

**BRENDA KAYE BEER,**

**Grievant,**

**v.**

**Docket No. 99-HHR-202**

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES,**

**Respondent.**

## **DECISION**

Grievant, Brenda Kaye Beer, employed by the Department of Health and Human Resources/Bureau for Children and Families (DHHR or Respondent) as a Protective Service Worker, filed a grievance on October 23, 1998, in which she contested “[t]he nine (9) day suspension, without pay, from October 26, 1998 to continue through November 9, 1998; and, the insubordination complaint as stated in John Hammer's letter dated October 15, 1998.” Grievant requested reversal of the suspension, and the insubordination charge removed from her personnel file. The record does not reflect that the grievance was reviewed at level one. The parties agreed that level two proceedings would be waived, and the matter advanced to level three for hearing.

Prior to the level three hearing, Grievant filed a second complaint on January 19, 1999, in which she alleged that she was unfairly evaluated on January 13, 1999. She requested the evaluation be removed from her personnel file. The parties agreed to consolidate the grievances for hearing at level three. Jack B. Frazier, Commissioner for the Bureau for Children and Families, denied the grievance following the level three hearing, and the matter was appealed to level four on May 20, 1999. After several continuances were granted for cause, a level four hearing was conducted to supplement the lower-level record on April 18, 2000. Grievant was represented by Kevin Church of AFSCME, and DHHR was represented by B. Allen Campbell, Assistant Attorney General. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law filed by the parties on May 22, 2000.

### **Background**

Regional Director John Hammer notified Grievant by letter dated October 15, 1998, that she was to be suspended, without pay, for nine (9) working days, beginning on October 26, 1998, and continuing through November 6, 1998. That letter stated in pertinent part:

On Thursday, October 15, 1998, Larry Kincaid, Social Service Supervisor, Barbour/Taylor/Preston Community Service District, held a discussion with you regarding the nature of your work deficiencies. Mr. Kincaid shared with you that disciplinary action was being considered. Your response to the event of 9/21/98, was that you 'did not feel that it was a problem or that it was urgent; that it was just a misunderstanding'. After reviewing your responses and the circumstance, I have decided this suspension is warranted.

So you may understand the specific reasons for this personnel action, I recount the following events:

- \* On September 21, 1998, at approximately 9:15 AM, your supervisor, Larry Kincaid, instructed you to proceed to Grafton Hospital and to conduct an Adult Protective Services intervention with client KM. Mr. Kincaid advised you that you needed to proceed immediately to the hospital since client KM was being maintained at the hospital pending your arrival. Mr. Kincaid directed that you place client KM in the home of Val Shepherd, a home experienced with caring for clients/patients with heart ailments. You shared with Mr. Kincaid that you believed that non-client EA was scheduled to be placed in the Val Shepherd home. Mr. Kincaid advised you to not place EA in Val shepherd since she had prior placement approval in another facility.
- \* At approximately 1:05 PM on September 21, 1998, Mr. Kincaid met you in the hallway at the Philippi DHHR office. He asked you how things went at Grafton hospital. You responded that you were just leaving to go there because you had completed paper work for an Adult Family Care client.
- \* On September 22, 1998, Mr. Kincaid became aware that you were in the process of placing client KM in the care home of Tammy Bolyard. Originally, Mr. Kincaid was advised of these matters by Human Service Aide Mary Phillips. Later when he questioned you, you confirmed these matters. Mr. Kincaid was advised of the following:

On September 18, 1998, you had assisted with the arrangement of the placement of non-client, EA, in the Val Shepherd home; and

Non-client EA was discharged from the hospital at approximately 11:00 PM on September 21, 1998.

Therefore, you had approximately fourteen (14) hours to prevent the placement of non-client EA in the home of Val Shepherd, and to have secured the placement of client KM in that home.

Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful directive by their supervisors is cause for severe disciplinary action. An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. Insubordination encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer.

Your insubordinate conduct makes it difficult for management in general, and your supervisor in particular, to carry out leadership responsibilities while you are at the work place. Your blatant and flagrant insubordination disrupts the orderly governmental process and warrants your suspension.

Obviously your failure to perform assigned duties affects the efficient operation of the agency, affecting the rights and interests of those we serve. In fact, your disobedience to directives makes it difficult for your supervisor to maintain discipline and exert leadership during your presence, all of which are sufficient to warrant your suspension.

So that you may realize the seriousness of your continual actions, I would be remiss if I failed to share with you that willful disregard of the employer's interest or wanton disregard of the standards of behavior which the employer has a right to expect of its employees, results in determination of 'gross misconduct'. Therefore, you must learn to discipline yourself in the matters previously cited. Any further infractions of this nature will result in more severe disciplinary action.

The following is offered as a demonstration of your continued disregard of your supervisor's instructions and your continuing attempt to set your own agenda:

\* According to Ms. Candace Maholic, Quality Analyst- Case Manager, United Hospital in Clarksburg, West Virginia, you had made an appointment to speak with her about a patient on October 23, 1997 at 9:00 AM; however, you did not arrive at the hospital until 11:00 AM. Ms. Maholic reports that when you met with her and Annica Stansberry, Social Worker/Discharge Planner, you appeared to become angry and continued to make statement to the effect that 'you can't throw the patient out of the hospital,' and 'I am an arm of the law'. Both Ms. Maholic and Ms. Stansberry report

that you continually interrupted their statements and questioned their knowledge of the patient/client's care needs. Both of these individuals report that you made a statement that you were going to depart from the facility since there appeared to be no need to continue to waste your time. At this point, both individuals report that you placed a telephone call. Mr. Larry Kincaid, your supervisor, reports that he received a telephone call from you on October 23, 1997, during which you stated in a stern and authoritative voice, words to the effect that 'you need to tell these people what my job is?' Both Ms. Maholic and Ms. Stansberry report that you 'tossed' the telephone receiver to Ms. Maholic. While tossing the telephone receiver you stated something to the effect that 'someone on the telephone wants to talk with you'. Mr. Kincaid reports that after a brief period of silence, Ms. Maholic answered the telephone. Ms. Maholic reported that you were 'out of control'. Mr. Kincaid reports that he asked her to specifically tell him what was going on. Mr. Kincaid reports that Ms. Maholic stated that you were irrational, defensive, confrontational, and appeared to be upset about something, but that she did not know what about.

\* On October 30, 1997, Mr. Kincaid met with the staff of the United Hospital Center, Clarksburg, West Virginia, in response to this complaint. On November 3, 1997, he referred this matter to John Hammer, Regional Director. On November 5, 1997, Mr. Hammer referred this matter to the Department of Health and Human Resources, Investigation and Fraud Unit for investigation. As you will recall, you were involved in an automobile accident in December 1997 and were absent from duty through June 1, 1998. Accordingly, this investigation was not completed until after you were interviewed on June 3, 1998.

\* Mr. Kincaid reports that he did not assign this referral to you, and that you had decided on your own to respond in violation of agency policy, Social Service Manual, Section 29530, Screening Referrals. He further reports that had he been aware of the referral, he would not have accepted it for investigation, since it did not meet Adult Protective Services guidelines.

During the course of the above referenced investigation, it was discovered that previously you had been involved in a case without prior supervisory approval in violation of agency policy, Social Services Manual, Adult protective Service, Chapter 29,000, Section 29,530. This involved Taylor County resident, BC, your mother's friend. When questioned on June 3, 1998, you admitted that you handled this case, even though not assigned by your supervisor. You claim that the case involved an

emergency situation, yet you were unable to locate the intake referral form. After placing BC in an appropriate facility in Marion County, you admit to accompanying your mother to BC's apartment to obtain some of her personal items. You admit that you did this during working hours and that you charged the Department of Health and Human Resources \$20.77 in mileage. It is reported that a verbal confrontation between the manager of the apartment, Susan Hallums, you mother and yourself occurred. You claim that the verbal confrontation was between your mother and Ms. Hallums. Ms. Hallums claims that you made statements to the effect that 'I am here to get some things out of BC's apartment, things that she wants, I have every right to be here and every right to go to that apartment and get whatever BC wants because she cannot get them herself.' Ms. Hallums reports that you stated something to the effect that you would make sure that she lost her job over this and because she showed no compassion to the elderly. Ms. Hallums reports that during the meeting you continued to refer to the individual accompanying you as 'mom' and at one point you patted her in a comforting way while stating something to the effect that 'don't worry Mom, I will get this all straightened out.'

If you had properly referred this case to the Marion County office, it is likely that you would not have been present. Department of Health and Human Resources Policy 2108, dated February 28, 1992, provides in pertinent part that:

Employees are expected to avoid conflicts of interest between their personal life and their employment. Employees shall not provide services or make decisions concerning eligibility for agency programs for spouses, relative, friends, neighbors, parents or former co-workers, or club or church acquaintances. Requests for services and questions regarding eligibility in these potentially conflicting situations should be referred to supervisors for reassignment . . . .

While it may be argued that your mother's friend is not within the confines of the above cited policy, it is a judgment interpretation that should be reserved for supervisory staff. As an Adult Protective Services Worker you are to avoid the appearance of conflict. In this case, such could have easily been accomplished by your contacting the Marion County office. In fact, while at BC's apartment you contacted Bernard Huey, Adult Protective Service Supervisor for Marion County. You admit that Mr. Huey arrived at BC's apartment within twenty (20) minutes after receiving your telephone call. Thus, you demonstrated that you knew the proper procedures. Additionally, you failed

to notify your supervisor, Larry Kincaid, of any of these matters.

This is the second occasion that you have provided services or attempted to provide services to BC without being assigned to the case by your supervisor.

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct, thus warranting your suspension. In fact, consideration was given to imposing a fifteen (15) working-day suspension without pay; however, I decided to impose a nine (9) working-day suspension without pay as an acknowledgment that some of the events occurred in 1996 and 1997. In no way does this reduce the seriousness of this matter. Any further infractions, whether they are the same as the present circumstances or different, may result in more severe disciplinary action . . . .

Mr. Kincaid completed a performance evaluation for Grievant on January 13, 1999, for the period of July through December 1998. Mr. Kincaid rated Grievant "satisfactory", but included the following remarks:

At times has failed to follow Supervisor's instruction.

Unscheduled changes in work plan are difficult for worker to accept . . .

Has had problems with agency policy and rules.

Worker is very aggressive in her social work methods. . .

Worker presents a negative attitude toward the agency. . .

Worker at times, has not followed explicit directives of her supervisor and at times failed to understand instructions as to content and logic.

Worker is sometimes argumentative . . .

## Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 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. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

It is well established that "[I]nsubordination involves 'willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995)(Stover I) (Citations omitted.). Where an employee has justifiably misunderstood or misinterpreted a superior's instruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to establish insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998), citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991).

"Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' Reynolds v. Kanawha-Charleston Health Department, Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988) [other citations omitted]." Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). While there are exceptions to this rule, such as where the employee reasonably has health and safety concerns (Stover I supra), "[a]n employee is not justified i[n] disobeying a reasonable order simply because he/she does not agree with it." Id. "An employer has the right to expect subordinate personnel 'to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .'. McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2,

1984))." English v. Div. of Corrections, Docket No. 98-CORR-082 (June 29, 1998).

At level three, Mr. Kincaid testified that when he arrived at work on September 21, 1998, he was advised that Dr. Bender from Grafton City Hospital had called regarding KM, a client who suffers from mental retardation and cardiac abnormalities. Dr. Bender had requested that Respondent get a worker to the hospital immediately because he was holding KM without any medical reason, but was fearful that if she left the facility she would be difficult to locate. Mr. Kincaid recalled that Respondent had been named health care surrogate for KM, but that Grievant had been unable to locate her the previous week. He indicated that working with KM was challenging, and Respondent was responsible for her placement in a personal care home.

Mr. Kincaid clearly recalled advising Grievant of the situation, and explaining to her that she needed to get to the hospital "right away", and that he wanted KM placed in the Val Shepherd home because Ms. Shepherd had experience working with cardiac patients. When Grievant returned to his office later to ask about another matter, he reiterated that she needed to go to Grafton right away because a doctor was holding KM until Grievant arrived. When he saw Grievant again at approximately 1:05 p.m., Mr. Kincaid asked how things had gone at Grafton Hospital, and she replied that she was just leaving. Mr. Kincaid further noted that it is within his authority to place an additional individual in a home which has reached its capacity, in certain circumstances.

Grievant testified that when Mr. Kincaid told her about KM she was not aware she needed to go to the hospital immediately, and decided that she would stop by following a previously scheduled meeting. KM was placed in the Tammy Bowyer home, according to Grievant, because it was the only facility with a vacancy. Val Shepherd had accepted another patient, whose placement Grievant had facilitated, the previous evening, and had reached its capacity. Grievant denies that she was ever given a directive from Mr. Kincaid to place KM in the Shepherd home.

Because the testimony of Grievant and her supervisor was directly contradictory it is necessary to assess the credibility of each witness, in order to ascertain which version of the facts is more credible. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider 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. Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998). See 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 Systems Protection Bd. 152-53 (1984). Although the undersigned was unable to observe the demeanor of several witnesses who appeared only at the Level III hearings, the remaining factors provide an ample basis to evaluate the credibility of their testimony. See Williams v. Kanawha County Bd. of Educ., Docket No. 98-20-321 (Oct. 20, 1999); Reynolds v. W. Va. Dep't of Admin., Docket No. 99-ADMN-049 (Sept. 1, 1999).

In this case, Grievant disputed the testimony of every witness who addressed her demeanor. According to Grievant, Annica Stansberry and Candace Maholic of United Hospital, and Susan Hallums, the Manager at Marion Unity Apartments, all misrepresented her demeanor and comments. However, the record does not reveal that any of these individuals, or Mr. Kincaid, have any motive to falsely accuse Grievant. Grievant admits that her visit to United Hospital was for the purpose of placing an individual who was not an assigned client, and her visit to Marion Unity Apartments, for which she charged time and mileage to Respondent, was to assist her mother in aiding a friend. Grievant was improperly representing herself as a DHHR employee in a matter which she had not been assigned, and was outside her territory.

In reference to client KM, Mr. Kincaid's recollection of his conversation with Grievant was quite clear and unambiguous. However, consistent with prior events, Grievant either lacked the capacity to understand her duties and authority, or simply chose to act independently in the manner she preferred. Mr. Kincaid's testimony is deemed credible, and Grievant's determination to visit the hospital on her own schedule, and to place the client in a home other than that identified by her supervisor, constitute insubordination. The suspension issued to Grievant could be sustained on this basis alone. Additionally, Grievant visited United Hospital to challenge the continuity of care given an individual who had not been assigned to her, in violation of the Social Service Manual, Section 29530, which states in pertinent part:

In order to determine which reports are to be investigated and why, the following guidelines were developed. The term used to describe the process is screening. While the method of screening may involve workers other than the reception service worker, i.e. adult service worker, the appropriate supervisor is ultimately responsible for the acceptance or non-acceptance of a referral and hence all

referrals should be sent to that supervisor for final disposition.

Grievant also represented herself to be an employee of Respondent's in a matter involving her mother's friend. DHHR Policy Memorandum 2108 provides that "[e]mployees are expected to avoid conflicts of interest between their personal life and their employment. . . Requests for services and questions regarding eligibility in these potentially conflicting situations should be referred to supervisors for reassignment." In consideration of the foregoing, Respondent has met its burden of proving good cause for the nine-day suspension. [\(See footnote 1\)](#)

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusions of law.

### Findings of Fact

1. Grievant has been employed by Respondent as a Protective Service Worker (Adult and currently Child) since March 1995.
2. At the beginning of the work day September 21, 1998, Grievant was twice directed by her supervisor, Larry Kincaid, to proceed "right away" to Grafton Hospital, and facilitate the placement of the client into the Val Shepherd personal care home.
3. Grievant did not proceed to Grafton Hospital but remained at the office completing paperwork. When Mr. Kincaid saw her at 1:00 p.m. she stated that she was just leaving.
4. The patient in question, KM is difficult to work with, and locate. She suffers from cardiac abnormalities and is mentally retarded. She was being held at the hospital without reason, pending Grievant's arrival.
5. Grievant subsequently placed KM in another home because another patient had been accepted at the Shepherd home. Although not assigned to that individual's case, Grievant had assisted in planning the placement.
6. Mr. Kincaid may, in his discretion, place an additional patient in a home which has reached its capacity. Grievant did not check with Mr. Kincaid regarding this situation, but independently determined that KM would be placed elsewhere, notwithstanding her supervisor's decision which had been made based upon the Shepherds' ability to care for cardiac patients.

7. In October 1997, Grievant met with the Quality Analyst-Case Manager and a Social Worker at United Hospital in Clarksburg regarding the continuing care of a patient. Grievant acted inappropriately leading them to file complaints with Respondent. Grievant had not been assigned a referral on the patient in question, who was later determined not to meet Adult Protective Services guidelines.

8. In October 1996 Grievant visited the Marion Unity Apartments in Fairmont in her official capacity, and again acted inappropriately, accusing the manager of stealing from a tenant and locking the tenant in a room, and threatening the manager's employment. The purported client was not assigned to Grievant, and would not have been because she was not assigned to that area, and the client was a friend of Grievant's mother.

### 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. Generally, an employee must immediately obey a supervisor's order and later take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

4. DHHR established that Grievant was insubordinate when she went to United Hospital several hours after being directed to proceed there immediately, and when she placed a client in a home other than that directed by her supervisor.

Accordingly, this grievance is **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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 10, 2000 \_\_\_\_\_

Sue Keller

Senior Administrative Law Judge

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[Footnote: 1](#)

*Because the suspension is upheld, Grievant failed to prove that the performance evaluation was erroneous, or that it should be removed from her personnel file for any other reason.*