REUBEN SWOPE

v. DOCKET NO. 94-BOD-1095

BOARD OF DIRECTORS/

SHEPHERD COLLEGE

D E C I S I O N

This grievance was filed by Reuben Swope ("Grievant") against the Board of Directors/Shepherd College ("Shepherd" or "Respondent"). The statement of the grievance reads as follows:

> On Sept. 27, 1994 I was told by Mr. Baxter that my job assignment was being changed rfrom [sic] T[r]ansportation Clerk to Building Service worker. My hours were changed from 7 am-3:30 pm to 11:pm-7:30 am. the same day. I was givne [sic] no opportuinity [sic] to address any specific ch[a]rges against me nor was I told who made any such charges. I want to be restored to T[r]anspoertation [sic] clerk with the same hour[s] I had previously, andy [sic] notes letters or memoranda regarding my reassisgnment [sic] removed form [sic] my personnel file and my name cleared. (See footnote 1)

Discussion

A. Burden of Proof.

The threshold issue in this matter is which party bears the burden of proof. Grievant has consistently maintained that this is a disciplinary case, and therefore the burden of proof is on Shepherd. The Grievance Evaluator (who also represented Shepherd at Level IV) stated at the beginning of the Level II hearing that "the grievant's complaint that is of record here has not complained of either discharge or discipline, and, therefore, does not in my opinion give rise to a burden of proof falling on the institution..." Shepherd has consistently denied that Grievant's reassignment was disciplinary, and denied that this is a disciplinary case, but, nonetheless agreed to present its case in chief first, calling only one witness, Dr. Dan Starliper, Director of Human Resources at Shepherd. Grievant called no witnesses. (See footnote 2) The Level II decision found that a transfer (See footnote 3) to a position "within the same department and of equivalent paygrade

is not 'discipline', regardless of whether misconduct was a consideration in the administrative decision", and that Grievant had not met his burden of proving the transfer was arbitrary and capricious.

In addition to seeking a recision of the reassignment, it is crystal clear from the grievance statement that Grievant also sought the opportunity to confront the allegations of misconduct against him, the removal of any mention of alleged misconduct from his personnel file, and his name cleared. The undersigned finds that among the documents Grievant sought to have removed from his personnel file was a written warning issued in response to the alleged misconduct. Regardless of whether the reassignment was disciplinary, the written warning which Grievant is challenging is obviously sufficient to make this a disciplinary case, and Shepherd was on notice from the filing of the grievance that it would bear the burden of proving by a preponderance of the evidence that Grievant committed the alleged misconduct.

The undersigned also concludes that the sparse evidence in the record demonstrates that Grievant's reassignment was directly related to Grievant's alleged misconduct, and is sufficient to support Grievant's claim that the reassignment was alsodisciplinary. See, McCoy v. Wayne County Bd. of Educ., Docket No. 94-50-063 (July 14, 1994). While Shepherd certainly would have been within its rights to place evidence in the record to support its own assertions that the reassignment was not disciplinary, it chose not to do so.

Grievant received a letter from C. Thomas Baxter (See footnote 4), dated September 27, 1994 ("the September 27th letter"), notifying him "that effective immediately your job assignment is being changed from Transportation Clerk to Building Service Worker." The letter continued:

> Because of misconduct by you during your work, we have lost confidence in your ability to appropriately handle the duties of Transportation Clerk. We are making this lateral transfer as an effort to give you a fresh start. However, adherence to institutional rules and policy will be required, and further misconduct may result in more severe disciplinary conduct, including dismissal.

The letter indicates that a copy was being placed in Grievant's personnel file. Grievant's Exhibit 1.

A memorandum dated October 12, 1994, from Shepherd President Michael P. Riccards to Grievant stated:

> As you know, I have asked Dr. Starliper to conduct a separate review of the **circumstances which led to your position duties and**

> **title to be** [sic] **laterally transferred** from transportation clerk to building service worker.
>
> I have received Dr. Starliper's report and I am satisfied that the lateral transfer is appropriate under the circumstances. (Emphasis added.)

The only copy recipients noted on this letter are Dr. Starliper and Mr. Baxter. Respondent's Exhibit 2.

It is clear from the language of the September 27th letter that it was a written warning, which is a form of discipline. It begins by referencing alleged misconduct which led to Grievant being reassigned, and concludes by noting that "further misconduct may result in more severe disciplinary conduct, including dismissal." (Emphasis added.) The letter notified Grievant of alleged misconduct, that he was being transferred because of the misconduct, and warned Grievant that next time he could be dismissed. The logical conclusion is that a lesser form of discipline was being imposed this time, and that lesser form of discipline was a written warning and reassignment. President Riccards' October 12, 1994 Memorandum affirms that the alleged misconduct "led to" the transfer.

The sole witness, Dr. Starliper, testified that his report, referred to in the October 12, 1994 memorandum, resulted from an investigation he made of disciplinary charges against Grievant. Level II Tr. 17. Dr. Starliper concluded from the September 27th letter that Grievant was transferred because of his misconduct during work, and he was not aware of any change in the reason for transfer. Level II Tr. 18, 19.

Curiously, Dr. Starliper later testified that, in fact, no disciplinary charges or charges of misconduct had been broughtagainst Grievant, nor were there any misconduct charges to be brought against him. Level II Tr. 25, 28. Regardless of what Dr. Starliper calls the alleged misconduct, it is clear that Grievant was disciplined because of it.

Contrary to the Level II conclusion of law noted above, and Shepherd's argument, the transfer of an employee to a position in an equivalent paygrade within the same department may indeed be a disciplinary action. See, McCoy, supra. This is not the first time an employer has made the argument that a reassignment of this type was not disciplinary. Labor arbitrators have seen this same argument made over many years, and have long recognized that a reassignment may, in fact, be disciplinary regardless of the characterization given to the action by the employer, and that it may be an

impermissible means of discipline. See, Allegheny Ludlum Steel Corp., 26 LA 546 (Arbitrator Montgomery, 1956); Parkside Manor, 53 LA 410, 413 (Arbitrator Belcher, 1969); City of Stamford, 49 LA 1061, 1062 (Arbitrator Johnson, 1967) ("This transfer can surely be described as disciplinary, since the job at the Incinerator [to which the employee was transferred] was decidedly far from pleasant."). Particularly on point are the following comments of Arbitrator Stutz, in Connecticut Chemical Research Corp., 30 LA 505, 506 (1958):

> While the Company claims that its action was not punitive, in that there was no loss in pay or change in classification, the Board is of the opinion that there was a punitive effect in the Company's action. There are many aspects of a job assignment other than pay which employees value, and it seems a rathershort-sighted view to suggest that a lateral transfer cannot be a disciplinary action.

It should be noted that the Classified Employee's Handbook referred to in the Level II decision (but not made a part of the record), does not list a transfer (or reassignment) as a form of discipline. The fact that a particular action is not within the enumerated list of possible disciplinary actions does not, by definition, mean the act was not disciplinary. Rather, it indicates that Shepherd had no authority to reassign Grievant as a form of discipline. See, Consolidated Foods Corp., 47 LA 1162, 1163-1164 (Arbitrator Kelliher, 1967) ("If the Company were to be upheld in this matter, it would be tantamount to a finding that the Company could transfer employees in lieu of a disciplinary suspension.")

This Board will not allow the employer to bypass the disciplinary procedure in place at Shepherd, including the burden of proof in this Grievance Procedure, by labelling techniques. In a disciplinary case, the employer bears the burden of proving the charges against the employee by a preponderance of the evidence. Tantlinger v. Board of Trustees/West Virginia Univ., Docket No. 93-BOT-364 (May 6, 1995); Woods v. Fairmont State Coll., Docket No. 93-BOD-157 (Jan. 31, 1994). Shepherd was obligated to meet the burden of proof in this matter.

B. Proof of Misconduct

Shepherd presented no evidence in support of the allegations of misconduct against Grievant. Shepherd has not met its burden of proving that Grievant engaged in the alleged misconduct which ledto his reassignment, and a written warning being placed in his personnel file.

The following findings of fact are properly made from the Level II transcript and exhibits, and the

statement of the grievance, all of which constitute the record in this matter.

Findings of Fact

1. Grievant is employed by Shepherd.

2. Grievant was reassigned from the position of "Transportation Clerk" to the position of "Building Service Worker." A "Building Service Worker" position is essentially a janitorial/building maintenance position.

3. Grievant's hours were changed in the reassignment from a day shift 7:00 a.m. to 3:30 p.m. work schedule, to a night shift 11:00 p.m. to 7:30 a.m. work schedule. Grievant's paygrade (4) and salary did not change upon his reassignment.

4. Grievant was notified of his reassignment by letter dated September 27, 1994. The letter identified the reason for the reassignment as Grievant's misconduct, and warned him that "further misconduct may result in more severe disciplinary conduct, including dismissal." A copy of this letter was placed in Grievant's personnel file.

5. A memorandum dated October 12, 1994, from Shepherd President Michael P. Riccards to Grievant affirmed that the alleged misconduct "led to" the transfer.

Conclusions of Law

1. Grievant was disciplined by Shepherd for alleged misconduct by the placement of a written warning in his personnel file, and by reassignment from the position of Transportation Clerk to Building Service Worker.

2. In a disciplinary case, the employer bears the burden of proving the charges against the employee by a preponderance of the evidence. Tantlinger v. Board of Trustees/West Virginia University, Docket No. 93-BOT-364 (May 6, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994). Shepherd advanced no evidence in support of its allegations of misconduct, and has not met its burden of proof.

Accordingly, this grievance is **GRANTED**. Shepherd is **ORDERED** to promptly: (1) return Grievant to his former position of Transportation Clerk (now apparently referred to as Mail Courier); and, (2) remove from Grievant's personnel file, all references to Grievant's reassignment, and to Grievant's alleged misconduct that resulted in the reassignment, including the written warning.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson County, 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: July 11, 1995

Footnote: 1 The grievance was filed on or about October 12, 1994. It is unclear from the record, and the parties were unable to agree, whether Grievant's immediate supervisor stated he did not have knowledge or information which would allow him to render a decision at Level I, or the grievance was denied at Level I. This disagreement is of no moment. A Level II hearing was held November 17, 1994, before K. Alan Perdue. The Level II decision denying the grievance was issued by Michael P. Riccards, President, Shepherd College, on November 28, 1994, wherein he adopted the Findings and Conclusions of the Grievance Evaluator. Grievant bypassed LevelIII, appealing to Level IV on December 2, 1994. The parties agreed to submit this matter for decision on the lower level record, and upon the submission of the last of the parties' written argument and responses on April 13, 1995, this matter became mature for decision.

Footnote: 2 The record in this case is sparse, even though both parties were represented by counsel at Level IV, and were given the opportunity to supplement the record at a Level IV hearing. It is unclear from the record what act Grievant is accused of committing which was alleged to be misconduct, although the statements of counsel characterize the alleged misconduct as sexual harassment of a non-employee. It is also unclear from the record what documents exist in Grievant's personnel file which refer to the alleged misconduct.

Footnote: 3 Grievant argued that Shepherd's movement of Grievant from the position of Transportation Worker to Building Service Worker was a demotion, while Shepherd argued it was a transfer. The undersigned need not reach this issue because it has no bearing on the outcome. The change in Grievant's position will be referred to in this Decision as a reassignment.

Footnote: 4 Mr. Baxter's role at Shepherd is not a matter of record. The record does make it clear that Mr. Baxter was a Shepherd employee having authority to notify Grievant of the reasons for his transfer. Level II Tr. 17-18.