W.J.C., (See footnote 1)

Grievant,

v. **Docket No. 00-HHR-026**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU OF CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

This grievance was filed by Grievant W.J.C., against his employer, Respondent, Department of Health and Human Resources/Bureau of Children and Families ("HHR"), on November 19, 1999, when he received a five day suspension without pay for insubordination. In addition to challenging the grounds for his suspension, he asserted that the policies used to support his suspension were in violation of Chapter 49 of the West Virginia Code, and the Code of Ethics, and that he was being discriminated against based upon his age. (See footnote 2) He further stated he was invoking the Whistleblower Law, and that there had been substantial retaliation against him in that he had been refused "permission to attend training needed to maintain social work licensure & substantial reductions in work performance ratings (See footnote 3), verbal and written reprimands and finally the suspension and accusations of insubordination." The stated relief was:

> To have all references of suspension and insubordination erased from my personnel files and all wages and benefits restored. To have the agency enjoined from further harassment and retaliation. To have policy and procedures established to comply with all mandates of WV State Code, Chapter 49, current CPS policy as included in FACTS, so that workers are not at risk of liability for failure to properly protect children and so that children are no longer at risk because of insufficient/ nonexistent investigations. And finally, in order that I might have peace of mind, that the charge of insubordination brought against me by West Virginia Department of Human Services NOT BE dismissed for any reason until a Level Four Hearing decision is made, so that I may exercise might [sic] right of appeal. That DHHR pursue this action in accordance with Chapter 29-6A-4 of the West Virginia Code. (See footnote 4)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by HHR for nearly 27 years, and is currently classified as a Child Protective Service Worker (“CPSW”), and is assigned to the Intake Unit.

2. Carrie Stalnaker, Child Protective Service Supervisor, supervises the Intake Unit, which investigates allegations of child abuse and neglect in Kanawha County. Shehas been Grievant's supervisor for two years.

3. CPSW's are assigned to investigate allegations of child abuse or neglect, and make an initial assessment of the allegations. They are required to make face to face contact with the child within 14 days of the allegation. In accordance with HHR policy, they are required to complete their investigation, document the information gathered, submit their initial assessment of the allegations to their supervisor for approval, and obtain their supervisor's approval of the initial assessment, all within 30 days. Grievant was aware of these requirements. If an employee is having difficulty meeting these time frames, he may ask Ms. Stalnaker for an extension of the time frames. It is the employee's responsibility to request an extension if he needs one. Ms. Stalnaker evaluates whether an extension is justified, and grants the extension if justified, setting a new time frame for completion of the initial assessment. Grievant was aware that he could request an extension from Ms. Stalnaker.

4. These deadlines are important because of the need to assess the risk to the child. It is the job of the CPSW's to determine whether the child is in danger, and to take appropriate action if the child is found to not be in a safe environment. If at any time, however, the CPSW makes a determination that there is imminent danger to the child if the child is left in the home, the child may be removed before the initial assessment is completed.

5. Employees can access information on their computers which tells them the date the allegation was made, so that they can determine when the assessment is due. There is also a “tickler button” on the computer system which changes from green to yellow when an assessment is close to being due, and it changes from yellow to red when an assessment is overdue. The computer system alerts the CPSW five days in advance that an assessment is approaching the due date. It is the employee's responsibility to keep track of the case deadlines, although Ms. Stalnaker also keeps

track of them. 6. Employees under Ms. Stalnaker's supervision are required to read their e- mail each day, and they are frequently reminded of this requirement as she walks through the Unit. Two dry erase boards in the Unit also remind the employees to check their e- mail.

7. In late August of 1999, Grievant asked Ms. Stalnaker for an extension of the 30 day time line on the A.P. (See footnote 5) case, because he was having trouble finding the alleged abuser. Ms. Stalnaker verbally granted an extension of about one week. Grievant asked for a second extension, and Ms. Stalnaker extended the deadline to September 21, 1999.

8. Sometime during September 1999, Grievant verbally requested an extension of the deadline for the initial assessment of C.W.'s case. Ms. Stalnaker granted the request, extending the deadline from September 17, 1999, to September 22, 1999.

9. On September 17, 1999, Ms. Stalnaker sent Grievant an e-mail reminding him that he had been granted extensions on the C.W. and A.P. cases, and telling him he needed to have these cases cleared by September 21 and 22, 1999, respectively. Grievant did not complete the assessments and submit them for approval by September 21 or 22, 1999, he did not request another extension on these two cases, and he did not speak to Ms. Stalnaker after this time about any problems he was having completing the assessments in these cases.

10. Grievant was off work on sick leave on August 30, September 17 and 21, 1999. Grievant was in the office on Monday, September 20, 1999, but he did not read his e-mail that day. He opened the e-mail sent to him September 17 on September 22, 1999.

11. The 30th day for completion of the investigation and initial assessment on the E.H. case, which was also assigned to Grievant, was September 21, 1999. Grievant did not submit the initial assessment for approval by this date. 12. On September 29, 1999, at 2:13 p.m., Ms. Stalnaker sent Grievant an e-mail telling him the three assessments discussed above were overdue, that she was placing him on mandatory overtime, and that the assessments were to be completed by no later than 3:00 p.m. on September 30, 1999. Grievant did not read this e-mail until October 1, 1999, and he did not submit the initial assessment on any of these cases by this deadline. Grievant was at work on September 29 and 30, 1999. Grievant did not discuss any of these cases or any problems he was having with Ms. Stalnaker between September 22 and October 1, 1999.

13. All contacts made with individuals involved with the E.H. case had been made by August 26, 1999. All contacts had been made in connection with the A.P. case by September 9, 1999. One

contact was made in connection with the C.W. case between September 9 and 30, 1999, and that contact was made on September 30, 1999.

14. In August of 1998, Grievant received a verbal reprimand for missing the 30 day time line for completing and submitting an assessment on a case assigned to him.

15. On June 8, 1999, Grievant received a written reprimand for missing the 30 day time line for completing and submitting an initial assessment on several cases assigned to him. (See footnote 6)

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. (See footnote 7)

Grievant was charged with insubordination, in that he failed to meet the 30 day deadline for completion of one assessment, and did not request an extension of time, and he failed to meet the deadlines set by his supervisor for completion of two other assessments after being granted extensions of time by her, and did not request additional extensions on these cases. 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.). 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 torespect 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).

HHR established that it had a policy in place which required that assessments be completed within 30 days. Specifically, § 9730 of HHR's Social Services Manual provides that:

> An SS-CPS-2 (Assessment for Child Protective Services) MUST be completed on all cases opened for child protective services. The Assessment must be completed within 30 days of the date the SSIS transmission was made to open the case or the SS-CPS-1 was completed, whichever came first.

Neither this Section, nor any other HHR policy, addresses the possibility of an extension of the 30 day deadline, but HHR acknowledged that Ms. Stalnaker had granted Grievant extensions on two cases, and he was not being punished for missing the initial 30 day deadline on these cases. He was insubordinate for missing the deadlines set by his supervisor when she granted the extensions. Although Grievant questioned whether § 9730 was still in place, Jane McCallister, Social Service Coordinator, testified that it had not been rescinded. The only evidence produced by Grievant on this issue was amemorandum dated March 17, 1992, which summarizes policy changes, and a chart labeled “Risk Continuum” which shows the time for the initial assessment as 30 days, with the column labeled “estimated time,” rather than “maximum time.” Ms. McCallister also testified that the “Risk Continuum” was merely a recommendation which was not made policy.

HHR also proved that Grievant was aware that assessments must be completed within 30 days, and that he could request an extension if necessary. While Grievant argued the 30 day requirement was not in the W. Va. Code, he admitted on cross- examination that he was aware of HHR's requirement that assessments be completed within 30 days. HHR established it was Grievant's responsibility to keep track of deadlines and to make sure his work was completed in a timely manner. Grievant was aware of the necessity for completing assessments in a timely manner, and knowingly failed to complete three assessments within the established deadlines or to inform his supervisor of the need for additional time to complete the assessments.

Grievant suggested he could not complete his work in a timely manner because he was ill. While Grievant's illness may have caused him not to get assessments completed on September 17, 20, 21, and 22, 1999, it does not relieve him of his work responsibilities for the month. It was part of his responsibility to keep track of his cases, check his e-mail daily, and enter his contacts daily, which he apparently also was not doing. When he became ill and could not meet the September 21 and 22 deadlines, it was his responsibility to go to his supervisor as soon as it became apparent that he was going to miss, or had already missed, these deadlines and talk to her about the problem. He did not do any of this. He completely ignored the deadlines and Ms. Stalnaker's e-mails.

Grievant also stated that he was not aware until he read Ms. Stalnaker's e-mail that she had set deadlines on the extensions she had granted. First, it was Grievant's responsibility to keep track of his deadlines, and to know what they were. Further,however, the record provides no rationale for Grievant's failure to complete any of these three assessments on September 23, 24, 27, 28, 29, or 30, or October 1, 1999, or his failure to discuss the delay in completing these assessments with his supervisor.

Grievant questioned whether an extension could be granted by his supervisor. Whether this practice was sanctioned by HHR is of no consequence. Even if Ms. Stalnaker was not authorized to grant extensions, she was authorized to tell Grievant to get his work done and to give him deadlines. She repeatedly told him to get his work done by particular dates, and he continually ignored her directives.

As to Grievant's claim of retaliation for “whistle-blowing,” W. Va. Code § 6C-1-3(a) provides as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or

> privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

In general, a grievant alleging discrimination or retaliation in violation of W. Va. Code § 6C-1-3, must establish a prima facie case, by showing:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Parker v. W. Va. Dep't of Health & Human Resources,Docket No. 91-HHR-282 (Apr. 22, 1992).

Once a prima facie case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. Liller, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981);Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26- 56 (Sept. 29, 1989).

The only report noted by Grievant was his report to his employer that he had ethical concerns with the requirements that face to face contacts be made within 14 days and the assessment completed within 30 days. Grievant did not indicate when he had expressed these concerns to his employer. However, assuming this report rises to the level of an activity protected by the statute, and it was made recently, Respondent presented legitimate, non-retaliatory reasons for suspending Grievant for

his insubordination.

Finally, Grievant alleged that HHR's practices are in violation of the law which requires a thorough and complete investigation. As relief for this he sought to have policies and procedures established which are in compliance with Chapter 49 of the West Virginia Code. First, it will be noted that Grievant did not demonstrate that the reason he did not meet the deadlines in the three cases at issue was because he needed more time in order to make a thorough and complete investigation. Second, Grievant pointed to a statement made to him by Troy Posey, Community Service Manager, to the effect that Grievant was doing a too detailed and thorough investigation, and asserted this statement indicates Grievant should violate the law. Certainly, such a statement by Mr. Posey does not indicate any such thing. It is a statement of Mr. Posey's opinion that Grievant is doing more than is necessary or required. Obviously, Grievant disagrees with this. Grievant also pointed to an occasion when he was told to close a case because the alleged victim was on vacation and face to face contact could not be made within the 14 day period required by law. While Grievant may have decided to keep the case open were he in charge, the undersigned is not in a position to second guess the management decision made here, or to make a conclusion that this violated any ethical standards applicable to Grievant as a social worker, given the sparse data presented on this instance. Moreover, the undersigned has no authority to grant the relief requested by Grievant. "The undersigned has no authority to require an agency to adopt a policy, absent some law, rule or regulation which mandates such a policy be developed. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997)." Gary and Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. 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.

2. Respondent proved that Grievant was aware of the requirement that he complete and submit initial assessments for approval within 30 days of the date a report of abuse or neglect was made; he was aware he could request an extension of the 30 day deadline from his supervisor; it was Grievant's responsibility to keep track of the deadlines; there were several ways available to Grievant to keep track of deadlines; and he failed tomeet the deadlines for completion of 3 initial assessments, including granted extensions of time, and failed to request additional time to complete the assessments.

3. W. Va. Code § 6C-1-3(a) provides as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

4. In general, a grievant alleging discrimination or retaliation in violation of W. Va. Code § 6C-1-3, must establish a prima facie case, by showing:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992).

5. Once a prima facie case of retaliation is established, the inquiry then shifts toward

determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. Liller, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981);Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172W. Va. 627, 309 S.E.2d 342 (1983); Webb v. Mason County Bd. of Educ., Docket No. 89- 26-56 (Sept. 29, 1989).

6. Grievant did not demonstrate he was retaliated against by Respondent for reporting his ethical concerns to his employer.

7. "The undersigned has no authority to require an agency to adopt a policy, absent some law, rule or regulation which mandates such a policy be developed. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997)." Gary and Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999).

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.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: May 26, 2000

Footnote: 1

At the Level IV hearing, Grievant expressed concerns about the potential for liability due to the nature of his job and

the charges against him, and asked that his name not be used in this grievance. Respondent did not object, and it was agreed that he would be identified only by his initials in this decision.

Footnote: 2

Grievant presented no evidence in support of this claim, nor did he address this issue at all at Level IV. Accordingly, this claim is deemed abandoned. Were the undersigned to address this issue, however, Grievant did not prove a prima facie case of discrimination, as he presented no evidence that he was similarly situated to any other employee who was treated in a different manner.

Footnote: 3

Grievant presented no evidence that he had been denied permission to attend any training, or that his performance ratings had been reduced. Accordingly, these claims will not be addressed.

Footnote: 4

Grievant asked to begin the grievance at Level II of the grievance procedure. The grievance was denied at Level II on December 16, 1999, and Grievant appealed to Level III on December 22, 1999. A Level III hearing was held on January 7, 2000. The grievance was denied at Level III, and Grievant appealed to Level IV on January 19, 2000. A Level IV hearing was held on March 10, 2000. Grievant represented himself, and HHR was represented by Anthony Eates, II, Esquire. This grievance became mature for decision on March 31, 2000, upon receipt of Respondent's written argument. Grievant declined to submit written argument.

Footnote: 5

Consistent with this Grievance Board's practice, initials have been used rather than client names in order to maintain confidentiality.

Footnote: 6

Grievant stated he was not given a verbal warning, that the documentation submitted by HHR did not show he had received either a verbal warning or a written reprimand, and that neither was in his administrative file as he asserted was required. His subsequent statements, however, are an admission that he did receive a written reprimand. Accordingly, it is of no moment at this juncture whether he received a verbal warning; however, the undersigned concludes from the documentary evidence submitted by HHR that Grievant did receive both a verbal warning and a written reprimand. Grievant also admitted as much in his statement of grievance. The undersigned further finds no requirement that written reprimands be placed in an employee's administrative file.

Footnote: 7

Grievant disagreed with several of the statements made in the Level III decision. These arguments need not be specifically addressed, as the issue here is not the accuracy of the Level III decision, but rather, whether Respondent has proven the charges.