

JASON FINKENBINDER,

Grievant,

v.

DOCKET NO. 97-LABOR-325

WEST VIRGINIA DEPARTMENT OF LABOR,

Respondent.

D E C I S I O N

Grievant, Jason Finkenbinder, filed this grievance against his employer, the West Virginia Department of Labor ("Labor") on July 3, 1997, alleging that, "[g]rievant was terminated from his position in the WV Division of Labor without just cause", and seeking "[t]o be returned to work when released by medical doctor, with back-pay with interest, and benefits." Soon after filing the grievance, Grievant requested this matter be held in abeyance pending his recovery from a physical injury. Thereafter, this matter was set for hearing at the Grievance Board's Charleston, West Virginia, office on September 12, 2000, and it became mature for decision on October 17, 2000, upon receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Mr. Fred Tucker, UMWA-WVSEU Representative, and Labor was represented by David P. Cleek, Esq., Senior Deputy Attorney General.

SUMMARY OF EVIDENCE

Labor's Exhibits

Ex. 1 - February 6, 1997, Report of Occupational Injury.

Ex. 2 -

March 26, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder re:

election of options.

Ex. 3 -

April 11, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder re: time sheets.

Ex. 4 -

April 21, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder re: time sheets; physician's statement.

Ex. 5 -

Memorandum memorializing April 17, 1997 telephone conversation between Commissioner Allred, Mitchell Samples, and Denise Brown and Ed Pancake.

Ex. 6 -

May 19, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder re: medical leave of absence.

Ex. 7 -

Physician's statement of Carlos Santiago, M.D., dated June 20, 1997.

Ex. 8 -

Memorandum from Jason Finkenbinder to Steven Allred with Sick Certificate, dated May 13, 1997.

Ex. 9 -

April 28, 1997 memorandum from Jason Finkenbinder to Commissioner Allred re: doctor's excuse, with attachments: Sick certificate, February 6, 1997; April 27, 1997 letter from Jason Finkenbinder to Commissioner Allred.

Ex. 10 -

Memorandum by Denise Brown re: telephone messages to and from Jason Finkenbinder on May 21 and 22, 1997.

Ex. 11 -

Memorandum by Denise Brown re: telephone call to Jason Finkenbinder on June 4, 1997.

Ex. 12 -

June 6, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder.

Ex. 13 -

October 2, 1997 letter from Robert Miller, General Counsel, to Jason Finkenbinder.

Ex. 14 -

July 31, 1997 letter from Christopher C. Quasebarth, General Counsel, to Jason Finkenbinder.

Ex. 15 -

June 25, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder.

Ex. 16 -

State of West Virginia Financial Information Management System Deposit Cover Sheet, dated September 8, 2000.

Ex. 17 -

February 20, 1997 letter from Steven A. Allred, Commissioner, to Jason Finkenbinder.

Grievant's Exhibits

Ex. 1 -

Employee Evaluation, dated January 15, 1997.

Ex. 2 -
July 3, 1997 letter from David A. Jividen, Esq., to Jason Finkenbinder;
June 12, 1997 letter from David A. Jividen, Esq., to Jason Finkenbinder;
June 20, 1997 memorandum from Patricia Finkenbinder to David Jividen, Esq.

Testimony

Labor presented the testimony of Denise Brown, Donna Bilyeu, and Steven Allred. Grievant testified in his own behalf.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts material to the resolution of this grievance.

1. Grievant sustained an injury to his back on February 6, 1997, while in the performance of his duties as a Compliance Officer. Grievant filed a Workers' Compensation claim for this injury on or about February 6, 1997. R. Ex. 1.

2. Since March 10, 1997, Grievant has been, and still is, under the care of Dr. Carlos Santiago.

3. On or about February 10, 1997, as a result of his on-the-job injury, Grievant was sent an "Election of Options" form.

4. The West Virginia Division of Personnel's policy on Workers' Compensation/Sick Leave provides that "[a]n employee absent from work due to a compensable work-related injury shall submit an Election of Option form to the agency payroll office within 3 working days from when a claim is filed. The form will designate whether TTD or sick leave benefits are preferred during the period of absence." R. Ex. 2 (emphasis added).

5. On February 20, 1997, Grievant was issued a written reprimand by Commissioner Allred for his failure to submit time sheets for the weeks of September 13, 1996; October 18, 1996, December 6, 1996; December 13, 1996; and December 20, 1996. Grievant had previously received a verbal warning about this from his supervisor, Buddy Compton. R. Ex. 17.

6. As of March 26, 1997, Grievant had not submitted the "Election of Options" form, and Commissioner Steven Allred sent him a letter that day reminding him of the need to submit that form. In addition, Commissioner Allred informed Grievant that he had been placed on sick leave and paid accordingly through March 14, 1997, in the absence of receipt of the Election of Options form. Further, the Commissioner informed Grievant that he needed to submit a physician's statement confirming the necessity for continued leave. Finally, Grievant was instructed to submit the time sheets that were previously due, as well as additional time sheets for the weeks of January 17, 24, and 31, 1997. The Commissioner explained to Grievant that it would be difficult to calculate his sick leave benefits without this data. Grievant was given until April 10, 1997, to comply with all of these requirements. R. Ex. 2.

7. Grievant provided an "Election of Option" form to the agency indicating he elected to receive sick leave benefits for the period he was absent from work, and that if he exhausted sick leave and annual leave, he elected to receive TTD benefits for any remaining period of absence from work. R. Ex. 3.

8. On April 11, 1997, Commissioner Allred wrote Grievant again asking for the time sheets and

activity reports referenced in his earlier March 26, 1997 letter. R. Ex. 3. 9. On April 17, 1997, a telephone conference was held between Commissioner Allred, Mitchell Samples, Denise Brown, and Edward Pancake, Esq., who indicated he was representing the Grievant. Mr. Pancake told the group that Grievant had previously submitted the time sheets, but that he would attempt to reconstruct them, but would need additional time to do so. Commissioner Allred advised Mr. Pancake of the status of Grievant's situation vis-a-vis the verbal and written warnings and directives he had been given regarding the time sheets. Commissioner Allred gave Grievant until April 25, 1997 to complete the time sheets, and Mr. Pancake indicated he would advise Grievant of this information. R. Ex. 5.

10. On April 21, 1997, Commissioner Allred wrote Grievant again regarding the time sheets, and confirmed that he had extended the time for Grievant to submit them until April 28, 1997. This letter informs Grievant that his failure to comply with the Commissioner's request constitutes insubordination, and should Grievant fail once again to comply with his directive, he will be dismissed from employment. R. Ex. 4.

11. On April 28, 1997, Grievant submitted the time sheets to Commissioner Allred, as well as a physician's statement from Dr. Santiago indicating Grievant "was under my professional care from 2/6/97-5/13/97 and was totally incapacitated during this time." R. Ex. 5.

12. On May 13, 1997, Grievant submitted a Sick Certificate from Dr. Santiago, indicating Grievant "was under my professional care from 5/13-6/13 and was totally incapacitated during this time." R. Ex. 8. 13. On May 19, 1997, Commissioner sent Grievant a letter indicating that he had used all of his accrued sick and annual leave as of April 21, 1997, and indicating Grievant now had the right to apply for a medical leave of absence. The letter set forth the Division of Personnel's Administrative Rule regarding medical leave, included a prescribed physician's statement form, and advised that form was the only one that would be accepted in the future in accordance with Division of Personnel policy. In addition, the letter advised Grievant that, upon receipt of his initial Workers' Compensation TTD check, he was to reimburse the agency the net value of sick/annual leave benefits he had been paid. R. Ex. 6.

14. On May 21, 1997, Grievant contacted Denise Brown in the Personnel/Payroll office for the dollar amount of leave benefits paid to him. She advised him the total amount was \$2,825.73 for leave. She also advised him he needed to pay his insurance premiums, due the 15th of each month. R. Ex. 10.

15. On June 4, 1997, Denise Brown, Mitchell Samples, and Commissioner Allred telephoned Grievant to remind him that he needed to request a medical leave of absence. Grievant indicated that since he was on Workers' Compensation, he did not think the medical leave policy applied to him. Ms. Brown advised him that it did, and he indicated he would have his attorney take care of it. R. Ex. 11.

16. On June 6, 1997, Commissioner Allred sent Grievant a letter confirming the telephone conversation of June 4th, and reiterating that Grievant needed to request a medical leave of absence, and that the "Sick Certificate" he had submitted from his physician was inadequate for this purpose. Commissioner Allred gave Grievant until June 23, 1997, to submit a request for medical leave, or return to work. Commissioner Allred also directed Grievant to contact him about establishing a mutually acceptable repayment method for reimbursement to the agency the amount of \$2,825.73. Commissioner Allred advised Grievant that he had not forwarded his insurance premiums, and that if his premium payments were not received by June 15, 1997, his insurance would be terminated. Finally, Commissioner Allred advised Grievant that if he did not submit a request for medical leave or return to work by June 23, 1997, he would consider Grievant to have abandoned his position. R. Ex. 12.

17. On June 20, 1997, Grievant's parents forwarded a physician's statement on the prescribed form from Dr. Santiago. The form indicated Grievant was unable to return to full duty employment, and that his period of incapacity was "indefinite." R. Ex. 7. On this same date, Grievant's parents corresponded with another attorney, David Jividen, about this matter, and sent him a copy of the Commissioner's June 6, 1997 letter giving Grievant until June 23, 1997, to respond to his inquiries or be dismissed. G. Ex. 2.

18. On June 25, 1997, Commissioner Allred wrote Grievant a letter dismissing him from employment effective July 10, 1997, as a result of insubordination. Specifically, the letter indicates Grievant failed to comply with the Commissioner's requests that Grievant request a medical leave of absence, or return to work, by June 23, 1997, and that Grievant failed to contact the Commissioner to establish a repayment plan for the amount of money due the agency.

19. On or about July 31, 1997, Grievant's parents sent a check in the amount of \$100.00 to the agency, offered as payment on the \$2,825.73 debt owed by Grievant. The check was returned by letter dated July 31, 1997, by Christopher C. Quasebarth, General Counsel, along with a draft

payment agreement. Mr. Quasebarth informed the Finkenbinders the agency could not accept the \$100.00 payment absent a signed payment agreement, and asked them to sign the agreement, and return it with the initial payment within seven (7) days. The letter also indicated the agency applied Grievant's additional accrued annual leave through the date of his termination to the balance due, thus reducing the payback amount to \$2,123.57. R. Ex. 14.

20. As noted in Finding of Fact Number 17, Grievant and his parents had conversations with attorney Jividen about his accident, and on June 20, 1997, faxed him a copy of the June 6, 1997 letter from the Commissioner giving Grievant until June 23, 1997 to respond to his inquiries, or face dismissal. Attorney Jividen did not respond to the Finkenbinders on this matter until July 3, 1997, after Grievant had been dismissed. G. Ex. 2.

DISCUSSION

Labor asserts that Grievant's failure to fully comply with its requests regarding application for medical leave and repayment constitutes insubordination warranting dismissal. Grievant denies he was insubordinate, and maintains that, due to his medical condition, and medications he was taking, he was unable to fully comprehend what was required of him by Labor. Additionally, due to his condition at the time, Grievant delegated some of his personal responsibilities to his parents, who attempted to comply with Labor's requests, but they were also unsure of what was needed, and indeed, contacted at least two different attorneys to aid them in this matter. In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89- D.V.-569 (Jan. 20, 1990). State employees, such as Grievant, who are in the classified service [\(See footnote 1\)](#) can only be dismissed for "cause", meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guide v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CARR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra. 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 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). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., 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. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). The employer can meet its burden 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. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995)(bus operator who substantiated her concerns over winter road conditions was found blameless in refusing to transport students).

Grievant's dismissal letter states he was dismissed for insubordination for failing to comply with Labor's directive to submit a request for a medical leave of absence, and for failure to contact the Commissioner to establish a payback plan for the monies owed to Labor as a result of Grievant receiving both sick leave and TTD benefits from Workers' Compensation.

The applicable sections of the West Virginia Division of Personnel's policies are as follows.

15.08

Leave of Absence Without Pay

(c)

Medical Leave

1.

An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:

a.

The employee (1) has exhausted all sick leave and makes application no later than fifteen (15) calendar days following the expiration of all sick leave or (2) has elected not to use sick leave for a work related injury and makes application no later than fifteen (15) calendar days following the date on which the employee filed a claim for Workers' Compensation.

b.

The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his/her duties and giving a tentative date for the employee's return to work;

c.

A prescribed physician's statement form is submitted every thirty (30) calendar days to confirm the necessity for continued leave; and

d.

The disability, as verified by a physician/practitioner on the prescribed physician's statement for, is not of such nature as to render the employee permanently unable to perform his/her duties.

15.9

Injury on the Job

(a)

In the event an employee is injured in the course of and resulting from covered employment, the employee may elect to receive either temporary total disability benefits from the Workers' Compensation

Fund or sick leave benefits, but not both. Employees may collect sick leave benefits and upon exhaustion of sick leave benefits, annual leave benefits until receiving temporary total disability benefits. If an employee has elected to receive temporary total disability benefits, upon receipt of the initial temporary total disability payment the employee shall pay or assign to his/her employer the net value of the sick and/or annual leave paid. Employees sick leave and, if used, annual leave shall be restored on a day-for-day basis which corresponds to the net value of the sick and/or annual leave paid. If the employee fails to pay or assign to the employer the net value of the sick and/or annual leave paid, then the employer shall deduct from the employee's subsequent wage payments an amount equal to the net value of the sick leave and/or annual leave paid. Upon payment of this amount the employer shall restore sick and/or annual leave previously paid.

R. Ex. 12. Both of these applicable provisions of the West Virginia Division of Personnel's policies were provided to Grievant through verbal and written communications.

There is no dispute that Commissioner Allred repeatedly directed Grievant to request in writing a medical leave of absence, and to contact him to establish a payback plan for the monies owed to Labor in accordance with Section 15.09, above. There is also no dispute that Grievant has not complied with these requests.

Grievant testified he was on medication during the time period at issue, and does not remember the telephone conversations he had with Denise Brown. He also testified he did not receive much of the correspondence sent to him, as it was addressed to his parents' address. Grievant lived with his parents at one point, but had moved to his own residence before the accident. Nevertheless, Grievant confirmed the return receipt requested cards for the letters were signed by his parents, indicating they had been received. Grievant testified his parents helped him with this situation, through drafting correspondence and communicating with his attorneys. Grievant lives with his girlfriend, and she was unwilling to help him with his correspondence, although she did author one communication with Labor on his behalf. Grievant's parents and girlfriend were not called to testify by either party.

Grievant's contention that he was physically and/or mentally incapable to comply with Commissioner Allred's repeated directions is not credible. While I do not doubt that Grievant was in severe pain and under strong medication for some portion of his absence from work, I do not believe that this condition continued throughout the entire period from February 1997, when the injury occurred, through June 1997, when Grievant was terminated.

As early as April 17, 1997, it is apparent that Grievant was able to function in some capacity. On

that date, Ed Pancake, an attorney, told Commissioner Allred, Mitchell Samples, and Denise Brown on the telephone that Grievant was in the process of reconstructing his time sheets for the dates in 1996 and 1997 which had been requested by the Commissioner. Grievant subsequently submitted those reconstructed time sheets to Labor. On May 21, 1997, Grievant telephoned Denise Brown and left a voice message asking for the dollar amount of the money he owed to the agency. She responded to him with a dollar amount, and also informed him that his insurance premiums needed to be paid. On June 4, 1997, Denise Brown again talked to Grievant by telephone about the medical leave of absence. Ms. Brown testified Grievant told her he did not know he had to submit a medical leave of absence as he was on Workers' Compensation, and she explained that he did. Grievant testified he told her he did not understand what was expected of him, and did not recall her telling him he had to request the medical leave of absence. Grievant was aware his parents were receiving correspondence from Labor, and they shared that correspondence with him. At no point in time did Grievant or his parents inform Labor that he had moved from his earlier residence. It is clear Grievant was able to telephone the agency as he did so on at least two occasions. Why Grievant did not do so when he was explicitly warned that failure to contact the agency would result in dismissal is a mystery, and the end result of this failure is very sad. However sad it may be, though, the fact remains that Grievant simply chose to ignore the directives of Commissioner Allred to contact him about these matters. That decision became a willful and intentional one at some point during Grievant's convalescence, even if it was not at the beginning. Grievant has proffered no credible excuse as to why he did not contact Commissioner Allred, and leaves me with the unavoidable conclusion that his inaction constituted insubordination.

CONCLUSIONS OF LAW

1. In disciplinary proceedings involving state employees, W. Va. Code § 29-6A- 6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89- D.V.-569 (Jan. 20, 1990).
2. State employees, such as Grievant, who are in the classified service ([See footnote 2](#)) can only be dismissed for "cause", meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of

Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guide v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

3. The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CARR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, *supra*.

4. 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).

5. 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).

6. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

7. 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. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

8. The employer can meet its burden 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. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995)(bus operator who substantiated her concerns over winter road conditions was found blameless in refusing to transport students).

9. Grievant failed to submit a written request for medical leave of absence in accordance with West Virginia Division of Personnel Policy.

10. Grievant failed to contact the agency to establish a payment plan for monies owed the

agency for sick leave benefits used while waiting for his TTD benefits from Workers' Compensation.

11. Commissioner Allred repeatedly directed Grievant to comply with West Virginia Division of Personnel and Workers' Compensation policies through written and verbal correspondence from February through June 1997.

12. Grievant failed to contact Commissioner Allred to discuss these matters. 13. Labor has proven by a preponderance of the evidence that Grievant's failure to contact Commissioner Allred, despite repeated directives, was willful and intentional, and thus constituted insubordination, warranting dismissal.

Accordingly, this grievance is **DENIED**.

Any party 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: November 16, 2000

[Footnote: 1](#)

"Classified service" is defined by W. Va. Code § 29-6-2(g) as "an employee whose job satisfies the definition for 'class' and 'classify' and who is covered under the civil service system[.]"

[Footnote: 2](#)

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