WILBURN H. MICHAELSON, JR.,

Grievant,

v. DOCKET NO. 97-ADMN-160

W. VA. DEPT. OF ADMINISTRATION/

GENERAL SERVICES DIVISION,

Respondent.

DECISION

Grievant, Wilburn H. Michaelson, Jr., is employed as a Building Maintenance Supervisor II by the General Services Division of the Department of Administration (Respondent). He filed a grievance at Level I, in which he grieved placement of a letter dated October 25, 1996 in his personnel file, on the grounds that the contents of the letter were untrue, unfounded and lacked merit. He requested as relief that the letter be removed from his personnel file, and that he be given a written job description and an audit of his position.

The grievance was denied at Level I, and was apparently held in abeyance for thirty days at Level II by agreement of the parties, in order for Respondent to pursue establishment of another position, in order to reassign some of Grievant's duties to this other position. The Level II evaluator specifically stated that removal of the letter from Grievant's personnel file would be considered if the new position were established.

After more than thirty days elapsed without word from Respondent, Grievant filed the grievance at Level III. A Level III hearing was held on March 18, 1997. (See footnote 1) The grievance evaluator issued a decision on March 19, 1997 granting Grievant's requests tohave his position audited by the Division of Personnel and to receive a written job description, but denying his request to remove the letter from his personnel file. (See footnote 2) Grievant advanced his cause to Level IV, where the parties agreed to submit the matter for decision based upon the record below. The case matured on April 22, 1997, the deadline for submitting proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1 1. Grievant has been employed by Respondent for a number of years, initially as a Facility Equipment Maintenance Technician (FEMT). For approximately seven years, Grievant has been a Building Maintenance Supervisor II (Supervisor). In his Supervisor title, Grievant was initially responsible for supervising approximately seven people on the special projects crew. Effective April 16, 1996, Grievant was temporarily upgraded to the position of Administrative Services Manager I, with a pay increase, and additional personnel and duties were assigned to him. In addition to his preexisting duties, Grievant took on those which had been assigned to another Supervisor, Paul Harper, who was in charge of a different crew. Although the temporary upgrade ended in approximately September of 1996, Grievant continues to have the increased duties and responsibilities.

2 2. In this position, Grievant now supervises approximately 22subordinates, and ensures proper service and maintenance for 17 buildings in various locations. Among other duties, Grievant is responsible for reviewing and prioritizing work orders, assigning work orders to his subordinates, monitoring the performance of his subordinates and the quality of their work, and ensuring subordinates have the proper training, information and materials to perform their work.

3 3. In approximately August of 1996, Respondent began using a new computerized system for logging, assigning, addressing, and closing out work orders. Primary purposes of this system are to maintain accountability and save money by tracking personnel and materials required to address specific work orders. There are no written procedures or policies regarding use of the computerized system. (Tr. pp. 33, 91-98, 100.)

4 4. On October 25, 1996, Jim Bumpus, Assistant Director of Professions and Management, General Services Division, delivered a letter of the same date to Grievant, which stated:

> The purpose of this letter is to advise you that I expect your total support in making the "work order" system workable within the Department of Administration, General Services Division, and to serve as a warning that you will be held accountable for any lack of support for the mission of this agency.
>
> It is very clear that you have not supported the new system. Examples of this are:
>
> -you do not review and prioritize work orders
>
> -you continue to assign FEMTs based on former building association vs priority of work.
>
> -you have attempted to defeat the system by creating generic building work orders vs specific job work orders. -you cannot account for the whereabouts/status of your employees/work orders

-you fail to order repair parts against specific work orders.

-you continue to voice your non-support for the system- this is reflected in the comments of your subordinates.

Foremost, as a direct result of the lack of leadership and support on your part, the incidence of repeat calls and complaints has risen dramatically. It is clear that this is only possible because you are not enforcing the system. You are allowing work orders to be improperly closed out, without the work being done, and without sufficient documentation to provide an audit trail. You are to take all necessary steps to ensure the full implementation of the "work order" system and must focus your attention to efforts that can facilitate the success of the system.

I remind you that it is your responsibility to review the work order priorities, serve as quality control reviewer by supervising the maintenance staff and maintaining proper part inventory by placing the necessary orders. Your performance is critical to the success of the "work order" driven maintenance system. You can make the system succeed or fail. You are expected to use sound judgement in the exercise of your duties and to conduct yourself in a manner that will likely result in the successful implementation of the "work order" system. Failure to use sound judgement in the performance of your assigned duties will result in disciplinary action.

Further, you must assure that all Operations and Maintenance personnel, including Paul Harper, comply with the requirements of the work order system. Should anyone fail to comply, then it is your responsibility to initiate the appropriate steps for corrective action.

5 5. Grievant responded to this letter in an undated writing, stating that the allegations were inaccurate and inappropriate considering the conditions within the workplace, and addressing each of the six itemized charges of the letter. Grievant requested clarification of the charges of creating generic building work orders rather than specific job work orders, as he was unaware of doing this. Grievant also asked for clarification of the charges of failing to order repair parts, as he was aware of only one possible instance of this, where the part was not readily available. Grievant also wrote that he inferred from the letter that he now was to supervise Mr. Harper, in addition to his other duties. Respondent provided no written response or clarification. 6 6. Grievant reviews and prioritizes work orders at the beginning of each work day, although work orders continue to be received throughout the day. Paul Harper, who was made one of Grievant's subordinates on approximately October 25, 1996, prints the computerized listing of all outstanding work orders. Grievant then prioritizes the list by reviewing the work orders listed, eliminating those he knows to have been completed or "closed out" previously, and assigning priority to the remainder based upon his judgment and established procedure. Items with the top priority are assigned to the FEMT's (except two FEMT "rovers").
7 7. When Grievant must leave the office for some reason, such as to monitor the performance of subordinates or to assist with an emergency, Mr. Harper assigns work orders. Mr. Harper is in the

office most of the time. Mr. Harper receives new work orders as they come in, and has authority to assign the next priority work order to an FEMT who has completed his or her initial assignment, and to reassign work orders, in accord with revised priorities, as necessary. The assignments are noted on a board in the office, which is to be updated as assignments are completed or changed during the day.

8 8. Grievant exercises sound judgment in reviewing and prioritizing work orders. Grievant assigns work based on its priority, and does not assign work based upon each FEMT's prior association with the building in which the work is done. Grievant does not create work orders inappropriately.

9 9. Grievant's job duties require him to be absent from his office a large part of each work day. However, he generally doesnot leave his office until the work order list is prioritized each morning, except with Mr. Bumpus' permission to address an emergency. (Tr. pp. 16-20, 32, 37-38, 42-43.)

10 10. Any incidents of failing to properly order repair parts were not due to Grievant's intentional failure to adhere to the new system, or to negligence on his part. Rather, they were due to changing requirements, emergency situations, or parts not being readily available.

11 11. Grievant has tried to implement the new computerized work order system, and uses it daily. Grievant made observations that the system had some problems when it was first implemented, but did not make derogatory remarks about the new system or voice "non- support" for the system to his subordinates.

12 12. Respondent contemplated creating a new position of Building Maintenance Supervisor III in order to provide a supervisor for Grievant and to relieve Grievant of some of his duties, but has failed to pursue the matter with the Division of Personnel. No other action has been taken by Respondent to alter the duties and responsibilities assigned to Grievant.

DISCUSSION

It must initially be determined that this is a disciplinary matter, despite Respondent's apparent belief that it is not. The October 25, 1996 letter, on its face, shows that it is a disciplinary action. The letter clearly states that it is "a warning" and that Grievant will be "held accountable" for future misconduct. Written warnings are low-level disciplinary measures, providing some documentation of problems and the employer'sresponse thereto. Written warnings often follow verbal warnings or reprimands, and also provide some basis for escalated disciplinary action should problems continue.

They are a step in the disciplinary process. Accordingly, the employer bears the burden of proof. Runyon v. Dept. of Corr., Docket No. 95-CORR-414 (Jan. 31, 1996).

Typically, the burden is to demonstrate the accuracy of the facts contained in the written warning, and that these facts constitute the problem addressed therein. Runyon, at 5. The action also must not be arbitrary or capricious, and must have some rational basis. Id., at 6. Stated differently, it is the employer's burden to show that the letter of reprimand was properly placed in Grievant's personnel file. Reed v. W. Va. Regional Jail Authority and Corr. Facility, Docket No. 93-RJA-134 (Sept. 30, 1993).

Here, the employer failed to carry its burden of proof. The only evidence produced by the employer was the testimony of Mr. Bumpus, which generally consisted of conclusory statements rather than facts. This conclusory approach is reflected in the general nature of the accusations in the letter, which were not tied to specific dates or events. Although documents were apparently referenced at the Level III hearing, no documents were admitted into the record which support Respondent's assertions. Respondent did not submit copies of any policies or procedures, or prior instructions, which Grievant had ignored. Nor did Respondent present any documents created by Grievant, to prove misconduct in their creation. On the occasions where Mr. Bumpus cited specific incidents to support the allegations of his letter, they were often lone examples addressing one specific charge. Moreover, several of his examples were called into serious question, as they appeared to be isolated mistakes or caused by something other than misconduct on Grievant's part.

The evidence that Grievant did not prioritize each and every work order, as they come in during the work day, is not evidence of misconduct given the work situation. Grievant is required to visit the work sites at numerous buildings, to check on his subordinates and their work. Mr. Bumpus seemed to approve of Grievant prioritizing the initial printed list of work orders in the morning, prior to leaving his office. Grievant has implemented a system for addressing work orders which come in while he is absent, by having Mr. Harper prioritize and assign them, and record work assignments, just as Grievant would, so that the location of all FEMTs is readily ascertainable. (Tr. pp. 59-61.) This seems a reasonable approach, although other approaches could no doubt be used. (See footnote 3)

Obviously, some method of addressing work orders in Grievant's absence from his office is essential, as Grievant must visit worksites. It is arbitrary and capricious for Respondent to require Grievant to be absent from his office, and then penalize him for that absence, without first advising

Grievant of a problem and/or a preferred procedure for addressing work orders which come in while he is absent. Respondent presented insufficient evidence of prior direction to Grievant on this issue to justify taking disciplinary action thereon.

As to the second charge, improper FEMT assignment, Mr. Bumpus testified about the advisability of assigning FEMT's who had previously worked in a specific building to work orders for that building, while cross-training other FEMTs. (Tr. pp. 115-116.) There was no evidence that Grievant had not adhered to this advice in assigning work orders. There was no evidence that Grievant had not cross-trained the FEMTs or that he inappropriately assigned work orders based upon former "building association."

Although Mr. Bumpus testified that Grievant gave the appearance of following the new system without actually following it, by creating generic building work orders, he failed to identify any specific instance in which this was done or to submit any written work orders as examples. (Tr. pp. 108, 117-118.) Indeed, Respondent failed to clarify what, exactly, was meant by this third charge. Respondent failed utterly to prove any misconduct by Grievant pertaining to "generic" work orders.

Similarly, Respondent failed to prove any misconduct by Grievant in failing to account for the location and status of employees and work orders. Indeed, the evidence showed that Grievant had in place a reasonable, and usually accurate, method oftracking employees and work orders, as noted above.

Specific examples were given by Mr. Bumpus of alleged failure to order parts, such as ordering a coil and borrowing parts from the electrician crew. However, reasonable explanations for most, if not all, of the cited "failures" were provided. Further, there was testimony that Grievant was able to solve parts problems and find replacement parts quickly, when his predecessor could not. (Tr. pp. 94-98.) This evidence falls short of proving misconduct, incompetence or insubordination on Grievant's part.

Finally, Mr. Bumpus testified to having heard Grievant state that the new work order system would not work, and that it was only being used because Grievant's supervisors mandated it. Grievant specifically denied making such derogatory statements about the system. He admitted to noting problems in the initial implementation of the computerized system, which he stated had been fixed subsequently.

While the demeanor of these two interested witnesses was not observed, the record as a whole does not provide confirmation of the allegation that Grievant "voiced non-support for the system."

Indeed, it suggests that Mr. Bumpus may have misinterpreted statements or been oversensitive to constructive criticism. Where the evidence equally supports both sides, the employer has not met its burden of proof. Leichliter v. W.Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

The evidence does not support the charges of misconduct made in the disciplinary letter. The letter must be removed from Grievant's personnel file. Overall, the record suggests that Grievant has attempted to do his best in a difficult situation. The scope of his responsibilities is large and possibly outside the limits of his class title, and a new computerized work order system has been implemented recently. Obviously, Grievant and Mr. Bumpus have problems communicating, and have differences which need to be addressed. Therefore, as mandated in the Level III decision, Respondent must provide Grievant with a job description and must obtain an audit of Grievant's position from the Division of Personnel, to determine whether the job duties given him are within his current classification.

CONCLUSIONS OF LAW

1 1. A letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and is therefore a disciplinary action. Runyon v. Dept. of Corr., Docket No. 95-CORR-414 (Jan. 31, 1996).

2 2. In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's reprimand by a preponderance of the evidence. W.Va. Code §29-6A-6; Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV- 569 (Jan. 20, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Id. 3 3. Respondent failed to prove the charges contained in its October 25, 1996 letter.

Accordingly, the grievance is **GRANTED.** Respondent is **ORDERED** to remove from Grievant's personnel file the letter of October 25, 1996, and Respondent is further **ORDERED** to provide Grievant with a written job description and to obtain an audit of Grievant's position from the Division

of Personnel, if it has not already done so as a result of the Level III decision.

Any party may appeal this decision to the Circuit Court of Kanawha County. 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 appropri ate court.

Dated: July 23, 1997

JENNIFER J.MEEKS **Administrative Law Judge**

Footnote: 1

A transcript of that proceeding was provided, and pertinent pages of that transcript are referred to herein as "Tr. p. __."

Footnote: 2

The grievance evaluator's decision stated that Grievant bore the burden of proof, as this was a non-disciplinary grievance. For reasons explained below, these statements are erroneous. A correct ruling on the burden of proof may have changed the evaluator's decision on removal of the letter from Grievant's file.

Footnote: 3

*The record suggests that this subordinate's actions were responsible for some communication or record-keeping problems which were alluded to in the warning letter. The record shows that this individual was not formally placed under Grievant's supervision until **after** the warning letter was issued. These circumstances show the lack of communication and the lack of definition of Grievant's responsibilities which likely resulted in the Level Three evaluator's mandate to provide an audit of Grievant's position and a job description.*