CHARLES GODFREY, .

.

Grievant, .

.

v. . DOCKET NO. 94-BOD-079 .

BOARD OF DIRECTORS, WEST VIRGINIA .

INSTITUTE OF TECHNOLOGY, .

.

Respondent. .

D E C I S I O N

This is a grievance by Charles Godfrey (Grievant) challenging his dismissal from employment by West Virginia Institute of Technology (WVIT) on October 26, 1993. Following denial of his grievance at Level II on March 1, 1994, Grievant elected to appeal directly to Level IV on March 8, 1994 in accordance with W. Va. Code §18-29-4(c). A Level IV hearing was conducted in the Board's office in Charleston, West Virginia on April 6, 1994. This matter became mature for decision on May 11, 1994, following receipt of the parties' post-hearing submissions.

Grievant generally contends that the evidence is insufficient to sustain the charges and, alternatively, the penalty of dismissal is too severe for the offense. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v.Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). The available evidence will now be examined to determine if the charge of neglect of duty is supported under the foregoing legal framework.

Grievant was advised of his termination in a letter from Michael L. Neese, WVIT's Associate Dean of Students and Director of Housing, dated October 26, 1993, the pertinent text of which follows:

> On October 18, 1993 the staff at Hirise Hall observed your work for an extended period and found that over the period in question you attempted no work and merely wandered about the building. Your supervisor, Mr. Jackson, had to send you home at 1:50 p.m. that day. We have discussed your inattentive work habits many times and this additional example of gross misconduct is inexcusable.
>
> You have received many verbal and written warnings in the past several months and you were suspended for three days, a year ago in October. Each of these warnings were given in the hopes that your work behavior and performance would improve, unfortunately this has not been the case. Your continued failure to comply with stated work regulations can no longer be tolerated.
>
> Your position as Building Service Worker II is terminated effective the end of the work day, today, October 26, 1993.

E Ex 14. [Documents admitted at Grievant's Level II hearing will be cited as "E Ex " for Employer's Exhibits. Documents admitted at the Level IV hearing will be cited as "J Ex " for Joint Exhibits, "G Ex " for Grievant's Exhibits and "R Ex " for Respondent's Exhibits.]

WVIT's Classified Employees' Handbook, governing Conduct, Discipline and Grievances, provides that "[i]mmediate dismissal forcause is also possible under certain circumstances discussed below." The Handbook further provides the following guidance:

> Immediate dismissal may be appropriate in cases of flagrant or willful violations of rules, regulations, standards of accepted behavior or performance, or for actions where an investigation proves the employee was in clear violation of policy.
>
> Administrators have the right of dismissal for just cause. In cases of immediate dismissal, a written statement will be given to the employee, and a copy will be included in the employee's personnel record. Just cause includes, but is not limited to, the following:
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> -Reporting to work under the influence of alcohol or narcotics or partaking of these

substances while at work;

-Malicious destruction or theft of property of the institution, the Board of Regents, or of its visitors, patrons, or employees;

-Wrongful injury to an employee of the institution or Board of Regents;

-Refusal to comply with institutional rules;

-Neglect of duty;

-Dishonesty;

-Sleeping on duty;

-Failure to maintain established performance standards;

-Habitual absence from work without permission or proper explanation;

-Tardiness; and

-Insubordination.

J Ex 1.

Anthony Jackson, Residential Director of Hirise Hall at WVIT, testified that he had been Grievant's

immediate supervisor since August 1993. On the morning of October 18, 1993, Mr. Jackson watched Grievant's work performance and concluded that "he wasn'twith us." Mr. Jackson noted that Grievant appeared "lackadaisical" and that he was "stumbling around" and not working. He did not see Grievant carrying any cleaning equipment, such as a broom or mop.

Mr. Jackson observed Grievant from time to time in various places throughout the morning without seeing him accomplishing any work. Mr. Jackson called Grievant into his office to discuss the situation and, according to Mr. Jackson, Grievant told him that he was "fine." Mr. Jackson felt that there was something wrong with Grievant but offered no opinion on the nature of the problem. While Mr. Jackson had found Grievant's work performance deficient on prior occasions, his conduct on the morning of October 18 was considered abnormal. As a result of his observations, Mr. Jackson contacted Elvin Dillon, Dean of Students, the next person in Grievant's chain of supervision in the absence of Mr. Neese, and obtained his approval to send Grievant home for the rest of the day.

Glenn Conliffe, an acquaintance of Grievant's, testified that he went to Hirise Hall on October 18 to check on his job application for a cook's position. Mr. Conliffe observed Grievant on the 2nd floor between 12:30 and 1:00 p.m. taking down some ceiling tiles. Approximately 15 minutes later, as he left the building, Mr. Conliffe observed Grievant sweeping up some glass outside the building. Grievant testified that he took down the ceiling tile and put a bucket on the floor because there was water leaking through the ceiling.

Grievant's testimony at the Level IV hearing also included the following:

> Q. [By Mr. Collias] There's been some testimony from Mr. Dillon that Mr. Jackson told him that you appeared incoherent, that Mr. Jackson testified that you appeared lackadaisical, not with us, someplace else and that something was wrong with him.

A. [By Grievant] Right, I agree with that.

> Q. Was there something wrong, was something bothering you on that day, anything unusual?

> A. Yes, because me and my wife, a couple weeks before then, we separated getting a divorce.

Q. So, in fairness to the witnesses for the State, is it possible that something was on your mind on that day?

A. Yes.

Q. Is it your recollection, however, that you still went to work and did your job?

A. Did my duties, yes.

* * *

Q. Was there ever a day that you worked that you didn't do any work at all?

A. No. I would work, you know, I might not work up to my capabilities but I would, you know, work, to my knowledge. Ever since this thing between me and my wife, I just had a whole lot on my mind, was frustrated and depressed.

On cross-examination, Grievant acknowledged that Mr. Jackson called him into his office on October 18th and inquired if he was alright. Grievant recalled telling Mr. Jackson that he was alright, he just had some things on his mind that were bothering him. Grievant further testified that, in addition to working outside the building, he worked alternatively on floors 6, 5, 4 and 3 or 10, 9, 8 and 7, switching assignments on a monthly basis withanother custodian. However, Mr. Jackson testified in rebuttal that he switched floor assignments between Grievant and another custodian on a permanent basis because of complaints about Grievant's work. According to Mr. Jackson, on October 18, Grievant was responsible for cleaning floors 3, 4, 5 and 6. The building entrance is on the second floor.

Nerland Jeanniton, Housing Administrator at WVIT, testified that she was Grievant's immediate supervisor from August 1991 to the Spring of 1993. Ms. Jeanniton issued a verbal warning to Grievant on April 13, 1993. E Ex 2. This warning, in essence, was for spending 15 minutes outside the building with a sanitation worker when he should have been in the building working.

On May 18, 1992, Mr. Neese issued a written warning to Grievant for misplacing his keys to the building where he worked. E Ex 12. On August 2, 1993, Mr. Neese issued a three-day suspension to Grievant for failing to submit proper timecards for work study students under his supervision. E Ex 11. Grievant was also issued a written reprimand by Mr. Neese on October 7, 1993 for leaving work during normal working hours without permission. E Ex 13. Grievant was advised that "[f]uture violations will result in either suspension or dismissal, depending upon the severity of the infraction." E Ex 13.

After reviewing the evidence presented at Levels II and IV, and assessing the credibility of witnesses where testimony was contradictory, the undersigned concludes that Respondent established a basis for Grievant's dismissal under the preponderance ofthe evidence standard. In particular, the Respondent demonstrated that Grievant's work performance on October 18, 1993, was at least inattentive. In that regard, Grievant concurred with Mr. Jackson's labeling of his performance as "lackadaisical" and that he had a whole lot on his mind and was frustrated and depressed. All of this was consistent with Mr. Jackson's observations of Grievant while at work on October 18th.

Mr. Jackson observed Grievant on several occasions during the morning of October 18th without seeing Grievant perform any meaningful work. Grievant's testimony does not directly refute that of Mr. Jackson. Grievant recalled that Mr. Jackson inquired if he was alright and Grievant responded that he was alright, he just had some things on his mind bothering him. This is substantially consistent with Mr. Jackson's testimony that Grievant told him that he was "fine."

Mr. Conliffe's testimony that Grievant was taking down a ceiling tile sometime between 12:30 and 1:00 p.m. and was sweeping up outside around 1:00 p.m. is not directly in conflict with Mr. Jackson. Mr. Jackson never stated that he constantly followed Grievant around. Rather, when he observed Grievant, Grievant was not doing any work. Even though it was not explained why Grievant was working on the ceiling tile (since such work was beyond his duties as a custodian and there was testimony that Grievant was assigned to clean the 3rd, 4th, 5th and 6th floors of Hirise Hall and the damaged ceiling tile was on the 2nd floor), cleaning up around the exterior of the building was consistent with Grievant'sassigned duties. Accordingly, it is accepted that Mr. Conliffe observed Grievant performing some work during the early afternoon of October 18th.

As between Grievant and Mr. Jackson, Mr. Jackson was the more credible witness. His demeanor was calm and casual and he readily responded to the questions asked by both parties with

equal candor. Moreover, there was no motive suggested for Mr. Jackson to misrepresent Grievant's actions on this occasion. Mr. Jackson appeared sincerely regretful that such severe disciplinary action was necessary.

Accordingly, the Respondent established, through the testimony of Mr. Jackson, as essentially corroborated by Grievant, that Grievant neglected his duties during a substantial period of time on the morning of October 18, 1993. While Grievant may have performed some work before being dismissed for the remainder of the day, the totality of the evidence indicates that Grievant was generally inattentive to his duties and not performing his assigned cleaning duties. Given Grievant's prior record of disciplinary actions, including a three-day suspension, a written reprimand, a written warning and a verbal warning, the Respondent's decision to dismiss him from employment was neither arbitrary nor capricious. See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant has been employed by Respondent West Virginia Institute of Technology (WVIT) since September 1988.

2. As of October 18, 1993, Grievant was employed as a Building Service Worker II, responsible for cleaning the 3rd through 6th floors of Hirise Hall at WVIT.

2. On the morning of October 18, 1993, Grievant was observed by his immediate supervisor, Anthony Jackson, wandering about his work area without any tools or equipment, stumbling, appearing lackadaisical and performing no meaningful work.

3. Grievant had previously been issued a verbal warning by Nerland Jeanniton on April 13, 1993 for spending time not working. Grievant also received a three-day suspension from Michael Neese on August 2, 1993 for failing to submit proper time cards for work study students under his supervision, as well as a written warning on May 18, 1992 for misplacing his keys to the building, and a written reprimand on October 7, 1993 for leaving work without permission.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. WVIT established by a preponderance of the evidence that Grievant engaged in neglect of duty on the morning of October 18,1993 by failing to accomplish any meaningful work while being observed by his immediate supervisor, Anthony Jackson.

3. Given Grievant's prior work record, WVIT's decision to dismiss Grievant from employment for this one instance of neglect of duty was not arbitrary or capricious nor an abuse of discretion. See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

Accordingly, this Grievance is **DENIED** .

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: July 15, 1994