HENRY S. WOMACK

v. **Docket No. 93-ADMN-430**

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICES DIVISION

D E C I S I O N

Grievant, Mr. Henry Womack, was dismissed from his classified employment as a custodian at Building 1 of the Capitol Complex effective October 16, 1993. The reason for his dismissal was "continuing insubordination." This insubordination consisted of an unauthorized attempt to duplicate a high security key followed by failure to return this key and to tell his employer from whom he received it.

This dismissal followed a three day suspension on September 15, 1993 for attempting to duplicate this key. Because this was a disciplinary action, the Grievant filed this grievance directly at Level IV on October 15, 1993 (See footnote 1). On his grievance form the Grievant stated, "[t]his dismissal was unfair and without just cause. I wish to be reinstated with full back pay plus interest and to bemade whole in every way." A hearing was held on November 18, 1993, and this case became mature for decision on December 9, 1993.

The Grievant's argument consists of two main issues. First, he stated the Respondent has not met its burden of proof to establish the Grievant was the individual who attempted to duplicate the key. Second, the Grievant argued the policy of prohibiting custodians from having keys to their assigned buildings and disciplining them for attempting to duplicate these keys is arbitrary and capricious. The Grievant also argued the Respondent wants to do away with custodians and replace them with Shawnee Hills employees as they are more cost effective, thus this discharge was a way of decreasing the number of custodians.

The Respondent replied that they have met their burden of proof and demonstrated by a preponderance of the evidence the Grievant was the individual who attempted to duplicate the key. The Employer further stated custodians are not allowed to have keys for security and safety reasons. Respondent argued that the policy regarding possession of keys has been communicated repeatedly

to the employees, and the rules and regulations regarding the use of keys is reasonable and necessary. As to the charge of wanting to replace the custodians with more cost-effective workers, the Respondent replied no plans are in effect to terminate custodians, but there are plans to decrease the number by attrition and assisting these employees to fill more highly skilled jobs.

The Respondent's evidence in support of the charges consisted primarily of the eyewitness testimony of Ms. Betty Ray from Judy'sLocksmith, Mr. Bernard Cobb, Grievant's second level supervisor, and Mr. Bill Elswick, Director of General Services. Additionally, the Respondent presented past suspension letters and memos to support their case. The Grievant did not testify at the hearing and elected to present no evidence or testimony in his behalf.

Identity Issue

Ms. Betty Ray, an employee of Judy's Locksmith, testified that in August, 1993, a man came to the counter of the shop to get a key copied. When she was unable to find the blank, she asked her employer about it. Ms. Judy Hansen, the owner, responded they could not order a blank to fit that particular key and the only place to obtain it was from the "building's administrator." After receiving this information the individual in question left. Ms. Ray described him as a tall, thin, "colored man", about six feet tall wearing a white cowboy hat, tee shirt, jeans, and flippers. His vehicle was a reddish Chevy van with gray trim. When asked if the Grievant was the man she saw in the shop she stated, "I believe this is the gentleman."

She stated her employer called General Services and Mr. Cobb came, took her statement, and later came back and showed her photographs of groups of individuals. She picked the Grievant out of those pictures. When cross-examined, she did not remember how many black individuals were in the photos. When asked why she said, "I believe" she replied, "I don't remember the mustache."

Next, Mr. Bernard Cobb, Assistant Director of General Services, testified that he interviewed Ms. Ray, and she told himthe man in the shop had been a black gentleman "rather dark in color," fifty-five to sixty years old, a hundred and fifty pounds, and wearing a white cowboy hat, tee shirt, and sandals (See footnote 2). She reported the vehicle as a customized van primarily red in color with gray trim and a small sticker on the front bumper.

Mr. Cobb stated that when she described the individual he thought it could be Grievant because he had seen him earlier at Green Feed and Seed wearing the same outfit and driving the same type

of vehicle. After he talked to security he returned to Ms. Ray with three separate group photos, and she picked Grievant out as the customer. Mr. Cobb testified the photos showed to Ms. Ray were from the bulletin board and were of various work crews. He stated there were two or three black individuals in the pictures. He also estimated the Grievant's height as 5'8" to 5'10".

After receiving this information, the Grievant was directed to meet with Mr. Cobb on September 15, 1993. The incident was discussed, and the Grievant denied all charges. He was directed at that time to produce the key at 4:00 p.m. on September 16, 1993. At the September 16, 1993 meeting the Grievant did not produce the key and stated, "I have no keys." (Resp. Exh. 3) The Grievant was then verbally suspended without pay for three working days. He wasdirected to report to Mr. Cobb's office on September 21, 1993, and to produce any State of West Virginia keys in his possession and to tell Mr. Cobb who gave him the key he attempted to duplicate. He was advised failure to comply would result in dismissal. A letter of suspension dated September 17, 1993 followed this verbal suspension and repeated the above directions.

This current suspension letter referred to Grievant's prior suspension on July 21, 1992 for possessing an unauthorized key (See footnote 3). This letter also summarized two previous memos on January 30, 1991 and April 19, 1993 by the Director of General Services. The January 30, 1991 memo requested all custodians turn in their keys. The April 19, 1991 memo reiterated that "no employee is to have in their possession any key to any door in the Capitol Complex, without the express consent of the Director of General Services or his representative." (Resp. Exh. 3). This suspension letter also mentioned a November 6, 1992 meeting where custodians were instructed to turn in their keys.

Upon his return to work on September 21, 1993, the Grievant was again directed to produce the key. (Dismissal letter at 3.) He responded "I don't have no keys." Id. Additionally the dismissal letter stated the Grievant's representative's response was, "You're asking a man to give somebody up." Id. After this conference the Grievant was again verbally suspended.

Grievant's dismissal letter from Mr. Chuck Polan, Secretary of the Department of Administration, followed on September 30, 1993. Mr. Polan wrote, "[a]n employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions" and "[y]our refusal to obey these directives materially affects my ability to exert leadership while you are present and to meet the mandates of my position." Mr. Polan concluded, "I believe the nature of your insubordinate

conduct, as referenced above is sufficient to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Department of Administration, General Services, warranting your dismissal."

Mr. Elswick, the Director of General Services, recounted the story of Grievant's prior suspension. In the Summer of 1992, Beth Loftis, Assistant Director of General Services, approached Mr. Elswick saying the Grievant was "slipping off" from work and returning later. This behavior would have been impossible without a key. When confronted, the Grievant denied the charge. Later he was observed by security guards in possession of a key and received a three day suspension. The September 21, 1992 suspension letter listed previous disciplinary problems with the Grievant and stated his behavior demonstrated a pattern of disobeying agency's policies and procedures. It ended saying, "This letter shall also serve as a final warning of impending dismissal." Mr. Elswick stated that thereafter the Grievant produced the key. This suspension was not grieved and thus is accepted as true. Perdue v. Dept. of Healthand Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 at 4 (Feb. 4, 1994).

Discussions

In a discharge case the burden of proof is on the Respondent to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990). The unrebutted testimony of Ms. Ray is that she saw the individual in question and his vehicle clearly. She picked the Grievant out of a series of photographs and identified him at hearing. The only question she had was whether he had a mustache in August. Since the Grievant did not testify, it is unknown if the mustache is a recent growth. The fact of the matter is, Ms. Ray's description, with the exception of the mustache and a few inches in height, matches that of the Grievant. The description of the customer's vehicle matched one his supervisor had seen him drive. The somewhat unusual outfit he was wearing was one his supervisor had also seen him wear. There is no reason to believe this testimony is not credible. No bias or motive was established, and the statements were consistent and plausible. No evidence of dishonesty was revealed. Perdue at 11.

Further, this behavior is consistent with the Grievant's conduct in 1992 when he was in possession of an unauthorized key. Prior to suspension he denied he had a key, after the suspension

and warning he turned the key in to his employer.

The Respondent has met his burden of proof through unrebutted eyewitness testimony, and has established by a preponderance of theevidence that the Grievant attempted to duplicate a high security key without permission of his employer.

Policy Issues

Grievant's next contention is, even if he did attempt to duplicate the key, the decision to make this a dischargeable offense is arbitrary and capricious (See footnote 4). Both Mr. Elswick and Mr. Cobb were closely questioned on this issue.

Mr. Elswick testified he was charged by statute with the care, custody, and control of the Capitol Complex buildings. W. Va. Code §5A-4-2. He noted many offices in the complex have confidential materials an individual might want to destroy or objects or money an individual might wish to steal. He discussed the difficulty of maintaining the security of a building open to the public much of the day, and then recounted some of the complex's problems the past couple of years. Recent acts of vandalism, theft, and unauthorized use of computers and video tape systems have been directly linked to the use of unauthorized keys. Thus, controlling the number of people who have keys, especially at night after the building is locked, is essential to maintain security (See footnote 5).

Mr. Elswick also reported the locks were recently changed at the cost of $100 per lock set, and that only management has the required blank to reproduce the key. These locks were changedbecause of the well-grounded fear that numerous unauthorized people had keys. (See footnote 6) The locks now allow an employee to exit without a key, but require one for reentrance (See footnote 7). If an employee wishes to leave the building during working hours, he must make prior arrangements with his supervisor for reentry.

Grievant responded that this reasoning was flawed because approximately 300 people, including the Legislature, have keys to Grievant's work area, Building 1. (G. Exh. No. 1.) Grievant's representative questioned why couldn't he have one, and why should possessing this key or attempting to duplicate it be such a serious offense when so many others have them. The Grievant argued Respondent's refusal to allow custodians a key is an attempt to control their behavior.

Mr. Elswick restated the primary reasons custodians do not have keys are for safety and security. Another reason is to protect the employee's reputation and integrity, because when something is lost

or stolen the first person usually blamed is an employee. Mr. Elswick agreed that although the system is imperfect, many people have keys, and having to prearrange with your supervisor is inconvenient, it is still preferable toincreasing the security risk and compromising the employee's integrity. He further testified that he sees no purpose for an individual to have an unauthorized key when they have access to the building. He stated the only reason a person would want an unauthorized key is to "take what doesn't belong to them" or "leave so they don't do what the people of West Virginia are paying them for." Mr. Cobb's testimony on this issue was similar to Mr. Elswick's (See footnote 8).

Discussion

As to the question of whether Grievant's failure to comply with management's directives constitutes insubordination and was sufficient to uphold his dismissal, the answer is clearly yes. The Grievant compromised security not only by attempting to duplicate an unauthorized key, but also refused to turn in the key, or disclose his source for obtaining the key. General Services and its Director are mandated by W. Va. Code §5A-4-2 to maintain care, custody and control of the Capitol Complex. One way Mr. Elswick has chosen to carry out this mandate is by limiting the number of people who have keys to entrances, especially at night after the building is checked and locked by security. His decision had a reasonable basis.

Possession of these keys is violative of Division's Policies, and Grievant was clearly informed of this by memos (See footnote 9), a group meeting and a prior suspension. Insubordination is defined as "willful failure or refusal to obey reasonable orders of a superior who is entitled to give such orders." Pennington v. Mingo County Bd. of Educ., Docket No. 92-29-061 (June 16, 1992); Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). The Grievant willfully disobeyed his employer's reasonable orders to not to have a Capitol Complex key in his possession, to return the key and to disclose his source for the key.

In addition to the findings of fact and conclusions of law contained in the foregoing discussions the following findings and conclusions are appropriate:

Findings of Fact

1. The Grievant, Mr. Henry Womack, was employed by General Services as a custodian in Building 1 of the Capitol Complex.

2. He worked the evening shift and his hours were from 4:00 p.m. to 12:00 midnight.

3. The doors of the Capitol Complex are locked at 7:00 p.m. and are reopened between 6:00 and 7:00 a.m.

4. The doors allow individuals to leave, but they cannot reenter without a key.

5. No custodians are issued keys. If they need or want to leave the building during working hours they must prearrange reentrance with their supervisor or find a security guard to let them back in the building. (See footnote 10)

6. The Grievant received a prior suspension in 1992 for having an unauthorized key. He initially denied having this key, but after suspension and warning turned the key in.

7. The Grievant attempted to duplicate an unauthorized key at Judy's Locksmith on August 25, 1993 one month after the key had been changed. The Grievant knew prior to this attempt, that unauthorized possession of a high security key was a dischargeable offense.

Conclusions of Law

1. In disciplinary matters, the burden of proof is on the Respondent to prove the charges by a preponderance of evidence. Perdue, at Conclusion of Law 1; Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

2. W. Va. Code §5A-4-2 charges the Director of General Services "with the full responsibility of the care, control and custody of the Capitol Building...". To this end he is directed to furnish janitorial, landscaping, repair and security services. Id.; W. Va. Code §5A-4-3.

3. The Respondent's policy that custodians are not allowed to have keys is reasonable and not arbitrary and capricious.

4. Insubordination is the "willful failure or refusal to obey reasonable orders of a superior who is entitled to given such orders." Pennington, supra; Gill, supra.

5. The Respondent has met its burden of proof and established by a preponderance of the evidence, that the Grievant attempted to duplicate a high-security key on August 25, 1993 at Judy's Locksmith, and then refused to either return the key or identify from whom he obtained it.

6. The Respondent has proven the Grievant is guilty of insubordination.

7. "When an employee charges his employer with discrimination as defined in W. Va. Code §18-29-2(m) his burden of proof must be at least initially met by prima facie showing of

discrimination." Jackson v. W. Va. Board of Trustees/West Virginia University, Docket No. 90-BOT-162/285/315, (Aug. 29, 1991). This Grievant has not met that initial showing of discrimination.

8. W. Va. Code §29-6-10, requires the dismissal of a Civil Service employee be for good cause, which means "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Oakes v. W. Va. Dept. of Finance and Admin., Syl. Pt. 1, 164 W. Va. 384, 264 S.E.2d 151 (1980), in part.

9. Respondent's oft-repeated policy and Grievant's prior suspension informed the Grievant that his actions were "misconduct of a substantial nature directly affecting the rights and interests of the public" thus, Grievant's dismissal was proper.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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 §29-6A-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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 30, 1994

Footnote: 1An attachment to the Level IV grievance form indicated that the Grievant had filed a grievance with General Services about his suspension on September 28, 1993. Additionally, the Grievant attached his discharge letter and it was considered part of the record for decisional purposes.

Footnote: 2In her brief, Grievant's representative objected to Mr. Cobb's recounting this information received from Ms. Ray as hearsay. Inasmuch as no objection was raised at hearing the objection to such evidence will not be considered here. State Road Comm'n of W. Va. v. Ferguson, 148 W. Va. 743, 747 (1964); W. Va. R. Evid. 103(a)(1). Further, relevant hearsay is admissible at administrative hearings. W. Va. Code §29-6A-6. The key question raised by such hearsay

testimony is to identify what weight it should receive.

Footnote: 3*This prior suspension will be discussed in more detail with Mr. Elswick's testimony at 6.*

Footnote: 4*The Grievant did not really discuss his behavior in terms of insubordination, but rather focused on whether Respondent's decision was arbitrary and capricious.*

Footnote: 5*Security officers lock the building at 7:00 p.m., and then "sweep" the building to identify who is still in the building and where.*

Footnote: 6*These new keys were distributed on or about July 22, 1993. (Parties Stipulation.) Thus, this Grievant attempted to obtain an unauthorized key only one month after they had been installed. This attempt, followed by the subsequent failure to produce the key and its owner, demonstrates the Grievant's total lack of concern for his Employer's duty to protect the people and property in the Capitol Complex.*

Footnote: 7*Prior to this change, an employee after 7:00 p.m. could not exit or enter without a key or the assistance of his supervisor or security.*

Footnote: 8*Grievant's attempt to demonstrate custodians were treated differently and that black custodians did not receive keys was unproven. No custodian, white or black, received keys, thus there was no disparate treatment.*

Footnote: 9*In fact, Respondent's tendered Exhibit 4, dated August 30, 1993 was issued after the Respondent received word of the attempt to duplicate the key. This exhibit is hereby admitted into evidence, in retrospect, over Grievant's objection, as it demonstrates the Grievant was given another opportunity to submit the key before his suspension.*

Footnote: 10*At hearing Mr. Elswick clarified that if an employee had a true emergency situation, he could leave immediately, if necessary, and discuss the problem later with his supervisor.*