CHARLENE BLACK,

Grievant,

v. **Docket No. 99-DOH-362**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant, Charlene Black, against her employer, the Division of Highways ("DOH"), on or about June 18, 1999, after she was given a written reprimand for insubordination. The statement of grievance reads:

> On June 11, 1999, I was served with an RL-544, written reprimand for insubordinate behavior, for stating in an e-mail I did not feel I should nor would I be completing the 1999-00 annual plans.
>
> My supervisor had knowledge six (6) months prior, this duty, for whatever reason, had been removed from me, and specifically inserted into the job description for another person, (male). Management has had six (6) months to train this male counterpart in the performing of this duty, however has failed to do so.
>
> While I respect Management's rights to assign employees to perform certain duties, so as to achieve maximum productivity with available resources, it should be done in a non-capricious manner. If I, a female, am instructed that I must "work within my job description" then so should my male counterparts.
>
> I feel this is Management's blatant form of harassment. I feel this is very discriminatory, I a female am being forced to perform duties which were specifically inserted into a job description for a male counterpart. I also feel this is a continuation of discriminatory practices and harassment, due to a claim, which has not been settled, with HRC.

She sought as relief that the written reprimand be removed from all her files, and, "Management to stop the discriminatory and harassment practices, and instruct the

male counterpart to perform those duties specifically and non-specifically listed in his job description."

Grievant expanded her claims of discrimination and harassment at the Level III hearing to include complaints regarding how her job was described on the District Two Organizational Chart, duties being removed from her, and male employees not being disciplined for refusing to obey orders as she was. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant is employed by DOH as an Engineering Technician - NICET in District Two. She has been an employee for 25 years.

2. In December 1998, Grievant met with her supervisor, David Bevins, Assistant District Administrator, District Two, and discussed her belief that, because a posting for avacancy had included as one of the duties of the position the preparation of the Annual Maintenance Plan, she should no longer have any role in this task. Mr. Bevins disagreed and told Grievant she still had duties with regard to this Plan. Grievant told Mr. Bevins she would not perform these duties unless he ordered her to do so. He responded that she was ordered to continue to perform these duties. Grievant had been performing these duties for at least five years.

3. The posting referred to in Finding of Fact Number 2 actually stated with regard to the Plan, "[w]ill assist with such items as the Division of Highways Maintenance Manual and the Annual Maintenance Plan as they are developed, interpreted, revised and applied to all counties in the District." This job posting was not prepared by Mr. Bevins. The vacancy was filled by Chris Sowards.

4. On June 1, 1999, Jim Hash sent an e-mail to several employees, including Grievant, asking for updates by June 17, 1999, on basic expense standards for the Annual Maintenance Plan. This is one of several steps in the preparation of the Annual Maintenance Plan.

5. Grievant forwarded this e-mail to Mr. Bevins stating, "[s]ince this is the first

step in preparing the new annual plans...and Chris [Sowards] is the AADA [Assistant to the Assistant District Administrator], and the annual plans were specifically listed as his duties, you need to forward this on to him".

6. On June 3, 1999, Mr. Bevins responded to Grievant's e-mail stating, "I feel this can be most efficiently handled as we have in years past. As district analyst, please provideMr. Hash with the information requested."

7. Grievant responded to Mr. Bevins' request by sending him an e-mail on June 3, 1999, in which she stated:

> Per job posting #450, one of the specific duties listed for an individual accepting this position would be the revision, development, and interpretation of the annual plans.
>
> In December 1998 we had a discussion concerning the preparation of the last half annual plans for fiscal year 98-99. During this discussion I informed you, this responsibility was now that of Mr. Sowards, who the job was posted for. You informed me of two (2) things.....#1 the job had not officially been given to Mr. Sowards yet & #2 I was taking the job description too seriously. We then began to discuss my complaint which is still filed with HRC, and how one part of it was because I had been moved "to work within my job description". I continued to inform you I would not make the revisions unless you directly ORDERED me to do so. At which time you said "so be it, I am ordering you to make the necessary revisions to the annual plans."
>
> It is very apparent to me and many others, a job was posted for Mr. Sowards. He was to perform certain duties in connection with this posting, however, to date Mr. Sowards is not performing all of the duties associated with the job position.
>
> Based on this information and other [sic] not disclosed at this time, I feel I should not and will not be performing the duties surrounding the revisions of the annual plans for fiscal year 99-00.

8. On June 9, 1999, Mr. Bevins issued Grievant a written reprimand for insubordination for refusing to follow his instructions to prepare the information for Mr. Hash.

9. Grievant's position description form, dated September 15, 1997, which she prepared, lists as one of her job duties: "develope [sic] and coordinate the annual

maintenance plans." After completing this form, Grievant's position was reallocated fromTransportation Systems Analyst I to her current classification.

10. Grievant's position is listed on the District Two Organizational Chart as "H.A.R.P.", which stands for Home Access Road Program (orphan roads). While Grievant's position is known within the District as a Maintenance Analyst, she has taken on the temporary duties of being the Coordinator of this three year program. The Maintenance Analyst position still exists, even though it is not specifically listed on the Chart.

11. Mr. Bevins assigned some of Grievant's duties to other employees because he believed Grievant needed some help after she took on the role of H.A.R.P. Coordinator.

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 § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88- 005 (Dec. 6, 1988). "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. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Respondent argued Grievant was insubordinate, and was properly punished according to its disciplinary policy.

Grievant argued she was the victim of discriminatory practices by DOH, both in work assignments and discipline. She argued males "are given titles and receive monetary gains while the females actually perform the duties." She stated she had been harassed for over two years, and as a result, she was disciplined.

DOH's response was that Grievant presented no evidence in support of her claims, and she failed to present a valid excuse for her failure to follow a direct order.

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 theemployee'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) (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 v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995)), "[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).

Grievant's response to her supervisor on June 3, 1999, was clearly inappropriate and insubordinate. First, she had already been told in December 1998 that she was to

continue to perform duties related to the Annual Maintenance Plan. According to her own e-mail, Mr. Bevins had "ordered" her to continue to perform the duty at issue after she told him she would not do so unless ordered. As far as the undersigned is concerned, her first e-mail to Mr. Bevins was insubordinate, and he exhibited a great deal of patience in not disciplining Grievant for insubordination after the first e-mail. Grievant, however, exhibited disrespect for her supervisor in the entire tone of both e-mail messages, in addition to her clear message that she did not believe her supervisor was acting appropriately in asking her to prepare the requested information, and she had no intention of complying with his request. She knew what she was being asked to do, and wilfully and intentionally stated her refusal to comply, simply because she disagreed with the decision. Whether it was appropriate to assign Grievant this task is irrelevant under the facts of this case.

As to Grievant's claims of discrimination, W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

This definition encompasses all types of discrimination, including discrimination based upon gender. It is not necessary to analyze Grievant's claims under the West Virginia HumanRights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96- T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995).

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant claimed that male employees are not disciplined for disobeying orders. However, she presented no evidence that any other employee, male or female, had ever told his or her supervisor that he or she would not perform a duty assigned to him or her by the supervisor, after the supervisor had made it crystal clear that he or she was to perform thatduty. To the contrary, Mr. Bevins stated, "I don't think I have ever had an employee refuse to do a specific task and I certainly don't want that to happen in the future." He stated this is the only time he has ever disciplined any employee for insubordination.

Grievant presented the testimony of Barry Mullins, Mingo County Supervisor, on this point. It appears that Mr. Bevins is his supervisor. Mr. Mullins at first testified that he had "probably" refused to do something that Mr. Bevins or Wilson Braley, District Two Administrator, had asked him to do, and he had never been disciplined. On cross-examination, however, when asked to describe these refusals by time, date, and nature, he stated he did not know when such had occurred, but he was sure he and Mr. Bevins and Mr. Braley had "disagreed" on things. When it was pointed out to him that the question asked was not related to disagreements, he then stated he had not directly refused to obey an order given by a supervisor. Mr. Mullins' testimony was not supportive of Grievant's claim.

Grievant also claimed discrimination in that a supervisor would sit down and talk to a male employee and try to work things out, but that this did not occur with her. In support of her claim, she presented the testimony of Curly Belcher, Logan County

Supervisor, that there had been times Mr. Braley had asked him about employing individuals to work in Logan County, and when he had expressed that he did not want them to work in Logan County, they were hired elsewhere, or “worked out some other way.” This one instance does not prove Grievant's claim. Further, Mr. Belcher also testified that, while he does not have the authority to hire employees, he can make recommendations. Obviously, his opinion on the employees he will be supervising is important, and if he does not want someone workingfor him, it may not be a good personnel decision to place that person under his supervision. This example is significantly different from Grievant's belief that she should not be performing a particular duty, especially since Grievant presented no good reason why she should not be performing this duty.

Further, as Mr. Bevins pointed out, he did discuss with Grievant whether she should be assigned the particular duty at issue here in December 1998, however, she did not convince him that she had a good reason for not performing the duty. The reason she gave him at that time was, because the duty was listed in a job posting for a vacancy, which had been filled by a male employee, the duty must be assigned to that employee. It is no wonder Mr. Bevins chose to disregard Grievant's opinion on this matter. In addition to being seriously flawed, this type of reasoning does not demonstrate a desire on Grievant's part to work as a part of a team for the good of the agency. Mr. Bevins testified he did not believe it was an issue of Grievant not having the time to perform this duty; rather, he felt this was a task she simply did not want to perform, and was looking for any way to get out of doing it.

There was no evidence that the insertion of a particular duty into a job posting operates to remove that duty from another employee, and the undersigned is not aware of any such rule. Mr. Bevins did not prepare the job posting, and did not intend to remove duties involving the preparation of the Annual Maintenance Plan from Grievant. He is the supervisor, and he gets to decide who does what, not Grievant. Grievant's position description form specifically lists as one of her duties "develope [sic] and coordinate theannual maintenance plans;" therefore, when she performs these duties, she is working within her job description. Grievant's duties with regard to the

Annual Maintenance Plans have never been removed from her by her supervisor, and she has not demonstrated any reason why it is improper for her to perform these duties.

Grievant further elicited testimony from Mr. Sowards and Mr. Bevins regarding whether female employees were performing some of Mr. Sowards' duties, apparently in support of her claim that males are given titles but are not performing the duties of the position. One of the two female employees referred to is Mr. Sowards' subordinate. It is his job to delegate to his subordinates those duties he believes are appropriate. As to the other female employee, Shelly Marcum, Grievant did not demonstrate she was performing duties with regard to emergency authorizations which Mr. Sowards should be performing.

Grievant further complained that her position as an Analyst was not on the District Organizational Chart, and that the duties she has been performing for years are being taken away from her. She argued this was a subtle form of harassment.

W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A singleincident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

Mr. Bevins testified he removed some duties from Grievant and assigned them to other employees because he thought she needed some relief after she took on the additional role of H.A.R.P. Coordinator, but he failed to discuss this with Grievant. The undersigned has no reason not to believe Mr. Bevins. Obviously, it is important for Mr. Bevins to communicate with Grievant about these matters in order to avoid such misunderstandings, but his actions in removing certain duties because he believed

Grievant needed help are not harassment.

The District Two Organizational Chart has Grievant's position listed as "H.A.R.P." Mr. Braley testified that the district was given the Chart and was to put people into the slots as best they could. They were not allowed to change the basic organization of the District Administrator. He stated the Chart is a guideline or "simply a suggestion that we should try to adhere to, and that's what we have done to try to best fit people into existing roles or into the new chart with their existing roles." He admitted it is not entirely accurate, and stated that the farther down the Chart you go, the more discrepancies there are. He explained, "[t]he further down the chart it was expected and understood that there would have to be custom fitting, tailoring the chart to fit our people and the jobs we had to do, and we manipulated the chart and the positions to accomplish the goals that needed to be accomplished." He stated Grievant's Maintenance Analyst position still exists, although she is temporarily also performing duties as H.A.R.P. Coordinator. It is evident that Grievant's position is on the Organizational Chart, and it lists a portion of her duties. While Grievant would prefer to be listed as an Analyst, DOH has chosen to list her as the H.A.R.P. Coordinator. While this may annoy and irritate Grievant, and make her wonder whether she will still have a job when her H.A.R.P. duties are over, she is the H.A.R.P. Coordinator, and listing her as such is not "contrary to the demeanor expected by law, policy and profession."

The following Conclusions of Law support the Decision reached.

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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. 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) (Citations omitted.).

3. Grievant was insubordinate when she wilfully and intentionally refused to perform a task as directed by her supervisor. 4. A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant failed to present any evidence that any other similarly situated employee had been treated differently by DOH.

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

7. Grievant did not demonstrate any actions taken by Mr. Braley or Mr. Wilson constitute harassment.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 § 29A-5-4(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.

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BRENDA L. GOULD

Administrative Law Judge

Date: January 21, 2000

Footnote: 1

The grievance was denied at Level I on June 28, 1999. Grievant appealed to Level II, where the grievance was denied on July 1, 1999. Grievant then appealed to Level III. A Level III hearing was held on July 27, 1999, and a decision denying the grievance was issued on July 28, 1999. Grievant appealed to Level IV on August 20, 1999. A Level IV hearing was scheduled, continued, and rescheduled, and the parties then agreed on December 2, 1999, to submit this grievance on the record developed at Level III. Grievant appeared pro se, and DOH was represented by Krista L. Duncan, Esquire. The parties were given until December 23, 1999, to submit written argument, and this grievance became mature for decision on that date when neither party submitted written argument. This grievance was transferred to the undersigned for administrative reasons on December 22, 1999.