2009, Grievant signed an acknowledgment form stating that she had received and read this policy. Respondent Exhibit 2.

⁶ It is interesting to note that Ms. Crouse admitted to giving as good as she received in the argument with Grievant. All witnesses, including Ms. Fleshman stated that both parties were shouting and obviously angry with each other. Yet Ms. Crouse received no discipline for violating Policy Memorandum 2108.

her directive was the final incident that led to Grievant's dismissal. Had this refusal not occurred, Grievant may have received a lighter discipline for the alleged violation of Policy Memorandum 2108.⁷

Grievant does not dispute that she entered into an argument with Ms. Crouse and that they both shouted at each other.⁸ However, she avers that she never refused to meet with Ms. Fleshman. Instead, she notes that she was ready to meet with her supervisor at any time regarding the incident as long as she was allowed to have a representative present. Grievant believed, based upon prior experience, that this discussion regarding the verbal altercation might lead to discipline and therefore she was entitled to have a representative present pursuant to WEST VIRGINIA CODE § 6C-2-3(g) (1) which states:

(1) An employee may designate a representative **who may be present** at any step of the procedure as well as **at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.**

(Emphasis added) *Id.*

Grievant maintains that she was not insubordinate because she did not willfully refuse to follow a lawful directive from her supervisor. Rather, she merely sought to have a representative at the meeting which was her statutory right.

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.*

⁷ Indeed it seems very likely that Grievant would not have been dismissed since Ms. Crouse received no discipline at all for her part in the verbal altercation.

⁸ Grievant also spoke loudly to two other co-workers when she incorrectly believed they were talking about her after her altercation with Ms. Crouse.

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 argues that Administrator Fleshman gave Grievant a valid directive to meet with her and told Grievant that she was not entitled to a representative because the meeting was an investigation not a discipline meeting. This position is fatally flawed.

The Grievance Board has already interpreted W. VA. CODE § 6C-2-3(g) (1) to require that an employee be allowed to bring a representative with her to such a meeting in *Knight v. Dep't of Health & Human Res.*, Docket No. 2008-0981-DHHR. At Conclusion of Law 12 the Administrative Law Judge held that:

The plain language of the statute at issue says an employee is entitled to representation: 1) during every step of the grievance procedure, and 2) at any meeting held for the "purpose of discussing or considering disciplinary action.

More importantly, Conclusion of Law 16 of *Knight supra*. states:

The roles/duties of an investigator must be kept separate from the roles/duties of the individual who considers whether disciplinary action should or will be taken. **If the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview.**

(Emphasis added).

There is no doubt that Administrator Fleshman has authority to impose discipline on Grievant and she is the person who was conducting the interview related to the verbal altercation. Additionally, the altercation that was the subject of the meeting was also listed

as one of the reasons for Grievant being dismissed. Ms. Fleshman indicated that the meeting that Grievant refused to attend would have been her 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*. There is no doubt that this meeting was related to discipline and Grievant was entitled to have a representative present.

Respondent's ⁹ reliance upon characterizing the meeting as an "investigation" to avoid allowing an employee to have a representative present is misplaced. The statute plainly states that the employee is entitled to have a representative present "at **any** meeting that is held with the employee for the purpose of discussing or considering disciplinary action." (Emphasis Added.) W. VA. CODE § 6C-2-3 (g) (1). The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if she makes such a request.¹⁰

In the case of *Swiger v. Civil Service Commissioner*, 179 W. Va. 133, 365 S.E.2d 797 (1988), the West Virginia Supreme Court upheld the denial of a representative to an employee in a pre-disciplinary investigation meeting because the statute covering the

⁹ As well as the person at the Division of Personnel who advised Administrator Fleshman.

¹⁰ These meetings are distinguished from counseling sessions and evaluation meetings where the intent is solely to advise employees of issues related to their employment so that the employee may improve. To avoid the necessity of allowing a representative at such meetings, the supervisor need only inform the employee that behavior discussed or revealed at the meeting will not lead to discipline. Additionally investigation meetings where the employee's role is that of a witness to the conduct of others are generally not covered by W. VA. CODE § 6C-2-3 (g) (1).

meetings at that time allowed the employees to appear personally and to reply to charges made against them. The Court specifically noted that "[i]f the Legislature wishes to provide due process rights to union representation before termination, it may amend the statute." *Id.* The Legislature expressed that desire in passing W. VA. CODE § 6C-2-3 (g) which states that employees are entitled to a representative at **any** such meetings. The clear reasoning behind this statutory expression of public policy was stated by Justices McGraw and McHugh in their *Swiger* dissenting opinion as follows:

. . . In *City of Marion v. Weitenhagen*, 361 N.W.2d 323, 328 (Iowa App.1984), the court commented that, "[T]here is nothing in the nature of a public employee's work which would result in harm to the public if he or she is given such representation. . . the public is best served by staunch protection of fundamental rights of expression, association, and petition.

Swiger supra (dissenting opinion).

That position is bolstered by other cases that have held that West Virginia's Due Process Clause requires presentation of charges and some opportunity for the employee to respond to them before the imposition of a discipline which deprives the employee of wages or salary. *Hammer v. Greenbrier County Bd. of Educ.*, Docket No. 2008-0302-GreED (May 21, 2008) (citing: *Syl. Pt. 7, Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977); *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981) and *Knauff v. Kanawha County Bd. of Educ.*, Docket No. 20-88-095 (Jan. 10, 1989)). In passing W. VA. CODE § 6C-2-3 (g) (1), the Legislature established that the right to a representative at such meetings is included in those Due Process protections.

It is undisputed that Grievant would have met with Ms. Fleshman if she had been allowed to have a representative present. Since Grievant had a statutory right to have a representative at the meeting, Grievant did not willfully refuse to obey a lawful command by her supervisor. Ms. Fleshman had no authority to require Grievant to abandon her right to a representative. Consequently, Grievant was not guilty of insubordination and the grievance is Granted.

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. Therefore, Grievant must be reinstated to her previous employment. If future meetings are conducted that relate to that incident or other factors of Grievant's job performance that could lead to discipline, Grievant is entitled to have a representative present.¹¹

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. 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*

¹¹ W. VA. CODE § 6C-2-2 (n) states: "'Representative' means any employee organization, fellow employee, attorney or other person designated by the grievant or intervenor as his or her representative and may not include a supervisor who evaluates the grievant."

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).

3. WEST VIRGINIA CODE § 6C-2-3(g) (1) which states: “(1) An employee may designate a representative who may be present at any step of the procedure as well as at **any** meeting that is held with the employee for the purpose of discussing or considering disciplinary action.” (Emphasis added). The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested.

4. Grievant had a statutory right to have a representative at the meeting with her supervisor. Since the supervisor did not have authority to require Grievant to waive that right, Respondent failed to prove that Grievant wilfully refused to follow a valid directive. Consequently, Respondent failed to prove Grievant was guilty of insubordination.

Accordingly, the Grievant is GRANTED. Respondent is Ordered to reinstate Grievant to her position from the date it was terminated with full back pay and benefits, including statutory interest. If additional meetings are held regarding the Grievant's conduct on February 25, 2010, Respondent is Ordered to allow Grievant to have a representative with her in those meetings, if she makes that request.

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: NOVEMBER 8, 2010

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**