JAMES BRAGG,

Grievant,

v.

Docket No. 98-RS-478 Docket No. 99-RS-398

DIVISION OF REHABILITATIVE SERVICES

Respondent.

DECISION

James Bragg (Grievant) was employed by the Division of Rehabilitative Services (DRS), as a Client Service Specialist (CSS) at DRS' Beckley office until his dismissal on November 16, 1998. He filed the grievance docketed as 99-RS-398 to challenge his 15 day suspension by DRS, and other matters, and the grievance docketed as 98-RS-478 to challenge his dismissal.

A Level III hearing regarding the grievance docketed as 99-RS-398 was held on June 1, 2, and 16, 1999, before Katherine L. Dooley, Esq. Grievant was represented at this hearing by Jerry A. Wright, Esq., and DRS was represented by Warren Morford, Esq. This grievance was denied at Level III, on September 13, 1999, by DRS Executive Director James S. Jeffers. The grievance docketed as 98-RS-478 was filed directly at Level IV on November 17, 1998.

A consolidated Level IV hearing was held on December 1, and 16, 1999, before the undersigned administrative law judge, at the Grievance Board's Beckley office. Grievant was represented at this hearing by Jerry A. Wright, Esq., and DRS was represented byWarren Morford, Esq. and Assistant Attorney General M. Claire Winterholler. The parties were given until February 15, 2000, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by DRS for approximately 22 years. He was a Client Service Specialist (CSS) at DRS' District IV office in Beckley until his dismissal on November 16, 1998. One duty of a CSS is to train new employees.

2. District IV has local offices in Raleigh, Summers, Fayette, Mercer, Wyoming and McDowell counties. Its Raleigh County local office is located in the same building as the District IV office.

3. Beginning in approximately 1992, the operations of District IV were disturbed by the intra-office dispute that was the basis of Walker v. W. Va. Ethics Comm'n, 201 W. Va. 108, 492 S.E.2d 167 (1997), which upheld the West Virginia Ethics Commission's finding that Mr. Walker violated W. Va. Code § 6B-1-1, the West Virginia Governmental Ethics Act.

4. Grievant was allied with Mr. Walker during this dispute.

5. At times relevant to this grievance, Grievant and other workers at DRS' Beckley office remained divided by this dispute.

6. Beginning in approximately 1997, Grievant sent a multitude of messages, via e-mail and other means, to co-workers in the Beckley office and outlying local offices. These messages expressed inappropriate affection for several of his married female co- workers; affirmatively publicized accusations of wrongdoing that Grievant felt had been made against him by DRS, but which had not; and spread defamatory accusations about co-workers.

7. On May 13, 1998, Grievant filed a grievance alleging that DRS failed to stop rumors of sexual misconduct, use of Internet pornography, and theft of a credit card by Grievant. This grievance was resolved by a letter, dated May 22,1998, from District IV Manager Judy Riffe (Riffe) exonerating Grievant.

8. Grievant's communications and other behavior disrupted the orderly operations of DRS District IV.

9. Grievant failed to perform several work-related responsibilities during this time.

10. DRS performed an investigation into Grievant's performance, which included interviewing affected co-workers and reviewing his communications and job performance.

11. On June 30, 1998, Grievant was called to a meeting at Institute, West Virginia, with Riffe, DRS Human Resources Manager James P. Quarles, and Assistant Director for Client Services John

Harrison. At this meeting, Grievant was given a verbal reprimand, ordered to stop his disruptive behavior, and told that further disciplinary action was being considered.

12. By letter of August 3, 1998, DRS suspended Grievant for 15 days. This letter also was "notice of your impending dismissal on the very next occasion of your demonstrating inappropriate behavior of a threatening, insubordinate, or sexual nature[.]" 13. Grievant resumed his disruptive behavior the day he returned to work.

14. On August 10, 1998, Grievant filed the grievance docketed as 99-RS-398 over the June 30, 1998, verbal reprimand; his July 31, 1998, performance evaluation; and his 15 day suspension. (See footnote 1)

15. DRS "Policy Governing the Use of E-Mail" states that "E-mail messages should not be profane, vulgar, harassing or defamatory."

16. By letter of November 16, 1999, DRS dismissed Grievant for unacceptable and insubordinate behavior.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), 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 defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279,

332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97- CORR-197A (May 12, 1999).

DRS suspended and dismissed Grievant for alleged unacceptable and insubordinate behavior. Grievant argues that any shortcomings on his part were trivial in nature and that he was dismissed in retaliation for protected grievance activity. (See footnote 2) Grievant seeks reinstatement, lost wages and benefits, and interest.

Insubordination is 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 may also be found when anemployee shows a willful disregard for the 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).

To prove insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). An employer also 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)).

Insubordination can result in disruption of the workplace such that it amounts to misconduct of a substantial nature affecting the rights and interests of the public. Payne v. W. Va. Dep't of Transp., Docket No. 93-DOH-454 at 11-12 (Apr. 29, 1994). Acts of insubordination such as failure to obey a lawful order of a superior have been held to constitute gross misconduct justifying dismissal. Bone v. W. Va. Dep't of Corrections, 163 W.Va. 253, 255 S.E.2d 919 (1979).

The record in this grievance is extremely lengthy, so much so that it is impractical to recount all of the evidence in the record of this decision. However, sufficient examples of the sort of misbehavior relied upon by DRS in suspending and dismissing Grievant will be set forth to support the

undersigned's conclusion that DRS had good cause to suspendand dismiss Grievant for insubordination.

With regard to DRS' charge that Grievant inappropriately expressed affection for several of his married female coworkers and circulated e-mails of a sexual nature, DRS established that Grievant sent numerous e-mails to his married trainee, Chris Dolan (Dolan), stating that he had an "inappropriate attraction" to her; that he had made her his "'Achilles Heel' by being so obviously fond" of her; that she was "one of the greatest sources of joy that [Grievant] had experienced in years;" and that he was being a "mother hen" to her. (See footnote 3) DRS established that Grievant e-mailed married co-worker Sherry Hamilton that his next visit to her office would include his adoration of her; that Grievant let it be known in the Beckley office that he felt a coworker had gotten her job by having an intimate relationship with her supervisor; that Grievant e-mailed another female employee to have "resilience in resisting temptation" with respect to a male co-worker; and that Grievant similarly e-mailed co-workers over a female co-worker's "common practice" of trying to touch and brush up against him. Grievant did not deny sending these and other e-mails, and admitted that he had an inappropriate attraction to Dolan.

With regard to DRS' charge that Grievant affirmatively publicized accusations of wrongdoing that Grievant felt had been made against him by DRS, but which had not, DRS established that Grievant did just that. For example, Grievant seized upon a credit card's disappearance to fabricate a charge by DRS that he had stolen the card, and then to vigorously defend himself against this non-charge with another flood of disruptive e-mail. The card was later found. Grievant similarly spread an office rumor that he had beenaccused of breaking into a co-worker's house and sexually assaulting her. Grievant publicized an office rumor that he had been accused of printing out pornography from the Beckley office's only Internet computer, although the record in this grievance does not establish that any such event occurred. He e-mailed six DRS local offices that he was not guilty of criminal allegations made against him, the nature of which he did not specify. He e-mailed his co-workers indicating that he had been prohibited from social interaction with them, which was untrue. He e-mailed Riffe stating that he had been accused of ransacking offices, when he had not. Grievant did not deny that he affirmatively publicized these non- existent accusations through numerous communications defending himself against them. With regard to DRS' charge that Grievant spread defamatory accusations about co- workers, DRS established that Grievant made a complaint to the

West Virginia Ethics Commission that a co-worker, Margaret Giampalo (Giampalo), had spent a work day shopping at a mall when she should have been attending a conference, and had misused state funds for years, although he had no direct knowledge of this. (See footnote 4) Grievant left a copy of the West Virginia Division of Personnel's workplace security policy in Riffe's mailbox. Referring to co-worker Thomas Rapp (Rapp), (See footnote 5) Grievant wrote on the policy “bouncer: shot man in bar, hit step-daughter's husband enough to be hospitalized, questioned for serial killing once[,]” and “stalked former (unreadable), incident at Jimmie's Bar/drinking moreheavily than in years, supercompetitive with other males.” On another occasion, Rapp found a document on the office copier titled “Thomas Rapp and the DOP Workplace Security Policy of May, 1995,” apparently written by Grievant. This document provided details of Grievant's charges of criminal violence by Rapp, above, and added that Rapp had been in many fights as an adult, had used muscle building hormones for years, and had attended college with a psychiatric disability. Grievant also communicated these accusations against Rapp to Riffe. (See footnote 6) Grievant also told “everyone” that Riffe “took the credit card and confessed to printing the stuff off the Internet.” Grievant did not deny making these statements.

With regard to DRS' charge that Grievant failed to perform several work-related responsibilities during this time, the record established that, although he had been a fine trainer for many years, his training of Dolan and trainee Jeanette Ratcliffe was deficient in several respects, and that their trainer/trainee relationship was wrecked by his inappropriate attentions to them. Grievant was tasked in July, 1998, with preparing a counselor training program for DRS, but had not completed the project by the time he was dismissed on November 16, 1998, although given several reminders and time extensions by Riffe. Grievant missed an important day-long meeting on electronic case management without prior permission, and he failed to complete an emergency evacuation plan for the Beckley office after being ordered to create one by Riffe. Grievant was also late in completing or failed to complete DRS reports referred to as QARs. Grievant did not deny these occurrences. Government employees may not refuse to do work merely because of disagreements with management, and failure to perform their duties is done at the risk of being insubordinate. Boyle v. United States, 515 F.2d 1397 (Ct.Cl. 1975). The first law of the workplace is that it is a place for doing work. Nagel v. Dep't of Health and Human Services, 707 F.2d 1384 (Fed. Cir. 1983).

Grievant also, through numerous e-mails and discussions, sought to embroil his two trainees and

other co-workers in what amounted to a ongoing office soap opera. Grievant schooled his two trainees in what he called the “sordid history” of the Beckley office, by which he meant the ethics controversy involving Larry Walker, describing himself as the “last man standing” in that controversy. Grievant also sought to plant seeds of distrust with the trainees regarding Giompalo and Rapp. This had the effect of perpetuating a divisive intra-office dispute that DRS wished to put behind it.

Grievant e-mailed Riffe stating that “since Danny left she seems to regard me as her new arch-rival,” “Donna [is] the source of much of my dilemma,” and that “I am one of only two people who knows the situation with poor Chris and me.” Grievant wrote to Riffe stating “DM is threatened by Annette and is close to Nancy Cuthbert.” He sent an e-mail stating that he had once dated his trainee's mother, and an e-mail stating that he had “appointed 'agents' in these other districts and armed them with the truth.”

Grievant established that other District IV employees used e-mail for personal communications, but these e-mails were far less numerous than the dozens or hundreds sent by Grievant and, of course, the other employees had not been ordered by DRS not to use the e-mail system for personal reasons. Grievant asserts that he was the victim of retaliation or reprisal for his filing two grievances relating to these events.

By engaging in retaliation, public officials restrain speech, impermissibly interfering with constitutional rights. Perry v. Sinderman, 408 U.S. 593 (1972). The purpose of statutes prohibiting retaliation is to make it unlawful for an employer to punish an employee for his protected activity, such as filing a grievance and pursuing it vigorously. See Harvey v. Merit Systems Protection Bd., 802 F.2d 537 (D.C. Cir. 1986).

Under West Virginia's statutory scheme, “[r]eprisal” means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p). “No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.” W. Va. Code § 29-6A-3(h).

To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's

employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that complainant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm., 179 W. Va. 53, 365 S.E.2d 251(1986), Ruby v. Insurance Comm. of W. Va., Docket No. 90-INS-399 (Dec. 1992).

However, an employer may rebut a grievant's prima facie case of retaliation by establishing "credible evidence of legitimate nondiscriminatory reasons for its action. . ." Mace v. Pizza Hut, Inc., 180 W. Va. 469, 472, 377 S.E.2d 461, 464 (1988). "Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination." W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994).

By filing a grievance, Grievant engaged in protected activity. Grievant was subsequently treated in an adverse manner by DRS, by being dismissed. However, the undersigned is unable to infer retaliatory motivation from the record in this grievance, as Grievant's superiors credibly testified that they were either unaware of his protected grievance activity, or did not consider it in deciding to dismiss him, and because of the substantial evidence of good cause for Grievant's dismissal contained in the record of this grievance. The evidence does not establish that Grievant's suspension and dismissal were motivated by any retaliatory intent. Accordingly, Grievant has failed to establish a prima facie case of retaliation.

Grievant's communications and other behavior seriously disrupted the orderly operations of DRS District IV. (See footnote 7) His communications and actions were disruptive, personal, and unrelated to the work of DRS. Grievant forced DRS officials to spend substantial worktime dealing with the repercussions of his behavior, including responding to his memos and e-mails, responding to memos and e-mails from affected co-workers, investigating incidents involving Grievant, dealing with co-workers who were offended by his flood of e-mail, dealing with co-workers' attempts to block his e-mails, dealing with employees who were planning to leave the agency because of his behavior, dealing with female co-workers who were afraid to or refused to work with him, and having to repeatedly urge Grievant to halt his intrigues and concentrate on the agency's mission of serving

clients with disabilities. Accordingly, Grievant's argument that his shortcomings were trivial in nature is rejected. Buskirk, supra.

DRS proved, by a preponderance of the evidence, that it had good cause to suspend and dismiss Grievant. His suspension and dismissal were appropriate for the offenses proved, and dismissal was an appropriate sanction for the insubordination shown when Grievant essentially ignored the directions given to him by his superiors at DRS during the June 30, 1998, meeting, by continuing to disrupt the workplace to the extent that his misconduct substantially affected the public's interest. Payne, supra.

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

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), 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.).

2. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

3. 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 may also be found when an employee shows a willful disregard for the 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).

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. Respondent DRS established, by a preponderance of the evidence, thatGrievant was guilty of insubordination.

6. “Reprisal” means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

7. To establish a prima facie case of retaliation, the burden is upon a grievant to prove by a preponderance of the evidence 1) that grievant engaged in protected activity, 2) that grievant's employer was aware of the protected activity, 3) that grievant was subsequently treated in an adverse manner by the employer and (absent other evidence tending to establish a retaliatory motivation), 4) that grievant's adverse treatment followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Frank's Shoe Store v. Human Rights Comm., 365 S.E.2d 251 (W.Va. 1986), Ruby v. Insurance Comm. of W. Va., Docket No. 90-INS-399 (July 28, 1992).

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8. Grievant failed to establish a prima facie case of retaliation.

9. Respondent DRS established, by a preponderance of the evidence, that it had good cause to suspend and dismiss Grievant.

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 § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number

so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated March 31, 2000

Footnote: 1

1 Due to the outcome of this grievance, Grievant's grievance of his June 30, 1998, verbal reprimand, and his performance evaluation of July 31, 1998, need not be decided.

Footnote: 2

2 Although Grievant was under a doctor's care for time periods pertinent to this grievance, he did not argue that any mental disability was a factor in this grievance, and the record showed that he never requested any accommodation from DRS for any disability he might have had.

Footnote: 3

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Dolan filed a grievance over these, and numerous other, statements.

Footnote: 4

4 Giompalo was one of the workers in the Beckley office who brought the Ethics Committee complaint against Mr. Walker. Grievant's complaint against her was dismissed by the Ethics Commission.

Footnote: 5

5 Rapp was one of the workers in the Beckley office who brought the Ethics Committee complaint against Mr. Walker.

Footnote: 6

6

Rapp filed a grievance over these allegations.

Footnote: 7

7 It is noted that Grievant's disruptive e-mails and efforts to defend himself against non-existent charges continued after his dismissal.