

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

S. D. D.,¹

Grievant,

v.

Docket No. 2018-0469-CONS

WEST VIRGINIA STATE UNIVERSITY,
Respondent.

DECISION

Grievant, SD, was employed by Respondent, West Virginia State University (“WVSU”), as a Trades Specialist. Mr. D filed a level one grievance form dated September 19, 2017, alleging that several of his personnel items were thrown in the trash by his supervisor. As relief, he sought reimbursement for all the items which had been thrown away. Mr. D filed a separate grievance form that day alleging that he had been improperly suspended without pay pending an investigation into allegations against him. Grievant seeks to have the suspension retracted and to receive back pay. By form dated October 13, 2017, Mr. D filed an expedited grievance to level three² contesting the termination of his employment. As relief Grievant seeks “Equal Pay for one year with overtime or an equivalent job within the state but I feel I cannot return to WVSU for fear of retaliation [sic].”

An Order was entered on October 30, 2017, consolidating these three grievances to level three of the grievance procedure for a hearing and decision. A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance

¹ Pursuant to an agreement of the parties reached after the hearing, Grievant will be identified herein only by his initials.

² See, W. VA. CODE § 6C-2-4(a)(4).

Board on January 2, 2018. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170, WVPWU.³ Respondent WVSU was represented by Dawn E. George, Assistant Attorney General. This matter became mature for decision on February 9, 2018, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was charged with violating Respondent's acceptable use provisions of the WVSU Policy and Handbook, by erasing applications necessary for completing necessary duties from a University issued cellular telephone by resetting the device to the factory settings. Additionally, Grievant was charged in participating in profane conversations and proposing illegal activity in text conversations on the University cell phone. Respondent proved the allegations by a preponderance of the evidence and the discipline was appropriate given Grievant's prior work history.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant SD was employed by Respondent, West Virginia State University, as a Trades Specialist. He began working for WVSU on November 1, 2012. Grievant was assigned to the WVSU Physical Plant as a Heating Ventilation and Air Conditioning ("HVAC") Worker. His duties included maintaining HVAC systems, elevators, and fire protection equipment on the WVSU campus.

2. Grievant had access to all the buildings and nearly all the rooms on campus. He was also provided with a cellular telephone which belonged to the University

³ West Virginia Public Workers Union.

that he could use for work purposes. The cell phone had apps⁴ loaded to monitor and help repair the HVAC system and other systems on campus.

3. In December 2016, Grievant entered two offices in WVSU Wallace Hall and took office supplies without authorization. This activity was captured on video tape. The items taken included a pencil cup, pencils, pens, markers, staples, a memo holder, a tape dispenser and six rolls of wide tape, small notepads and various other small items. (Respondent Exhibit 1).

4. Grievant met with William Porterfield, Campus Police Supervisor, and Marvin Smith, Physical Plant Director, regarding the incident and admitted to taking the supplies. Grievant said that he was taking them for use in the Physical Plant office because they lacked supplies. Grievant returned the items and promised to not go into any areas on campus where he was not specifically authorized. In exchange, Grievant was not disciplined for this incident. *Id.*

5. In 2010 the State of West Virginia transferred ownership of the old West Virginia Rehabilitation Hospital facilities to WVSU. This property included buildings which were in dilapidated condition which were condemned and had been boarded up.

6. WVSU received a grant for historic renovation of some of the buildings. The remainder, including building C, were fenced and boarded for safety and to prevent theft from the buildings. Nevertheless, the University had instances where Building C had been broken into for theft of copper and other materials. Each time the building needed to be resealed. No employees of the University had duties requiring entry into these buildings.

⁴ An “app” is a specialized computer program that is downloaded to a mobile device.

7. In the morning hours of September 12, 2017, contractors working on the renovations reported to university police seeing individuals with flashlights walking in the upper floors of Building C of the old Rehabilitation Hospital. The individuals left the building through an unsecured door to a vehicle which had been parked out of sight. The workers reported that the vehicle had a State Government license plate (green) with the number 76-589. Grievant was on duty that morning and was identified as one of the people in Building C and driving the State vehicle. The person with Grievant was another Trade Specialist employed at the Physical Plant. That person (“MW”)⁵ was not on duty at the time. (Respondent Exhibit 2). Neither Grievant nor MW had any work-related reason to be in the condemned Building C. Neither Grievant nor MW have any responsibility for security at the University and should contact Campus Security to investigate anything out of the ordinary.

8. Grievant was interviewed by University Police officer, Ron Mercer on September 12, 2018, at 2:30 PM. Grievant gave a written statement stating that 6:00 AM he decided on his own to make a “walk thru” of the old Rehab building. At 6:30 AM, SD picked up MW at his home and drove to old Rehabilitation Hospital. They both walked through Building C and around the perimeter of the building. (Grievant Exhibit 1).

9. At approximately 1:30 PM September 15, 2017, Grievant was called by his supervisor, Dayton Wilson and instructed to attend a meeting with Mr. Wilson, Marvin Smith, and MW regarding his suspension. The meeting took place at 4:00 PM. Thereafter,

⁵ The coworker will also be identified by his initials herein. It would be inherently unfair to protect Grievant’s identity yet reveal his coworker’s since he was not involved in this hearing and decision.

Grievant was informed that he was suspended and instructed to surrender his work cellular telephone and facility keys. *Id.*

10. At the meeting Grievant was given a memorandum from Director Melvin Smith, dated September 15, 2017, stating that Grievant and his coworker were suspended without pay pending the outcome of an investigation into “being seen in Building C of the old rehab center.” (Respondent Exhibit 4).

11. Grievant had protected the content of his work cell phone by installing a password. No one at the Physical Plant or in the WVSU Human Resources office had the password to the University cell phone issued to Grievant. Consequently, they could not check the content. When first contacted about the password, Grievant only provided four characters of the six -character password. At a later date, Grievant was contacted again and he provided the full password. When Grievant gave the password to the Human Resource officer, Janice Bennett, she found that the memory of the cell phone had been erased, and it had been returned to the factory setting. Ms. Bennett contacted the cell phone provider who said that the phone could be reset to factory setting through the I-Tunes internet site. Only Grievant had the password necessary to complete such a factory reset. When the phone was returned to factory settings all of the work-related apps for monitoring and adjusting the HVAC system were deleted.

12. Grievant’s co-worker, MW, had not placed a password on his cell phone nor erased the memory. Text exchanges between Grievant and MW unrelated to work were discovered on MW’s cell phone. Some of the text’s appeared to related to procuring drugs,

as a well as inappropriate sexual innuendo. The following are examples of such tests taken from MW's work phone:⁶

August 21, 2017.

- SD – Don't know hot those emoji got on my last text. I think the intercity lingo means Suck IR among the native tribes. Jude done grass now ready for a bee and a buzz.
- MW – I just got naked in bed With a line cut ready to go Fighting with mother.

August 24, 2017.

- SD – What's the official crazy bitch doing?
- MW – Just not heard from us She's good
- SD – Tell her to front us one and I'll give her five Xanax Friday
- MW – I'll get us one
- MW – Will I have been sitting down stairs with a line cut for us are you coming or what

August 27, 2017.

- SD – Have you seen any faggots today.
- MW – Not one have you seen any straights
- SD – Everyone is st8
- MW – That's right faggot What's up?
- SD – Even the dude I nailed in the shower last night was st8

August 28, 2017.

- SD – I drilled holes in the van cause I locked the keys up in the fucking thing.

September 1, 2017.

- SD – Nothing yesterday or today and I feel fine
- MW – I wish
- SD – Call hermie see what's up. Lmk if cool we'll go the first bullshit we abort. Still got Xanax if you want to trade with the girl is fine but still want to get with hermie.

(Respondent Exhibit 2).

13. WVSU BOG⁷ Policy #53, *Responsible Use of University Computing*

Resources, contains the following provisions:

3.1.5.1 In the interest of making the use of IT resources a natural part of the day-to-day learning and work of all employees of the University community, incidental personal

⁶ The texts appear herein as they were written without corrections.

⁷ "BOG" refers to the Board of Governors.

use is tolerated. However, one should not use University sources of email, Internet access, and other IT services for activities of an extensive nature that are unrelated to University purposes. Excessive use of systems for recreational Internet browsing, email, or gaming is to be avoided and may subject University employees to disciplinary action.

6.1.2.1 Attempted or detected alteration of software, data or other files as well as disruption or destruction of equipment or resources is considered theft.

6.1.3 Vandalism. Violations include but are not limited to:

...

- Tampering with or obstructing the operation of WVSU computer systems;

...

- Damaging computer hardware software.

Id. (Respondent Exhibit 3)

14. The WVSU *Employee Handbook*, in the section entitled *Workplace Expectations* contains the following provisions:

- Internet, University provided equipment (e.g., Cell phone, laptops and computers) and services may not be used for transmitting, receiving or storing any communications of a defamatory, discriminatory, harassing or pornographic nature.
- The following actions are forbidden: using derogatory, abusive, profane or offensive language; creating, viewing or displaying materials that might adversely or negatively reflect upon: or be contrary to West Virginia State Universities best interests: and engage in any illegal activities . . . ;

All institution-supplied technology and/or related work records belong to WVSU and not to the employee. WVSU may monitor use of institutions-supplied technology. Inappropriate or illegal use or communications may be subject to disciplinary action up to and including termination of employment. Refer to BOG Policy #52.

Id. (Respondent Exhibit 5).

15. By letter dated September 26, 2017, Grievant was notified of the intent to terminate his employment effective October 2, 2017. The reason given for the anticipated action was “Inappropriate communications on your work cell phone that did not pertain to your employment with West Virginia State University.” The letter alleged that the communication violated the WVSU Employee Handbook and the WVSU Board of Governors policy. (Respondent Exhibit 6). Grievant was also given the opportunity to attend a predetermination meeting regarding these charges. (Respondent Exhibit 8).

16. By letter dated October 3, 2017, Physical Facilities Director, Marvin Smith, advise Grievant that he was dismissed from his position as a Trades Specialist 1 with WVSU for gross misconduct. The reason given for the dismissal was the same as those listed in the September 26, 2017, letter giving Grievance notice of the University’s intent to terminate his employment.⁸ (Respondent Exhibit 7).

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271

⁸ Director Smith testified that he also recommended Grievant’s dismissal because he had gone into an area on campus where he was not authorized without permission which he had previously promised not to do. See FOF 4. However, this reason was not listed in the notice or termination letters and cannot be considered.

S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.") . . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent State employee when his employment was terminated. 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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Grievant was dismissed from employment for alleged violation of policy and handbook provisions related to the use of a cellular telephone provided to him by Respondent to use in the performance of his duties. Respondent alleges that Grievant's actions constitute gross misconduct. Gross misconduct is defined in the *WVSU Employment Handbook* as "misconduct substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct." *Id.*

Grievance Board decisions have held that gross misconduct "implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which

the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n.*, Docket No. 02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010); *Poke v. Human Rights Commission*, Docket No. 2014-1196-HRC (Mar. 18, 2015); *Wilson v. W. Va. Tax Dep't*, Docket No. 2017-2172-DOR (Oct. 17, 2017).

There is no dispute that Grievant was issued a cellular telephone by the University to use for performing his duties. The telephone was loaded with applications for monitoring and controlling the HVAC systems in the various building on the WVSU campus. Additional apps were loaded for work with other mechanical systems on campus. Pursuant to University policies, Grievant was allowed to use the cell phone for limited personal use, but there were clear restrictions. WVSU BOG Policy #53, *Responsible Use of University Computing Resources*, states:

6.1.2.1 Attempted or detected alteration of software, data or other files as well as disruption or destruction of equipment or resources is considered theft.

It was proven by a preponderance of the evidence that Grievant reset the cell phone to its factory settings to cover his improper use of the equipment. While Grievant did not admit to this action, he was originally instructed at 1:30 PM on September 15, 2017, to attend a meeting at 4:00 PM regarding his suspension. Grievant had plenty of time prior to that meeting to reformat the phone anticipating its confiscation. Additionally, the telephone was password protected. Respondent's agents had no access to reset it nor any motive to do so. The management wanted to preserve the contents for potential

evidence, not delete it. Additionally, Grievant was reluctant to provide the password for the cell phone and gave only a partial password the first time he it was requested. The manufacturer confirmed that he would have been able to reset the phone remotely if he knew the number and password. It is more likely than not that Grievant reset the University cell phone to its factory settings in an effort to cover his inappropriate use. This action also erased all the apps which had been installed for performance of the HVAC Technician's duties. This action clearly violates WVSU *BOG Policy #53*.

The WVSU *Employee Handbook* prohibits, "using derogatory, abusive, profane or offensive language;" or "engag[ing] in any illegal activities" through the use of University owned cell phones. Additionally, the equipment may not be used in any way which "might adversely or negatively reflect upon: or be contrary to West Virginia State Universities best interests." *Id. at Workplace Expectations*.

The text conversations between Grievant and MW violate these acceptable use limitations. They used profane and offensive language, were derogatory to homosexuals, and discussed the procurement and exchange of controlled substances in a manner which was not subtle. These conversations by WVSU employees on WVSU equipment reflect negatively upon the University if they are condoned. They violate the acceptable use provisions of the WVSU *Employee Handbook* and are subject to discipline. It is apparent that Grievant's conduct demonstrated "a willful disregard of the employer's interest" and "wanton disregard of standards of behavior which the employer has a right to expect of its employees," thus resulting in gross misconduct. *Graley v. W.Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332 S.E.2d 579 (1985)).

It is troublesome that Respondent's case rested on a great deal of hearsay evidence. For example, a witness testified regarding what the telephone manufacturer representative said about remote reset of the cellular telephone and the transcripts from the text conversations were introduced through a witness who had not made the transcription.

With regard to the hearsay evidence, the issue is not admissibility but one of weight. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The administrative law judge applies the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

In this instance, the hearsay evidence was consistent with the facts and circumstances established by first-hand testimony and the overall circumstances. Additionally, there was no contradictory evidence and the witnesses were credible. The hearsay evidence was entitled to enough weight to meet the preponderance standard.

Respondent proved the charges against Grievant by a preponderance of the evidence. Given Grievant's work history dismissal was warranted. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence." *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent proved by a preponderance of evidence that Grievant violated WVSU acceptable use provisions of its policies.

3. Gross misconduct "implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W.Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332

S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010); *Poke v. Human Rights Commission*, Docket No. 2014-1196-HRC (Mar. 18, 2015); *Wilson v. W. Va. Tax Dep't*, Docket No. 2017-2172-DOR (Oct. 17, 2017).

4. Grievant's conduct demonstrated "a willful disregard of the employer's interest" and "wanton disregard of standards of behavior which the employer has a right to expect of its employees," thus resulting in gross misconduct. *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332 S.E.2d 579 (1985)).

5. The administrative law judge applies the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. See, *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

6. The hearsay evidence relied upon by the Respondent was entitled to enough weight to meet the preponderance standard.

Accordingly, the 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: MARCH 20, 2018.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE