MARTI SHARP,

Grievant,

v. **DOCKET NO. 97-BOD-497**

BOARD OF DIRECTORS/

WEST VIRGINIA STATE COLLEGE,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Marti Sharp on February 21, 1997, after she was dismissed from her employment with Respondent West Virginia State College ("WVSC"), for her rude and discourteous treatment of a student. Grievant sought as relief that the termination be rescinded, and that her personnel file be purged of all records relating to the termination letter and her poor performance evaluations. (See footnote 1) The following formal Findings of Fact are properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant had been employed by WVSC since 1992 as a secretary. She had been employed as an Administrative Secretary in the Communications Department since 1994.

2. On September 20, 1996, Grievant's supervisor, Dr. David Wohl, issued a written reprimand to Grievant regarding her rude and discourteous telephone behavior, and her poor job performance. The reprimand warned that if Grievant's performance did not improve, further disciplinary action would be taken.

3. On September 23, 1996, Dr. Wohl issued a second letter of reprimand to Grievant, and suspended her for ten days, for calling one of the persons who had complained about her behavior and was named in the September 20, 1996 written reprimand, Mack Miles, regarding his complaint,

and for her rude, discourteous and abusive behavior toward Mr. Miles when she called him. Dr. Wohl's letter stated that when she returned to work, he would discuss with Grievant a Plan of Corrective Action to address his concerns with her performance. 4. Upon Grievant's return to work after her suspension, Dr. Wohl presented her with a Plan of Corrective Action, which cited four areas targeted for improvement: telephone behavior, listening skills, attitude, and quality of job performance. The Plan stated that discharge was being considered, and if her work was not brought up to standard within 30 days, she would be dismissed. Dr. Wohl later counseled Grievant on telephone behavior and attitude. She was not dismissed at the end of the 30 day period.

5. On January 10, 1997, Dr. Wohl evaluated Grievant's progress, noting no improvement had been made in Grievant's attitude, some improvement had been made in telephone behavior, and little improvement had been made in listening skills and quality of job performance. This written evaluation stated that it served as a second letter of warning that her job performance had not improved. It warned that if substantial improvement was not made within 30 to 90 days, Grievant would face further disciplinary action, including possible suspension or dismissal.

6. Three days later, on January 13, 1997, a student complained to Dr. Wohl about Grievant's behavior, characterizing Grievant as rude and discourteous. The student complained that Grievant had refused to make a copy for her, and that Grievant had grabbed a paper from her hand. This student did not testify either at Level II or Level IV, and did not commit her complaint to writing.

7. Grievant did not refuse to make a copy, she did not grab a paper from a student's hand, and she was not otherwise rude or discourteous to a student on or about January 13, 1997.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 18-29-6. Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).

The first determination to be made in this case is what were the specific charges against Grievant which had to be proven. It is well established that a tenured employee such as Grievant has a property and liberty interest in her continued employment, and must be provided with notice of the charges against her sufficient to allow her to make an informed response to the charges. Bd. of Educ. of County of Mercer v. Wirt, 192 W. Va. 568 (1994). "Where an act of misconduct is asserted in

a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 279 S.E.2d 169 (W. Va. 1981), citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 238 S.E.2d 842 (W. Va. 1977).

The dismissal letter from Dr. Barbara J. Oden, Vice President of Academic Affairs, is dated February 10, 1997, and states the decision to terminate Grievant is based upon the recommendation of Dr. Wohl, and upon her consultation with Dr. Cassandra Whyte, Administrative Vice President, and Barbara Rowe, Director of Human Resources. It goes on to recount that Grievant had received two written warnings regarding her poor job performance, one of which had resulted in a two week suspension. It then states:

> On January 10, 1997, you received an evaluation that also described your job performance as being poor. On January 21, you received another written notice of poor job performance from your supervisor along with a recommendation for dismissal. . . ..
>
> You are being dismissed because of these repeated warnings, a previous suspension (in the last six months) and the fact that improvement in your job performance has not been evident . . ..

Dr. Oden testified the dismissal was based solely upon the recommendation of the immediate supervisor.

Dr. Wohl's January 21, 1997 memorandum to Dr. Oden recommending Grievant's dismissal states that his recommendation is based upon a student complaint regarding her behavior, and notes it is the third serious complaint he had received in six months from a member of the public. He testified at Level II that he had extended the improvement period in his January 10 evaluation, and his recommendation of dismissal was based upon this student complaint. His memorandum states, "[t]his latest incident leaves me with no alternative but to recommend termination."

Dr. Wohl also sent a memorandum to Grievant bearing that same date, with the subject being, "Student Complaint and Recommended Disciplinary Action". The memorandum related:

> On Monday, January 13th, a student came to see me in my office to complain about your behavior. This student was extremely upset and characterized your actions (grabbing a curriculum check sheet out of her hand and complaining about copying it)

> as being rude and discourteous. This student is a "non-traditional" student with a full-time job at AT & T. She said that if an employee at her workplace had acted as you did, he/she would have been fired immediately. She told me that she mentioned this to you.
>
> The student has also told me that she is considering filing a formal, written complaint. (See footnote 2)
>
> This is the third time in the past 6 months that I have received serious complaints about your behavior. You have been repeatedly advised to maintain professional standards with the public and you have been disciplined for your lack of professional behavior in the past. After repeated discussions, reprimands, and a two-week suspension, your behavior had not improved. Accordingly, I have recommended to Dr. Oden and to the Office of Human Resources that you be dismissed from your job as Department of Communications/Arts and Humanities secretary. This is a recommendation only and does not serve as an official notice of termination. If you have any questions, I suggest you contact the Office of Human Resources.

Prior to this, Grievant had been placed upon a Plan of Corrective Action, and had been evaluated on January 10, 1997. The evaluation concluded:

> Accordingly, this letter serves as a second letter of warning that your job performance has not improved in the areas stated in my memo of October 9. If substantial improvement is not made within the next 30-90 days, you will face further disciplinary action, including possible suspension or dismissal.

(Emphasis in original.)

It is clear from reading these three documents together, and the testimony of Dr. Oden and Dr. Wohl that, although Grievant's overall job performance placed her on the brink of dismissal, it was one final event which led to her dismissal: the complaint from the student on January 13, 1997. Respondent was charged with proving the student's complaint was valid.

Respondent failed to call the student as a witness. The only testimony offered by Respondent on this event was that of Dr. Wohl. Dr. Wohl, however, did not observe the interaction between Grievant and the student. He testified:

> The student was very, very upset about Ms. Sharp's behavior. She told me that Marti had grabbed a curriculum sheet out of her hand and complained about copying it; told me she was being rude and discourteous and then said that she is a non-traditional student, an older student, said that something to effect that, "I work at AT&T and if I ever had an employee that acted like this woman just acted, she would be fired instantly." I mean this woman was upset. She stormed into my office very, very upset.

Dr. Wohl's testimony is hearsay.

> Under W. Va. Code § 18-29-6, the formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay

> evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dept. of Health and Human Res., Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24- 111 (Sept. 23, 1996); Seddon, supra.
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> There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997).

Respondent presented no reason for its failure to call the student complainant as a witness so that she could explain under oath exactly how Grievant was rude and discourteous to her, how the paper was grabbed from her hand, what Grievant said which led her to believe Grievant refused to make the copy, and what had transpired before Grievant allegedly grabbed the paper from her hand, and so her testimony could be cross-examined. She was a critical witness, as Grievant's dismissal resulted directly from her complaint to Dr. Wohl. She did not give a written statement of any kind, and much of what Dr. Wohl related about her statement to him consists of the student's conclusory opinion, and is not a statement of fact. Further, Grievant's version of what had occurred was markedly different from that related by Dr. Wohl, and made it clear that the student did not tell Dr. Wohl the entire story, which is one reason a witness should be presented for cross-examination. Grievant denied grabbing the paper from the student's hand. Grievant explained that the copy machine was down the hall from her office, and that she had been to the copy machine five or six times already making copies for other students. The student asked Grievant to copy something for her. Grievant admitted that she did not jump right up and run down the hall when the student asked her to do so. She asked the student if she could wait ten minutes while Grievant took a break, and the student would not wait. Grievant stated:

> She had to have it now. So she insisted that she would go make the copy and I told [her] that I appreciated that but I couldn't let her do that, I had to copy it myself. She would not be soothed. She could not wait ten minutes. She kept pressuring me. So I said, "OK, I'll make your copy." I apologized to her too.

Grievant stated she was aware of her obligation to make the copy, but noted she was in charge of her own schedule, not the students. She asked the student if she had a class she had to go to, and she had said no.

Dr. Wohl's hearsay testimony obviously cannot serve as the basis for Grievant's dismissal. The testimony, when considered in the light most favorable to Grievant, paints a picture of an older impatient student who was used to ordering secretaries around, and who simply thought her time was more important than Grievant's. She did not want to wait, and when Grievant did not jump up immediately and run down the hall, she became irritated and decided to get back at Grievant by storming into her supervisor's office and registering a complaint. Whether she was truly very, very upset, was simply acting, or Dr. Wohl simply misinterpreted her feelings is unknown, as she did not testify. While Grievant may have needed to improve her job performance dramatically, that is not the issue before the undersigned. The issue is whether Grievant was rude and discourteous to a student on January 13, 1997, whether she refused to make a copy for the student, and whether she grabbed a paper out of the student's hand. Respondent did not prove that this occurred.

Quite frankly, although it is not an issue in this grievance based upon the foregoing, the testimony regarding Grievant's job performance prior to the January 13, 1997 incident leaves the undersigned wondering about the standards imposed upon Grievant by the Communications Department. A good example of this was the testimony of the Theatre Facilities Supervisor, Richard Wolfe. He stated that people generally thought Grievant was pushy on the telephone because she would ask, "who may I say is calling, and who are you with," and she would not take "no" for an answer when someone did not care to leave a message. He then gave his version of what had resulted in the first disciplinary action against Grievant, as it related to the Mack Miles complaint. While he stated that he could not recall exactly what had occurred, his view of the story is telling.

Mr. Wolfe related that he had received a message from Grievant that a Mack Miles had called, and he would not say who he was or what he wanted. Mr. Wolfe's reaction to this was that he knew immediately that "things had gone ballistic on the phone." He related that he was not in when Mr. Miles had called, and that Mr. Miles had inquired as to where he was and when he would be back. Before answering these questions, Grievant asked the caller who he was and what he wanted, which

Mr. Miles took as an indication that his request was a nuisance to Grievant, and according to Mr. Wolfe, "things got tense on the telephone quickly." The undersigned is at a loss to understand why a caller inquiring as to where someone was and when they would return would become offended when Grievant needed to know their identity and the nature of the call before shereleased this type of information. Surely if the caller had been a thief, and she had released this information without asking these questions and Mr. Wolfe had been robbed, she would have likewise been disciplined for her lack of good sense. Mr. Wolfe stated Mr. Miles does not call often, so there is no indication that Grievant should have known who he was. Mr. Wolfe had never told Grievant not to screen his telephone calls, and indicated he thought she should do so. Exactly what Mr. Wolfe and Mr. Miles thought Grievant should have done in this situation is a mystery to the undersigned, as it no doubt was to Grievant. It is no wonder Grievant was not able to improve her performance.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a preponderance of the evidence. W. Va. Code § 18-29-6. Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).

2. Respondent failed to prove the charges against Grievant, in that it failed to prove Grievant refused to make a copy for a student, or that she grabbed a paper from the student's hand, or that she was otherwise rude or discourteous to the student in any way on or about January 13, 1997.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to return Grievant to an Administrative Secretary position at West Virginia State College, to pay her backpay, plus interest, to restore any other benefits to her in full which she lost as a result of her dismissal, to thedate of her dismissal, and to purge her personnel file of all records relating to the termination letter. If an Administrative Secretary position is available in another department of West Virginia State College which is acceptable to Grievant, she is to be placed in that position; otherwise, she is to be returned to her position in the Communications Department.

Any party may appeal this decision to the Circuit Court of Kanawha 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: June 15, 1998

Footnote: 1

Grievant's supervisor responded, among other things, that he was unable to grant the relief requested. A Level II hearing was held on October 29, 1997, and a decision denying the grievance was issued on November 5, 1997. Grievant bypassed Level III, appealing the Level II decision to Level IV on November 10, 1997. This matter was set for hearing at Level IV in December 1997, but the hearing was continued and held May 7, 1998, as Grievant had taken a new job, and could not be available for hearing until that time. Grievant was represented at Level IV by Diane C. Ridgway, and Respondent was represented by Gregory G. Skinner, Esquire. This matter became mature for decision upon receipt of the last of the parties' written arguments on May 28, 1998.

Grievant also initially sought an investigation into a hostile work environment. This requestwas not addressed at the Level IV hearing or in post-hearing written argument, and is deemed abandoned.

Grievant's representative argued Respondent had defaulted. The undersigned ruled at the hearing that this issue would not be addressed as Grievant had chosen to pursue her grievance through Level IV, rather than seeking enforcement of the default through the circuit court. She also argued Grievant was terminated because of a proposed reorganization which would eliminate her position. This argument need not be addressed due to the finding that Respondent failed to prove the charges supporting the dismissal.

Footnote: 2

The student did not file a written complaint.