JUDY CASTO,

Grievant,

v.

DOCKET NO. 00-DOE-143

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Judy Casto, filed this grievance on November 19, 1999, protesting a verbal reprimand given her by her immediate supervisor, Lisa Mahon, Manager of Cedar Lakes Conference Center ("Cedar Lakes"), which is under the direction of the West Virginia Department of Education ("DOE"). The grievance was denied at level one, and a level two hearing was held on February 4 and March 13, 2000. The grievance was denied by grievance evaluator Karen Larry, by decision dated April 6, 2000, whereafter Grievant appealed to level four on April 21, 2000. The parties agreed to submit the grievance on the record developed at levels one and two, and this case became mature for decision on July 21, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented at level two by Jerry Payne, and at level four by Hoyt E. Glazer, Esq., Stuart Calwell, PLLC, and DOE was represented by Katherine L. Dooley, Esq.

SUMMARY OF EVIDENCE

DOE Exhibits

Ex. 1 -

Handwritten notes of Margaret Boggess.

Ex. 2 -

Cedar Lakes Handbook, “Disciplinary Action.”

Ex. 3 -

Undated memorandum to the file from Lisa Mahon.

Ex. 4 -

Handwritten notes of Jean Alfred, dated May 17, 1993.

Grievant's Exhibits

Ex. 1 -

January 27, 1999 Employee Performance Appraisal of Judy Casto.

Ex. 2 -

W. Va. Department of Education Personnel Action Form

Ex. 3 -

Not admitted.

Ex. 4 -

Cedar Lakes Handbook, “Personnel Policies.”

Ex. 5 -

Cedar Lakes Handbook, “Introduction and Purpose.”

Ex. 6 -

November 29, 1999 response to grievance, by Lisa Mahon.

Ex. 7 -

Bureau of Employment Programs Form 1099-G, Unemployment Compensation paid in 1996.

Testimony

DOE presented the testimony of Timothy Lowry, Margaret Ann Boggess, Deanna King, Diane

Marie Fletcher, and Lisa Kateri Mahon. Grievant testified in her own behalf, and presented the testimony of Don Blandford, Betty Brown, Susan Newsome, Audrey Koontz, Patricia Walker, and Lisa Mahon.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is an employee of DOE's Cedar Lakes Conference Center.

2. On October 29, 1999, during a meeting of Dining Service employees and the General Manager, Lisa Mahon, Grievant repeatedly interrupted Ms. Mahon while she attempted to answer questions by the employees, contradicting information Ms. Mahon was trying to impart.

3. During that meeting, Ms. Mahon informed the dining service employees that the dining hall would be closed for approximately two weeks, from December 20, 1999through January 3, 2000. For at least the past four years, the dining hall has been closed during this period of time, and the employees have been assigned to work in other areas of the camp.

4. On November 1, 1999, Maintenance Supervisor, Tim Lowry, informed Ms. Mahon that Grievant told him the entire camp was going to be closed for two to three months, and employees would be laid off from work.

5. On November 2, 1999, Ms. Mahon called a meeting with Grievant and her immediate supervisor, Don Blandford, Food Service Director, to discuss Grievant's behavior during the October 29, 1999, meeting, as well as the rumor she had told Mr. Lowry.

6. Grievant denied telling Mr. Lowry the camp would be closed for two or three months, and Ms. Mahon called Mr. Lowry in to the meeting to repeat what he had told her. Grievant became aggressive with Mr. Lowry, and again denied making that statement.

7. At the end of the meeting, Ms. Mahon told Grievant she was giving her a verbal warning to cease and desist her disruptive behavior in meetings, and for spreading false rumors.

DISCUSSION

DOE bears the burden of proving by a preponderance of the evidence that Grievant's actions occurred and warranted a verbal reprimand. 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 evidence of greater weight or more convincing than the evidence whichis 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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 Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Ms. Mahon's verbal reprimand was for insubordination based on Grievant's disruptive behavior at the October 29, 1999 meeting, and for spreading false rumors about the closing of the camp and employee layoffs. Insubordination involves the “deliberate, willful, or intentional refusal or failure to comply with a reasonable order of a superior.” 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 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 CountyBd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

This Grievance Board has previously noted that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out." 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). Thus, this Board has found that uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dep't of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). See Burton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). "Discipline imposed upon an employee who has reported wrongdoing to the authorities, but who is also grossly insubordinate and provocative toward his superiors, is non-retaliatory under these circumstances." See Coster v. W. Va. Dep't of Corr., Docket No. 94-CORR-600 (Aug. 12, 1996), citing Church v. Dep't of Army, 6 MSPB 615 (1981), citing Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979). An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. See Nagel v. DHHS, 707 F.2d 1384 (Fed. Cir. 1983). An employer can take into account negative reactions of co-workers to an employee who continually reports their minor transgressions. Duran v. MSPB, 707 F.2d 1174 (10th Cir. 1983). In the instant case, Ms. Mahon issued the verbal reprimand to Grievant for (1) her repeated interruptions during the October 29, 1999 meeting led by Ms. Mahon; and (2) for giving false information to Mr. Lowry on November 1, 1999. Grievant denies the charges. The two charges will be addressed separately.

The October 29, 1999 meeting was one of several meetings with Cedar Lakes staff to discuss the state of the facility, future plans, and other matters. The October 29 meeting involved the dining hall, maintenance, and housekeeping staffs. During that meeting, Ms. Mahon informed the staff that the dining hall would be closed from December 20, 1999, through January 3, 2000. This was not an unusual occurrence, as the dining hall had been closed during this same period for at least the past four years. In the past, the dining hall employees were either given work to do in the dining hall, not associated with serving meals, or assigned work elsewhere in the camp.

Several employees discussed among themselves whether they would be able to receive unemployment compensation for that time period, and Patricia Walker, a salad cook, asked Ms. Mahon if they would be assigned elsewhere, and Ms. Mahon responded "no". Tr., pp. 45, 103. She then asked if they would be able to draw unemployment, and Ms. Mahon responded "no" again.

While Ms. Mahon was trying to answer questions about this subject, Grievant interrupted and told Ms. Mahon the employees could get unemployment compensation. Ms. Mahon told her the laws had changed in the past four years, but that she would check into it. Grievant again said they could get unemployment compensation. This exchangecontinued, and Grievant interrupted Ms. Mahon at least

one more time to argue her point. Finally, Ms. Mahon told Grievant, “that's enough”. Tr., pp. 44, 65, 114, 170, 200.

Several employees present in the meeting testified to this incident. Margaret Boggess, Head Cook, testified that, before Ms. Mahon could answer the questions about unemployment, Grievant “jumped up and yelled” at Ms. Mahon that they could draw unemployment. Tr., p. 41. Deanna King, a co-worker of Grievant's, testified Grievant interrupted or answered questions meant for Ms. Mahon about three times before Ms. Mahon told her “that's enough.” Tr., p. 65. Don Blanchard, Food Service Director, testified he was in and out of the meeting, and did not observe Grievant being out of order at the meeting, but he did recall Ms. Mahon telling her “that's enough.” Betty Brown, a salad cook, first testified she did not see any conflict between Grievant and Ms. Mahon, and that all of the employees were asking questions and talking about the unemployment issue. Tr., p. 196. Later, she testified Grievant and Ms. Mahon “kind of got into it” and Ms. Mahon told Grievant to “be quiet” or something. Tr., p. 197. Audrey Koontz, a co-worker of Grievant's, testified Grievant was calm throughout the meeting. Patricia Walker testified Grievant was calm, and Ms. Mahon was the one who “got loud” after the employees started asking questions. Grievant does not deny she told Ms. Mahon the employees could get unemployment after Ms. Mahon had told them they could not, however, she denies being “insubordinate” or acting out of order at the meeting. Ms. Mahon admitted getting angry with Grievant for interrupting her while she was trying to answer the employees' questions. Nearly all the witnesses who testified about Grievant noted she has a loud voice, an aggressive demeanor, is very blunt, and says what she thinks. Indeed, on a recentotherwise excellent performance evaluation, her immediate supervisor, Mr. Blanchard, gave her a “poor” rating for “tact”. There was testimony that Grievant had a hard time getting along with her co-workers, was bossy, and wanted things her way all the time.

Given Grievant's temperament, along with the testimony of her co-workers regarding the October 29, 1999 meeting, I find it is more likely than not that she interrupted Ms. Mahon in order to correct what she thought was erroneous information. It is subjective, depending upon whether one was the recipient of the interruption, the interrupter, or merely a witness to the incident, whether such behavior amounted to “insubordination.” In this instance, Ms. Mahon, who, as General Manager of Cedar Lakes, was undeniably the person in charge of the facility, believed Grievant was undermining her authority, and questioning her knowledge, in front of the other workers. While Grievant may

believe she was just correcting what she thought was erroneous information given by Ms. Mahon, it was disrespectful of a person in authority to simply interrupt and interject contradictory information in front of other employees in a scheduled staff meeting. Indeed, Ms. Mahon acknowledged that, while this incident was not terribly serious in nature, she felt she needed to give Grievant fair warning that she did not appreciate it, nor did she want it to happen again. Ms. Mahon believed a simple verbal warning would accomplish that goal. I cannot disagree with Ms. Mahon's conclusion. It was not arbitrary or capricious, or an abuse of discretion for Ms. Mahon to give Grievant a verbal warning over her behavior at the October 29, 1999 meeting. (See footnote 1) With regard to the second charge, Grievant's and Mr. Lowry's testimony regarding their conversation on November 1, 1999, is in direct conflict, requiring a determination as to which testimony is truthful. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id; Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. Lowry testified Grievant approached him in the dining hall on November 1, 1999, and told him the camp was going to be closed for two to three months, and the employees would be laid off. He went to Ms. Mahon with this information, and she informed him it was not true. Ms. Mahon called Grievant and her immediate supervisor, Mr. Blanchard, into her office on November 2, 1999, and confronted Grievant with the information Mr. Lowry had conveyed to her. Grievant denied making the statement. Ms. Mahon then called Mr. Lowry into the office, and he repeated what he said Grievant had told him. Grievant againdenied making the statement, telling him she said two or three weeks. Mr. Blanchard testified that, after Grievant denied making the statement several times to Mr. Lowry, Mr. Lowry said she might have said three weeks. Neither Ms. Mahon nor Mr. Lowry testified that he said Grievant might have said three weeks during the November 2, 1999 meeting. Finally, Margaret

Boggess, the Head Cook, testified she had heard rumors going around that the camp was going to be closed for three months, and that Grievant was one of the people spreading the rumor. Tr., p. 49. No evidence was presented which would indicate Mr. Lowry or Ms. Boggess had any reason to make up this story about Grievant. There was some evidence that Ms. Boggess did not always get along with Grievant, but that alone is not enough to conclude she would lie about Grievant under oath. Consequently, I find it is more likely than not that Grievant told Mr. Lowry the camp was going to be closed for two to three months.

As an affirmative defense, Grievant alleges her constitutional right to free speech was violated when Ms. Mahon gave her a verbal warning for speaking out at the October 29, 1999 meeting. Whenever an employee alleges an affirmative defense to a disciplinary charge, the employee has the burden of establishing that defense by a preponderance of the evidence. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); Young v. W. Va. Dept. of Health & Human Res., Docket No. 90-H-541 (Mar. 29, 1991).

Under Pickering v. Board of Education, 391 U.S. 563, 88, S.Ct. 1731, 20 L.Ed.2d 811 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights,as well as other First Amendment rights. However, Pickering recognized that the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employee's right to free speech, which is not absolute. See, Syl. Pt. 3, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1984).

To be protected, speech must first involve matters of public concern. Orr at 344, citing Pickering, supra. Second, statements that are made “with the knowledge [that they] . . . were false or with reckless disregard of whether [they were] . . . false or not,” are not protected. Id. Third, statements which would disrupt “discipline . . . or harmony among coworkers” or destroy “personal loyalty and confidence” may not have protection. Id.

Any discipline involving an employee's exercise of speech involves a balancing of the employee's interest in the speech and the employer's interest in maintaining an efficient and orderly workplace. Although Grievant's representative attempted to show Grievant had been correct about the unemployment compensation question, and thus, she did not make false statements, there is no evidence that Grievant was disciplined for the content of her speech. Rather, she was disciplined for

the insubordinate way in which she chose to impart that speech. Employers have a right to expect certain conduct from their employees, and in this instance, in a staff meeting, the manager of the facility had a right to expect to conduct that meeting without repeated interruption from a subordinate employee. There is no evidence that, had Grievant waited until Ms. Mahon was finished with her presentation, she would not then have had an opportunity to voice her concerns and objections about the information given out at that meeting. Grievant has failed to prove she was disciplined by Ms. Mahon for the content of her speech, and thus she hasfailed to prove by a preponderance of the evidence that her constitutional right to free speech was violated.

CONCLUSIONS OF LAW

1. DOE bears the burden of proving by a preponderance of the evidence that Grievant's actions occurred and warranted a verbal reprimand. 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 “deliberate, willful, or intentional refusal or failure to comply with a reasonable order of a superior.” 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).

3. 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).

4. “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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). 5. This Grievance Board has previously noted that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out." 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). Thus, this Board has found that uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dep't of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). See Burton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.).

6. "Discipline imposed upon an employee who has reported wrongdoing to the authorities, but who is also grossly insubordinate and provocative toward his superiors, is non-retaliatory under these circumstances." See Coster v. W. Va. Dep't of Corr., Docket No. 94-CORR-600 (Aug. 12, 1996), citing Church v. Dep't of Army, 6 MSPB 615 (1981), citing Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979). An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. See Nagel v. DHHS, 707 F.2d 1384 (Fed. Cir. 1983). An employer can take into account negative reactions of co-workers to an employee who continually reports their minor transgressions. Duran v. MSPB, 707 F.2d 1174 (10th Cir. 1983).

7. DOE has proven by a preponderance of the evidence that Grievant's conduct of repeatedly interrupting her supervisor during the October 29, 1999 meeting, and spreading false rumors to Mr. Lowry on November 1, 1999, was insubordinate.

8. Whenever an employee alleges an affirmative defense to a disciplinary charge, the employee has the burden of establishing that defense by a preponderance of the evidence. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16,1991); Young v. W. Va. Dep't of Health & Human Res., Docket No. 90-H-541 (Mar. 29, 1991).

9. Under Pickering v. Board of Education, 391 U.S. 563, 88, S.Ct. 1731, 20 L.Ed.2d 811 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, Pickering recognized that the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employee's right to free speech, which is not absolute. See, Syl. Pt. 3, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1984).

10. Grievant has failed to prove by a preponderance of the evidence that she was disciplined for the content of her speech, or otherwise prevented from speaking about the unemployment compensation issue at the October 29, 1999 meeting.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 29, 2000

Footnote: 1

No written documentation of this verbal warning was put in Grievant's personnel file at the time it was issued. However, Grievant's representative insisted something be inwriting, so Ms. Mahon wrote a note indicating she had given Grievant a verbal warning to be placed in her file.