

JOY BUTTS,

Grievant,

v.

Docket Nos. 99-BOD-508/00-BOD-105

BOARD OF DIRECTORS/SHEPHERD COLLEGE,

Respondent.

DECISION

Grievant, Joy Butts, employed by the Board of Directors as an Associate Professor of Mathematics at the Shepherd Community and Technical College (Respondent), filed a level one complaint on November 5, 1999, in which she stated, “[o]n October 22, 1999, I received a memorandum dated October 19, 1999 alleging 'insubordinate behavior on your part' and other falsehoods. These allegations are invalid, inaccurate, and unwarranted,” For relief, Grievant requested that the memorandum, along with any other documents which made reference to it, be rescinded, that the harassing, discriminatory, and retaliatory treatment cease, and that she be restored to wholeness. Ethel Cameron, Coordinator of Developmental Mathematics and Grievant's immediate supervisor, denied the matter at level one. A level two hearing was conducted on November 30, 1999. While neither Grievant nor Kevin Church, her union representative, appeared, he filed a Motion to Remand, noting that Grievant had a medical appointment, and to his knowledge had not even received a notice of the scheduled hearing. Although the representative apparently had received a notice, since he advised that he would not be present, and Grievant would present her case, there was no opposition to the Motion, which was granted.

Grievant filed a second complaint on February 28, 2000, in which she stated, “[o]n February 11, 2000, I received a memorandum dated February 9, 2000, alleging to be 'a written reprimand for said behavior' as itemized therein. These allegations are misrepresented, invalid, and unwarranted” Grievant requested that the document, and all references to it, be removed from her personnel file, that such treatment cease, and that she be “restored to wholeness and normal faculty employee working conditions, rights, privileges, security, benefits, opportunities, and responsibilities as per Faculty Handbook and related official documents on campus” Ms. Cameron denied the grievance at level one.

A joint request to bypass level two, and consolidate the matters for hearing at level four was granted. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on October 6, 2000, at which time Grievant was represented by Lawrence M. Schultz, Esq., and Respondent was represented by K. Alan Perdue, Esq. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by both parties on or before October 24, 2000.

The essential facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent since 1978, and is presently assigned to the Community and Technical College as a tenured Associate Professor of Mathematics. Grievant is the only full-time, tenured faculty member assigned to the Community and Technical College; all other positions are filled by adjunct instructors.

2. By memorandum dated October 11, 1999, Ethel Cameron, Coordinator of Developmental Mathematics, requested the faculty provide her completed forms identifying students who were performing at the Incomplete Failing or Failing level. The forms also requested the number of tests completed, and the student's attendance record. The forms were due by Monday, October 18, 1999, for Monday-Wednesday-Friday classes, and Tuesday, October 19, 1999, for Tuesday-Thursday classes.

3. Grievant did not file the completed forms with Ms. Cameron.

4. Ms. Cameron issued a Grievant a memorandum dated October 19, 1999, which stated as follows:

On Monday, October 11th, you were directed by letter to provide me with a copy of your midterm grades and to complete the form letter that is mailed to students with an IF or F at midterm. These were due by Monday, October 18th. It is obvious that you have chosen to disregard this written request and your failure to comply constitutes insubordinate behavior on your part.

For that reason, please consider this letter a written reprimand for said behavior. A copy of this letter with attachments thereto will be forwarded to Dr. Checkovich for inclusion in your permanent file.

5. By memorandum dated December 6, 1999, Ms. Cameron advised that there would be a faculty meeting on December 15th at 8:00 a.m. She advised that "Carolyn will be here with her baby and Erdem is retiring. Also that is faculty appreciation day in the study center." The memo continued to state that an attached list provided the items each instructor needed to provide her, along with their grade sheets. These items included attendance sheets, copies of individual test grade sheets and final grade sheets, room and file cabinet keys, textbooks, and answer keys, if they were not to be used the following semester.

6. Grievant did not attend the faculty meeting, and did not provide the items requested by Ms. Cameron.

7. Ms. Cameron issued Grievant a written reprimand on February 9, 2000, for her failure to attend the faculty meeting, and to comply with the request for information and materials.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 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 and Human Res., 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.

Respondent has charged Grievant with insubordination which 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). In order to establish insubordination, an employer must demonstrate that the employee's failure to comply with the order was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. See Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See

generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (*per curiam*). "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) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)).

Additionally, 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). "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first[,] and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997): See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, *supra*. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, *supra*. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, *supra*; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

Respondent asserts that Grievant's failure to attend the faculty meeting, and to provide the information requested by her supervisor, constitutes insubordination. Because Grievant admits that she did not attend the faculty meeting, and declined to provide Ms. Cameron with the requested information, Respondent has met its burden of proof.

At level four, Grievant testified that she had discontinued attendance at faculty meetings in 1997 or 1998 because they were not relevant to her. Grievant stated that she specifically did not attend the December 1999 meeting because the memorandum indicated it was to be a social gathering, a fact she later confirmed with another employee. Grievant notes that the Faculty Handbook does not require attendance at faculty meetings, and Dr. Jerry Smith, a former colleague, testified that he was not aware of any other faculty member being reprimanded for missing a faculty meeting.

Addressing her failure to provide Ms. Cameron with the requested information, Grievant opined that she was prohibited from doing so by student confidentiality provisions in Respondent's Student

Handbook, and federal legislation set forth in 20 U.S.C. §1232g, "Family educational and privacy rights". Grievant argues that no student has ever consented to having his or her grade released to Ms. Cameron, that she provides the grades to the Registrar, and Ms. Cameron can obtain grade information from that source. Grievant cites the 1999-2000 Student Handbook, (pg. 35), Right to Privacy, Section III, "Confidentiality of Records", which states in part:

All policies and practices concerning records shall respect the privacy of the individual students. Because of the professional and legal responsibilities involved, recordkeeping must be delegated only to responsible persons. Records will be kept only on matters relevant to the educational process. Even these minimum records will not be disclosed except with the student's written consent or as otherwise stated in the following policies, which are designed to protect the privacy of the student and yet facilitate sound administrative practice

However, reading further, subsection (C) states:

Prior written consent of the students concerned will be obtained before releasing information from student records to individuals other than the students referred to in those records. Exceptions to this policy are outlined below or are in other parts of this publication.

1. Members of the faculty may have access to academic records and files for internal educational purposes.

Similarly, 20 U.S.C. 1232g provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following ----

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests;

Under both the institutional and federal provisions, Ms. Cameron is entitled to receive the requested information which, as a faculty member and Coordinator, she uses to counsel students

and to determine program development. She provided a specific example of the latter, stating that if she knew that a certain number of students had not successfully completed a class in the present semester, she could schedule an additional section of that course for the following semester. These reasons clearly demonstrate the information is used for internal, legitimate educational purposes, and her request was not improper in any way. Therefore, Grievant's determination that she could not provide the information was erroneous, and the failure to comply with the request constituted insubordination.

Grievant's decision to discontinue her attendance at faculty meetings also constitutes insubordination. The evidence establishes that she was notified of the December 15 meeting, but intentionally and knowingly did not attend. Whether she is commanded to attend these meeting by the Faculty Handbook is not controlling. Attendance at faculty meetings is generally accepted in the profession as one of a teacher's many duties. The fact that Grievant does not find the topics discussed relevant to her, and a "waste of her time", is unfortunate, but does not excuse her absence. Interestingly, Grievant did not confer with Ms. Cameron regarding the missed meeting, but asked Anna Mary Walsh, Coordinator of the Tutor Program, who she understood, confirmed that it had been a social meeting. Ms. Walsh, however, stated that she would not have been present for the actual faculty meeting. When Grievant failed to attend the December 15 faculty meeting, or to provide a valid reason for her absence, she engaged in insubordination.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

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

3. An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No.97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam).

4. Respondent has proven that Grievant was insubordinate when she refused to provide information requested by her supervisor and failed to attend a faculty meeting without an excuse.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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.

Date: October 31, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE