CHUCK REYNOLDS and

KENNY LUCAS,

Grievants,

v. **Docket No. 99-ADMN-049**

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,

GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Pursuant to W. Va. Code §§ 29-6A-1, et seq., Chuck Reynolds and Kenny Lucas (Grievants) filed grievances at Level I on or about October 5, 1998, against their employer, the West Virginia Department of Administration, General Services Division (GSD). In the first grievance, Grievants complain that they were improperly harassed and subjected to a hostile work environment by a supervisor, James Bumpus. In the second grievance, Grievants challenge a three-day suspension each received for alleged insubordination. These grievances were advanced to Level III without being resolved, and a Level III evidentiary hearing was held on November 13, 1998. On January 20, 1999, the Level III grievance evaluator denied the grievances, and Grievants appealed to Level IV on January 27, 1999. This matter was set for Level IV hearing in March 1999. After that hearing was continued for good cause, and a new hearing date was established, the parties agreed tosubmit this matter for decision on the basis of the record developed through Level III. In accordance with a briefing schedule agreed to between the parties, this matter became mature for decision on August 17, 1999, upon receipt of the parties' written arguments. (See footnote 1)

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of

the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Accordingly, Respondent GSD has the burden of establishing that Grievants engaged in insubordinate conduct, warranting the three-day suspensions they received.

In regard to Grievants' claims that they were subjected to harassment in violation of W. Va. Code § 29-6A-2(l), and a hostile work environment, Grievants have the burden of establishing their allegations on these issues by a preponderance of the evidence. SeeW. Va. Code § 29-6A-6; Johnson v. Dep't of Health & Human Resources, Docket No. 98- HHR-302 (Mar. 18, 1999).

The parties have presented substantially different versions of the events which gave rise to these grievances. In order to determine which version of events more closely depicts the actual events that transpired, it will be necessary to assess the credibility of certain witnesses. Moreover, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995). See Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987).

Inasmuch as the witnesses to these events did not appear before the undersigned Administrative Law Judge, there has been no opportunity to consider the witnesses' demeanor as a factor in assessing credibility. Nonetheless, a witness' opportunity or capacity to perceive and communicate, reputation for honesty, and attitude toward the action may still be considered. Likewise, the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information may still be factored into the process of determining credibility. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). See Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998); Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board152-53 (1984). Accordingly, it will be

necessary to discuss certain aspects of this matter in detail.

Grievants are employed by the West Virginia Department of Administration, General Services Division (GSD), as Facility Equipment Maintenance Technicians. Grievant Reynolds has been employed by GSD for 21 years, while Grievant Lucas has worked for GSD for 19 years. At approximately 8:00 a.m. on the morning of September 9, 1998, Grievants were working on a boiler which they were in the process of re-tubing. This task had been assigned by their immediate supervisor, Mike Michaelson, several days earlier. Because Mr. Michaelson was off work on sick leave, their immediate supervisor that morning was Anthony Thaxton.

James Bumpus is employed by GSD as an Assistant Director of General Services, and is in charge of Operations and Maintenance, the same section where Grievants are employed. Inasmuch as Mr. Michaelson had been off for a few days, Mr. Bumpus stopped in the Grievant's work area, which was near his office, to check on their progress. At this point, the parties' stories about what took place become significantly different.

Grievant Reynolds testified that Mr. Bumpus came into their work area, and asked him what they were doing. Grievant Reynolds responded, “Jim, we're cleaning the boilers.” According to Grievant Reynolds, Mr. Bumpus repeated this same question two more times, and on each occasion he gave the same answer, “we're cleaning the boilers.” Grievant Reynolds asserted that Mr. Bumpus then stated, “get out of my way,” and shoved Grievant Reynolds, as he proceeded to where Grievant Lucas was working. Grievant Reynolds claims he could no longer work under such conditions and he went home sick, afternotifying Mr. Thaxton that he was taking sick leave “due to harassment and hostile work environment.” Grievant Reynolds obtained a medical excuse for the following day from Dr. Albert Lee, who prescribed Xanax for what Grievant Reynolds asserted was “stress.” G Ex 2.

Grievant Lucas declared that he was in the process of cleaning the boiler with a shop vacuum when Mr. Bumpus approached and asked him six times what he was doing, and he replied six times that he was cleaning the boiler. Before that conversation, he had looked up to see Mr. Bumpus approach Grievant Reynolds. He recalled that Mr. Bumpus had asked Grievant Reynolds the same question three times, and he had seen Mr. Bumpus shove Grievant Reynolds as he said, 'get out of my way.”

Grievant Lucas recalled that Mr. Bumpus also asked him when they were going to start putting the boiler tubes in, but he was unable to say because he had not worked on that type of job

previously. Nonetheless, when Mr. Bumpus repeatedly asked him the same question about what he was doing, and he was unable to give an acceptable answer, despite truthfully and accurately responding that he was cleaning the boiler, Grievant Lucas stated that he “panicked,” believing Mr. Bumpus was trying to set him up for some sort of trouble, and he left the work area because he was unable to work any further in those circumstances.

According to Mr. Bumpus, he first approached Grievant Reynolds and asked, “how much longer do you have before you're finished?” Grievant Reynolds responded that he did not know. He then asked Grievant Reynolds if they were going to clean the controls. Again, Grievant Reynolds indicated that he did not know. Failing to get a satisfactoryresponse, Mr. Bumpus told Grievant Reynolds, “Excuse me Chuck, let me get over and ask Kenny [Grievant Lucas] some questions since you don't have any of the answers.” Mr. Bumpus described Grievant Lucas as having his head inside the boiler while running a vacuum cleaner. When he approached Grievant Lucas and asked him the same questions, Grievant Lucas responded, “I'm tired of this harassment. I'm going home. I'm fed up with it.” Grievant Lucas appeared agitated and was yelling at Mr. Bumpus.

Mr. Bumpus denied asking the same question of either Grievant more than one time. He further recalled that as Grievant Lucas walked around the boiler to leave the work area, Grievant Reynolds pointed his finger at Mr. Bumpus and said, “I'm tired of this too. I'm going home and we'll just settle this in court.” After that, Grievants signed out on the sign-out board, but did not obtain approval to leave work. Neither Grievant indicated to Mr. Bumpus they were sick.

Anthony Thaxton, a Building Maintenance Supervisor II who has been employed by GSD for 20 years, was standing approximately 15 to 20 feet from where Grievants were working on the boiler when Mr. Bumpus approached Grievants. He was not in a position to see Mr. Bumpus speak to Grievants Reynolds and Lucas, because they were on the other side of the boiler. Mr. Thaxton did see them come out from behind the boiler separately, Grievant Reynolds first, and tell Mr. Bumpus they were going home because they were tired of his harassment.

As Grievants' acting supervisor, Mr. Thaxton had spoken with Grievants to verify that they had all the tools and equipment they needed for the job less than an hour earlier. According to Mr. Thaxton, after the confrontation with Mr. Bumpus, neither Grievant requested his permission to leave the work area, nor did they appear sick.

On the morning of September 11, 1998, after Grievants returned to work, they met with Messrs.

Bumpus, Michaelson, and Thaxton to discuss the incident of September 9. Mr. Thaxton did not recall Grievant Reynolds making any mention of Mr. Bumpus shoving him during that meeting. Otherwise, Grievants' explanation of their conduct was substantially similar to their Level III testimony.

As a result of these events, as related by Mr. Bumpus, and the subsequent discussion between Grievants and Messrs. Bumpus, Michaelson and Thaxton, GSD Director Raymond Prozzillo issued written notices to Grievants on September 21, 1998, advising that they were being suspended for three days without pay for insubordination. Grievants are alleged to have been insubordinate by stopping work and going home. Generally, insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). However, this Grievance Board has also recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton,supra at 10. If Grievants left work, rather than answer legitimate questions from a supervisor, such conduct is encompassed by the foregoing concept of insubordination.

Grievants argue that they were victims of prohibited harassment, and this disciplinary action is nothing more than another step in Mr. Bumpus' program of deliberate harassment. W. Va. Code § 29-6A-2(l) defines harassment to mean “repeated or continual disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” If Mr. Bumpus repeatedly asked Grievants the same question, without any explanation why he would not accept their responses, or if he pushed Grievant Reynolds without provocation, such conduct would be evidence of harassment under the foregoing definition.

As previously indicated, whether Grievants prevail on their claim of harassment, or GSD establishes that Grievants were insubordinate, depends, to a large extent, on whose version of events is most credible. Grievants indicated they were familiar with the grievance process, and had previously employed that process to resolve problems with their supervisors. Nonetheless, Grievants

offered no reasonable explanation why they did not immediately file a grievance over Mr. Bumpus' alleged conduct, rather than walking off the job, and filing a grievance after returning to work. Even if Grievants' version of events is completely accepted, their depiction of Mr. Bumpus' conduct fails to establish a recognized exception to the "obey now - grieve later" doctrine in American employment law. See Frank Elkouri & Edna A. Elkouri, How Arbitration Works 154-155, 671 (3rd Ed. 1973). See also Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). Mr. Bumpus could be lying to avoid a finding that he went beyond the acceptable limits of a supervisor in harassing Grievants and shoving Grievant Reynolds. Grievants could be lying to avoid having a suspension for insubordination affirmed in their employment record. Because of their respective interests in this matter, equally credible arguments could be made to support the proposition that either Grievants or Mr. Bumpus did not tell the whole truth in this matter. The only other witness to this matter was Mr. Thaxton. Although Mr. Thaxton was recently promoted to the supervisory position he held at the time of this incident, his testimony is less susceptible to bias. Beyond overhearing a portion of their conversation with Mr. Bumpus, all of which was generally consistent with both parties' version of events at that point, Mr. Thaxton had no direct evidence of what transpired between Grievants and Mr. Bumpus.

However, Grievants specifically testified they told Mr. Thaxton they were taking sick leave. They also testified that the subject of Mr. Bumpus shoving Grievant Reynolds came up during the meeting with Messrs. Bumpus, Thaxton and Michaelson on September 11. According to Mr. Thaxton's testimony, neither Grievant approached him to request sick leave, or to advise him they were taking sick leave. Moreover, Mr. Thaxton did not recall any reference to the shoving allegation during the meeting on September 11. Neither party questioned Mr. Michaelson about what was said during the meeting on September 11, which is understandable, given that he appeared confused between that meeting and subsequent brief meetings with Grievants on September 21, when he handed them the suspension notices signed by Mr. Prozzillo. As far as the conversation with Mr. Bumpus that led up to this incident, while Grievants emphasized that Mr. Bumpus asked the same question repeatedly, they also indicated that there were other questions asked about Grievants' progress on this project. Frankly, none of Grievants' reported answers were sufficiently enlightening to satisfy the undersigned that Mr. Bumpus should have ceased his inquiry. It may well have been that Grievants knew what they were doing and did not need any supervision, but their responses to Mr. Bumpus did not provide

any assurance that they were on schedule, or had any clear idea when they would finish the project.

Ultimately, Grievants' testimony was contradicted by Mr. Thaxton to the point where Mr. Bumpus' version of the incident is more credible. Further, Grievants' conduct could still be considered insubordinate as they did not have sufficient cause to leave their work area without proper permission. See generally Maxey v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). Because Mr. Bumpus' testimony is more credible, the insubordination charge is sustained. Likewise, Grievants' claim of harassment and a hostile work environment is not supported by a preponderance of the credible evidence of record.

Grievants also contend that a three-day suspension was a disproportionate penalty, given their prior unblemished work record over an extended period of service to the State of West Virginia. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievants bear the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offenseand the personnel action. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH-88-063 (March 31, 1989).

In determining whether a given penalty is arbitrary and capricious, the undersigned is not permitted to simply substitute his judgment for that of the employer. See generally Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Even assuming, for the sake of argument, that Grievant's conduct was provoked to some extent by Mr. Bumpus' unduly harsh attitude and confrontational demeanor, a three-day suspension for insubordination in walking off the job, and not returning until the second day following the incident, is not an arbitrary and capricious penalty. See Stamper v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Martin, supra; Schmidt, supra.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are made in this matter.

FINDINGS OF FACT

1. Grievants are employed by Respondent West Virginia Department of Administration, General Services Division (GSD), as Facility Equipment Maintenance Technicians. 2. On the morning of September 9, 1998, at approximately 8:00 a.m., Grievants were retubing a boiler in accordance with instructions from their immediate supervisor, Mike Michaelson.

3. Jim Bumpus is employed by GSD as Assistant Director of General Services, in charge of Operations and Maintenance, the section in which Grievants work.

4. Mr. Bumpus approached Grievant Reynolds and asked him how much longer they would be working on the boiler, and other work-related questions. Grievant Reynolds responded that he did not know. Mr. Bumpus then asked Grievant Lucas the same question. Grievant Lucas responded by raising his voice and stating that he was tired of being harassed, and that he was going home because he was fed up with it. At that point, Grievant Reynolds similarly made a comment that he was being harassed.

5. Grievants walked off the job without first requesting approval from a supervisor to take sick or annual leave.

6. Grievants did not return to work until September 11, 1998.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, 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. Wellman v. W. Va. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va.Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination also "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

3. Respondent GSD established by a preponderance of the evidence that Grievants were insubordinate by walking off the job without proper authority or just provocation after being questioned by GSD Assistant Director James Bumpus regarding their progress on an assigned project.

4. Harassment is defined as “repeated or continual disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” W. Va. Code § 29-6A-2(l).

5. GSD Assistant Director James Bumpus did not harass either Grievant Reynolds or Grievant Lucas by his conduct on September 9, 1998. See Johnson v. Dep't of Health & Human Resources, Docket No. 98-HHR-302 (Mar. 18, 1999).

6. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Thompson v. W. Va. Dep't of Health & Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995). 7. Grievants failed to establish that a three-day suspension was a disproportionate penalty for insubordination, notwithstanding that it was their first offense in an otherwise unblemished career of service to GSD.

Accordingly, these grievances are **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. In accordance with W. Va. Code § 29A-5-4, 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 1, 1999

Footnote: 1

At the Level III hearing, Grievants were represented by Freddie Maynard with the United Mine Workers of America, and Respondent was represented by Bill Charnock, Assistant General Counsel to the West Virginia Department of Administration. Grievants' written argument was submitted by Fred Tucker with the United Mine Workers of America, while Respondent's written argument was submitted by Assistant Attorney General Joy M. Cavallo.