

**STEVEN A. THOMPSON**

**v.**

**Docket No. 95-MCHD-578**

**MONONGALIA COUNTY HEALTH DEPARTMENT**

**DECISION**

Grievant Steven A. Thompson filed this grievance against his employer, the Monongalia County Health Department (MCHD), following his suspension without pay due to alleged misconduct in the workplace. MCHD argues the suspension was justified under the circumstances. On the other hand, Grievant maintains the suspension action was unlawful retaliation against him for exercising his rights to protest "the validity and wisdom" of certain MCHD policies, which according to him is a protected activity under the First Amendment to the United States Constitution and other law. A level four hearing was conducted on February 14, 1996, and the case became mature for decision on April 30, 1996, upon receipt of the last of the parties post-hearing briefs and supporting materials.

**Background**

Grievant was employed by MCHD as a building maintenance worker and mechanic in 1990. Generally, Grievant is scheduled for work during the business day, except when he is needed for a work-related, after-hours project. In his work capacity, Grievant has been entrusted with keys to enter various workers' offices in the work place for emergencies or problems. On occasions when commercial deliveries have occurred late in the work day, Grievant has delivered parcels and mail to offices after the close of the business day, using his keys to enter any locked offices. Grievant has had good evaluations of his work performance. He received a merit raise in 1994.

Apparently, MCHD employees are paid twice a month. MCHD's long-standing practice of paying workers immediately following a pay period, on the fifteenth of the month and on the last day of the month, was earmarked for change, beginning

September 1995. By memorandum dated July 31, 1995, MCHD Executive Director Sally Taylor informed employees that, due to the time spent reviewing, approving and processing employee time sheets, a pay date change process would begin "with the work period ending August 31[,1995]," and that pay checks "for the work period August 16-31 will be September 1[, 1995]." See EX 12, L3. The plan was to implement pay date changes gradually for six successive pay periods, culminating in the issuance of pay checks seven days after the end of the scheduled work period. For example, in the last stage of the plan, pay checks for the pay period of November 1 through 15, 1995 would be issued on November 22, 1995.

Dr. Taylor noted that everyone would eventually benefit from the completed pay date transition because paychecks would accurately reflect sick leave usage and balances. Dr. Taylor also recognized that workers could have "transition difficulties" regarding due dates for mortgages and other payments, and offered workers a letter to financial institutions explaining the pay date changes. Employees were directed to see their division directors with any further questions.

Dr. Taylor's memorandum relative to the pay date change triggered a protest from Grievant, and he sent her a lengthy letter dated August 3, 1995:

I am writing to you in regard to several employee issues at the health department that, in my opinion, violate the spirit if not the letter of the laws covering public and civil service employees.

Most recently the employees were informed that effective in the next month our pay will be moved each pay period for the next three months until the pay day will be set on one week behind its past and present schedule (the 15th and end of each month). This move in the day I receive [sic] my check will create an unsolicited hardship [sic] on myself and my family and in effect the health department has given my landlord [sic] a \$300.00 a year rent increase. I am bound by the legal rental agreement that I signed that if my rent is more than three days late I must pay a \$25.00 late fee.

All of my other bill payments have been set up to be paid on the 15th of each month and I do not have the desire to have my credit ruined for a benefit that I fail to

see, as implied in the memo announcing the pay day change, I see no benefit to me nor any other member of the health department regarding their financial [sic] situation.

This brings me to matters which I feel have been developed with criminal disregard for the whole employee staff. These matters affect the status of health department employees and the livelihood and futures of these people.

I am specifically talking about the removal of health department employees from the civil service system, and the refusal to acknowledge [sic] governing body status over the health department employees by denial of either county or state worker designation. These two issues have significant impact on the employees pay grades, job classifications and titles, longevity pay, time in service recognition, retirement and perhaps most significantly [sic] morale in the work place.

As I am inclined to believe that these actions were deliberate, I am asking for an explanation and definitive [sic] proof that I and the other employees have benefited and have not in fact been cheated out of money due to us for our hard work and dedicated service to the public and the Monongalia County Health Department. As it is my belief that the move from civil service and the lack of governing body status is a criminal act and not some chance negligence [sic], I am writing to you in an effort to clear up what is more than a misunderstanding. These matters need to be addressed and should be considered as a formal grievance with this letter being the first phase of the grievance process.

Thank you for your time in considering these very serious matters and I will consider myself available and willing to discuss these grievances.

EX 2, L3.

Dr. Taylor immediately responded to Grievant's letter, by return letter dated August 4, 1995:

I am in receipt of your letter dated August 3, 1995. You have indicated your desire to consider this letter to me as the "first phase of the grievance procedure." If this a formal grievance, as your letter states, then I need to refer you to the [MCHD] Employee Handbook. [MCHD]'s grievance procedure is defined in the Handbook. The first level of a grievance is with your immediate supervisor and this step cannot be

bypassed.

If you have discussed your concerns with your supervisor and division director, and not received a satisfactory response, and if you do not want to discuss them with me in an informal manner, then you have every right to pursue the grievance procedure. When you do, however, we are all bound to follow the documented guidelines. Therefore, if this truly is a grievance, please refer to your Handbook and/or consult with our Personnel Assistant for guidance. If it isn't truly intended as a grievance, then please feel free to initiate discussion with your supervisor, division director, and me. Thank you.

EX 3, L3.

In addition, Dr. Taylor responded to Grievant's message, and perhaps to concerns expressed by other workers, regarding the announced pay date change, in that she also sent a memorandum to all of MCHD's employees on August 4, 1995. In that memo Dr. Taylor stated the pay change would be shelved until January 1996. She further explained the new plan would operate slightly differently for salaried and hourlyworkers, and that workers would now have four months to notify creditors and to prepare otherwise for the change. See EX 12, L3.

Following Grievant's receipt of Dr. Taylor's letter, he appeared unannounced at Dr. Taylor's office, and they discussed various matters relative to Grievant's August 3, 1995 letter, including the proposed pay date change and classification issues. Dr. Taylor believed the discussion had been productive, and that Grievant at least understood the rationale for the pay date change and had accepted her assurances that classification matters were under review by management. See Level Three Transcript at 36-38.

Approximately one month later, Grievant's regular work hours were altered so he could attend an evening first aid training session, a task for which he had volunteered, on "company" time, rather than on his own time. For this purpose, Grievant was scheduled to report to work (for the training) on the evening of September 6, 1995 from 6:00 to 9:30 p.m. However, the training session concluded between 8:30 and 9:00 p.m. T3.8.

Between approximately 8:30 and 9:30 p.m., Grievant reproduced and distributed copies of a letter, unsigned, undated and lacking any salutation, in which he voiced certain concerns, on behalf of all of MCHD's employees at times and on his own behalf at other times, relative to MCHD's compensation and classification practices and management in general. Although Grievant did not distribute the letter until September 6, 1995, the last paragraph in the three-page, single-spaced missive stated that "copies of this letter will be made available" to MCHD personnel "no later than" September 5, 1995. In its employee handbook, MCHD forbids the use of the "interoffice" mail to send unsigned, undated messages or letters. Grievant posted or placed his letter in various work areas, departmental mailboxes, and on desk tops in unlocked offices. Grievant also used his office pass keys to open locked offices to place the letter on desk tops. Approximately 500 copies of the letter had been duplicated on MCHD's copy machine using MCHD's paper supplies. Ordinarily, MCHD permits an employee to "make a small number of copies" of personal materials; however, the employee is expected to deposit five cents for each copy in a collection can near the copier. See T3.10 and MCHD Employee Handbook, at 44. Grievant did not pay for the copies in the required manner, nor did he make any arrangements with anyone about payment prior to using the copier on the night of September 6, 1995.

Among other things, Grievant alleged in his letter that MCHD management had, for several years, failed to comply with federal and state regulations relative to employee classification. He also complained that MCHD's employees were not paid as well or afforded the same job security and benefits as employees of other county health departments and that employees had to "moonlight" to support their families. From all appearances, this letter expanded upon matters first touched on in Grievant's August 3, 1995 letter to Dr. Taylor, the letter in which he primarily objected to the proposed pay date changes. Notably, between the August 3 and September 6, 1995 letters, Grievant never filed a formal grievance over any of the matters raised in the letters.

In any event, on the evening of September 6, 1996, Grievant was observed by someone as he distributed his letter, and Dr. Taylor was notified about the incident at

home at approximately 9:30 p.m. According to Dr. Taylor, the following day, September 7, 1995, employees complained of being extremely upset and angry because their offices had been entered the previous night, and because a fellow employee had spoken anonymously for them instead of letting them voice any job-related concerns on their own.

An administrator with MCHD, Jim Strosnider, and Maintenance Supervisor Jerry Johnson met with Grievant near the end of his work day on September 7, 1995, to discuss the incident which occurred the evening before. Grievant admitted that he distributed the materials, and that he had used MCHD's copier and paper. Grievant was told at the meeting he would be suspended for six days, starting the end of the day's work shift. [\(See footnote 1\)](#) Thereafter, Mr. Johnson sent Grievant the following memorandum:

I am writing to re-affirm the disciplinary action taken at our meeting today. You are suspended without pay from 9:00 AM, September 8, 1995, through 5:00 PM, September 15, 1995 (six work days) for the following violations committed on or before September 6, 1995:

- 1) Insubordination in not utilizing the chain of command for communication (second offense in two months), counseled by Jim Strosnider after first violation in August.
- 2) Willful, unauthorized use of Department keys in accessing and entering locked employee offices after work hours.
- 3) Willful, unauthorized use of Department copier to reproduce personal letters.
- 4) Loitering after work hours on Department property to be disruptive.
- 5) Violating the interoffice mail policy by not clearly identifying sender and date on a communication to employees.

As you acknowledged today, these are serious offenses, and this is the reason that disciplinary action has been taken. Any further violation(s) will result in more severe discipline, up to and including discharge. I certainly hope this will not be necessary.

I would encourage you to contact the Health Department's Employee Assistance Program (E.A.P.) at 293- 5400 for any need you may have at this time. I look

forward to having you back to your normal job duties at 9:00 AM, on Monday, September 18, 1995.

EX 5, L3.

Grievant filed a grievance. Eventually, a level three hearing was conducted before MCHD's governing body. Only charges 2, 3, and 5 were upheld by MCHD, and the suspension was modified to three days rather than six. Grievant then appealed to level four. At hearing, the parties agreed that the original charges numbered 2, 3, and 5, as well as the modified suspension, were presently at issue.

### Discussion

Under W.Va. Code §29-6A-6, in a disciplinary matter, the employer must prove the charges upon which the action was based by a preponderance of the evidence. Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 11, 1989). In this case, Grievant does not deny that, after the normal business day on September 6, 1995, he used MCHD's copier and paper to produce 500 copies of a three-page, unsigned letter he drafted. He also admits that he did not arrange to pay for the copies beforehand, and that he circulated the letter within MCHD's workplace, including common areas and offices, using his office pass keys to enter any locked offices in order to place the letter on desk tops.

MCHD argues that a three-day suspension was appropriate for the admitted offenses, under the circumstances. It also denies that the punishment imposed was related to the content of Grievant's letter.

In defense of his actions on September 6, 1995, Grievant states, without further explanation or argument in his level four brief, that the letter he copied and distributed was speech protected by "the First Amendment to the United States Constitution" and "by Article III, §§ 7 and 16 of the West Virginia Constitution." ([See footnote 2](#)) GR Brief at 1. In essence, Grievant alleges that MCHD violated his First Amendment rights and retaliated against him and punished him for speaking out against management. See Orr v. Crowder, 315 S.E.2d 593 (W.Va. 1983).

Grievant simply has not met the required standards to establish a prima facie case of retaliation under the case he cited, Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W.Va. 1991). In other words, Grievant has failed to show that he engaged in constitutionally protected activity in the work place on the night of September 6, 1995. [\(See footnote 3\)](#)

Unquestionably, MCHD, a public employer, "cannot condition public employment on a basis that infringes [Grievant's] constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983). However, Grievant's interest in free expression may be limited by MCHD's interest in providing efficient services to the public through its employees. See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

The competing interests need not be balanced if Grievant's speech in this case had not touched upon matters of public concern. See Connick, supra, at 146, 149-50; Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183 (4th Cir. 1994). "The essential question is whether the employee is speaking out as a citizen, upon matters of public concern, or as an employee, upon matters only of personal interest." Id. at 192. This determination turns on the content, form and context of the speech, as revealed by all of the circumstances. Connick, supra, at 147-48.

The content of Grievant's speech consisted of numerous complaints outlining Grievant's dissatisfaction over classification and compensation matters within MCHD. Never did Grievant allege a misappropriation, misuse, or theft of funds or public monies. Thus, the speech primarily related to financial issues personal to Grievant, but of "limited public interest," and did not "seek to bring to light actual or potential wrongdoing or breach of public trust." See Connick, supra, at 148-49.

Neither did the form of Grievant's speech support that he was addressing matters of public concern. In fact, Grievant circulated his September 1995 letter to staff within MCHD's offices, and he never publicly aired his concerns therein to the public at large, a more conventional form of disseminating information about matters of public concern. [\(See footnote 4\)](#)

Finally, with respect to the context of Grievant's speech, it does not appear that



the underlying circumstances and the rationale prompting the speech were to remedy any abuse of public trust. It appears from the record that, among other things, Grievant did not want MCHD's method of paying its employees to change, and that the pay date change proposal served as the catalyst for other gripes he had. Moreover, in his brief, Grievant generally stated that the intention of the speech (September 1995 letter) was so that employees would be informed of issues concerning their employment prior to a general staff meeting. This reason does not establish that the speech related to a matter of public concern. Therefore, it cannot be concluded that the context of Grievant's speech addressed a matter of public concern. [\(See footnote 5\)](#)

Having found that Grievant's speech in the work place on the night of September 6, 1995 was not a protected activity, the next step must be to determine whether Grievant's actions were infractions for which he is subject to discipline, and, if so, whether the punishment given was proper. According to Grievant, he did nothing wrong.

In his level four brief, Grievant appears to argue that he was somehow entitled to use MCHD's copier and materials to reproduce 500 copies of his letter for distribution among his fellow employees. His rationale is that the letter he copied was not personal, in that "it provided information to employees about important issues confronting [MCHD] and their employment with [MCHD]" in time for an important staff get-together. Grievant's reasoning that his use of the copier was for a legitimate business reason is flawed. Simply put, Grievant is not authorized to compile and disseminate his own personal views about management among co-workers using MCHD's equipment and supplies during his scheduled work hours or at any other time.

Despite what well may have been good intentions on Grievant's part to communicate with co-workers about MCHD's management at a critical time, he was not hired or funded to convey such information on behalf of MCHD or its employees in the manner in which he did. If employees had unlimited access to their employers' equipment and materials to reproduce multiple-copies of messages bearing their own work-related concerns without cost to them and at any time they pleased, it is

conceivable that the employers' resources would soon become strained. In this case, the resources Grievant used to reproduce his letter are publicly-funded.

Moreover, it is also determined that Grievant's use of his pass keys to enter locked offices for personal purposes, albeit, to deliver a missive containing his personal views of management practices relating to classification and compensation, was a breach of trust for which punishment is justified. MCHD's advertised staff meeting, or "Fall Forum," was scheduled for Tuesday, September 13, 1995. On September 6, 1995, Grievant had four business days and an entire weekend to distribute his message during scheduled work breaks or lunchtime, or after work and/or during the weekend. Indeed, Grievant could have slipped the message under the doors in the locked offices, rather than enter the office to place the letter upon the desk tops.

The final issue then, is whether the punishment imposed "was so far divorced from the basic principles of [MCHD's disciplinary policies] that it constitutes evidence of retaliatory motive," as Grievant contends. GR Brief at 11. MCHD maintains that the three-day suspension was justified under the circumstances and in view of the nature of Grievant's misconduct. While reasonable minds may differ as to whether a verbal warning, written warning or a multiple-day suspension would have been the most appropriate penalty in this case, it cannot be found in this record that MCHD impermissibly imposed a more severe punishment as opposed to a less-severe punishment befitting the proven offense(s). See Jenkins v. Bd. of Directors/Fairmont State College, Docket No. 46-BOD-034 (June 7, 1996). MCHD has established a written disciplinary policy, more specifically, a "Disciplinary Action" statement and definitions along with "Disciplinary Action Guidelines." Essentially, the policy provides for progressive discipline for some offenses, beginning with a verbal warning for a first infraction. A second offense warrants a written reprimand, and a dismissal may ensue after four repeated infractions. For more-serious offenses, the policy provides for immediate suspension, pending further investigation, or termination.

In Grievant's view, only conduct amounting to criminal activity or conduct of a malicious nature warrants a first-offense suspension under MCHD's disciplinary policy. According to him, the charges against him, even if proven, were not of such a nature

as to warrant an immediate suspension, especially in view of his unblemished, exemplary work record. Grievant is somewhat correct, in that the policy calls for a first-offense verbal warning for "[w]illful, unauthorized use of Department vehicles, telephones, and other Department equipment." Grievant's unauthorized use of MCHD's copier would fall into this category.

While the policy does not specify that the unauthorized use of MCHD's property be quantified, the magnitude of Grievant's use must be considered. Here, for example, Grievant did not just stop at the grocery store while using a company car or, to be more precise, he did not just make one or two copies of his child's homework paper. Instead, Grievant made 500 copies of a three-page letter, using MCHD's copy machine, electricity, and paper supplies, hardly an insignificant use.

Additionally, Grievant misused his office pass keys, a topic not covered in MCHD's "Disciplinary Action Guidelines." However, as Grievant readily acknowledged, the infractions specifically covered by the guidelines in MCHD's policy are not intended to be all-inclusive. In some respects, the more serious misconduct in this case was Grievant's use of keys which were entrusted to him for business purposes.

Indeed, the unauthorized use of the keys was a breach of the trust placed in Grievant to use the keys for the intended purposes. See, e.g., Hamilton v. Dept. of Highways, Docket No. 94-DOH-1116 (Nov. 29, 1995). It does not matter if Grievant's intent in entering the offices was for benign or malicious purposes. When Grievant enters locked offices for personal purposes he compromises MCHD's ability to provide office workers a safe and secure place where personal possessions or work-in-progress documents may be kept, such as loose change, artwork on the walls, books, or confidential materials about a client. Grievant's conduct also undermines the office workers' confidence that their locked offices are secure. Finally, such conduct might place Grievant in jeopardy for being blamed if something is lost or stolen in the offices. See Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994).

In summary, Grievant's use of MCHD's copier and supplies was a misappropriation of the public's funds for which he is subject to discipline. Moreover, the unauthorized use of his office keys to enter locked offices after business hours to distribute his

personal message was not consistent with his normal job duties, as Grievant argues. Rather, such conduct was a serious breach of the trust placed in him to use the keys for legitimate business purposes. Three days' suspension without pay is not unreasonable for these two offenses, notwithstanding Grievant's five-year work record. [\(See footnote 6\)](#) In addition to the foregoing, the following findings of fact and conclusions of law are made.

### Findings of Fact

1. In his work capacity, Grievant, a maintenance worker, has been entrusted with pass keys to enter locked offices for an emergency or other work-related purposes.
2. Prior to September 6, 1995, Grievant had an unblemished work record. He is regarded by management as a good worker.
3. After business hours on the evening of September 6, 1995, but while Grievant was "on-the-clock" because of his voluntary attendance at a seminar conducted in the building, Grievant used MCHD's copy machine and supplies to reproduce 500 copies of a three-page, unsigned, undated personal letter, addressed to no one in particular, in which he voiced criticism, on his own behalf and on behalf of all employees, of his employer's compensation and classification practices. Grievant did not pay for the copies via the collection can sitting by the copier, nor did he prearrange to pay for the copies in some other manner.
4. After he finished copying the letter, Grievant distributed copies throughout the workplace. In order to place the letter on desk tops in locked offices, Grievant used his pass keys.
5. MCHD's office employees, including those whose locked offices had been entered, were upset about finding the unsigned letter purporting to air their concerns about management.

### Conclusions of Law

1. Respondent Monongalia County Health Department has established the facts giving rise to Grievant's three-day suspension by a preponderance of the evidence.

See Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (Mar 11, 1989).

2. Whether Grievant's speech in the work place touched upon matters of public concern and was, therefore, a constitutionally protected activity, turns on the content, form and context of the speech, as revealed by all of the circumstances. Connick v. Myers, 461 U.S. 138 (1983).

3. Grievant's written, personal comments and criticisms of his employer's compensation and classification practices did not address a matter of public concern and were, therefore, not protected under the First Amendment to the United States Constitution. Id.

4. Grievant's use of his employer's copy machine and paper for personal reasons was a misappropriation of public funds, and, together with the unauthorized use of his office pass keys, constituted reasonable grounds for his employer to impose a three-day suspension without pay.

5. Grievant failed to establish sufficient mitigating circumstances or any other reason which would warrant a lesser punishment than that imposed.

Accordingly, the 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**NEDRA KOVAL**

**Administrative Law Judge**

**Date: June 14, 1996**

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[Footnote: 1](#)

*Dr. Taylor testified that the suspension was to begin after the work day on September 7, 1995 in order to protect Grievant's privacy. She said he could then explain whatever he chose to fellow workers about his absence.*

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[Footnote: 2](#)

*Contrary to Grievant's additional assertion, it cannot be found that Grievant's distribution of his September 1995 letter is a "protected activity" relative to West Virginia's "Whistle-blower Law" under W.Va. Code §§6C-1-1, et seq. As Grievant notes, "the Act prohibits a public employer from discriminating or retaliating against an employee for reporting to the employer an instance of wrongdoing or waste." See GR Brief at 1 (n. 2). Grievant did not address the letter he delivered on September 6, 1995 to his employer or make any effort to serve the letter upon his employer or any other relevant authority. In fact, Grievant's letter, by his own admission, was intended for circulation among MCHD's employees. GR Brief at 2.*

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[Footnote: 3](#)

*In Powell, a worker in the private sector was discharged four months after he had filed a Workers' Compensation claim. The Court concluded the employee had established a prima facie case of retaliatory discharge based on his filing of the claim.*

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[Footnote: 4](#)

*This is not to suggest or imply that public dissemination of critical remarks is necessary to be protected speech. See Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).*

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[Footnote: 5](#)

*Under the circumstances, it is not necessary to address MCHD's argument that, even if Grievant's speech arguably was protected, he could be subject to discipline if he had disobeyed his employer's reasonable rules or regulations regarding the manner in which he made his speech.*

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[Footnote: 6](#)

*Due to the findings and determinations at this juncture in the case, it is not necessary to reach the questions of whether Grievant additionally disobeyed an in-house written policy that interdepartmental mail be signed and dated or whether such a directive is even reasonable or permissible.*