DOUGLAS FRANKLIN,

Grievant,

v. **DOCKET NO. 01-HEPC-445**

HIGHER EDUCATION POLICY COMMISSION/

MARSHALL UNIVERSITY BOARD OF GOVERNORS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Douglas Franklin after he was dismissed from his employment with Marshall University ("Marshall") for gross misconduct. The statement of grievance reads:

> That Marshall University violated Senate Bills 547, 653, 703 dealing with Higher Education; the policies and regulations that control the Higher Education Interim Governing Board; Federal EEO guidelines and the Marshall University Handbook. (See footnote 1) Specifically, The Physical Plant Dept. denied both vacation time and leave without pay in the case of Douglas W. Franklin, who was trying to continue his education by becoming eligible for an Internship with a local business by obtaining employment first. Marshall refused his requests with nebulous reasons. Indeed, the first reason was that he could not be spared from working at Marshall during Graduation Week. The second reason was his first line supervisor did not want him to be paid with his vacation time while he was earning a salary with the local business. This attitude is not one that should be allowed at Marshall. Numerous people have worked and continue to work second jobs to supplement their pay at Marshall. This is true for both Faculty and Classified Staff. Marshall's Physical Plant Dept. has allowed employees in the past to take vacation time off during Graduation Week and they have accommodated workers in the past, adjusting their work schedule to allow them to maintain their full benefits, work less hours and go to school. The Marshall University Physical Plant Dept. denied Mr. Franklin the same options. This is wrong. Instead of helping Mr. Franklin become a better employee by finishing his education, he was terminated for job abandonment by not calling in for three days. This action was the only course left open to Mr. Franklin because of Marshall's refusal to either grant vacation or leave without pay, as they had in the past.

Grievant sought as relief:

> Mr. Franklin seeks the restoration of his position and that allowances be made so that he can finish his education. He also will seek any lost wages that might occur during

this grievance procedure, plus the standard interest allowed by the Grievance Board and all seniority and benefit rights due him by this unfair and discriminatory action. (See footnote 2)

The dismissal letter states the reasons for dismissal as follows:

This is to inform you that you will be terminated from employment at Marshall University effective at close of business, Monday, May 14, 2001, due to gross misconduct arising from the following sources:

1. Abandonment of your job inasmuch as three working days elapsed during the period Wednesday, May 2, through Friday, May 4, 2001, during which there was no contact from you with regard to reporting to work, even though we do not believe you were providentially hindered from contacting us.

2. Insubordination in the matter of ignoring your obligation to report to work after elective annual leave was disapproved for your absences from work beginning on Monday, April 30, 2001. There are no reasons for your absence on these dates that are acceptable unless you were gravely injured or seriously ill or experienced other compelling circumstances that prevented you from reporting to work. You simply disobeyed the directions of your supervisor. It was additionally insubordinate because this leave occurred at commencement during which week elective leave is not allowed.

3. Violation of the University's rules with regard to outside employment by accepting other employment that conflicts with the working hours of your University job and for which you did not obtain the advance approval of the President.

4. Substantial misrepresentations to us about the facts surrounding whether or not your present situation is or is not a valid internship that would satisfy requirements of your academic program. From what we have been able to learn it is simply other full-time employment that might later provide an avenue toward an internship. The actual facts versus your representations make us unable to place trust in you any further.

The following formal Findings of Fact are properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant was employed by Marshall as a Campus Service Worker in Roads and Grounds in the Physical Plant Department. He was a full-time employee at Marshall for six years until his employment was terminated on May 14, 2001.

2. Sometime in April of 2001, Grievant spoke to Mike Farley, who supervises his daily work, about taking a leave of absence. Mr. Farley believed, based upon what Grievant told him, that the reason for the leave of absence was so he could participate in an internship which would further his education.

3. On April 20, 2001, Grievant verbally requested a leave of absence. On April 23, 2001, Grievant submitted a written request for leave of absence to Mr. Farley. It states:

> This is a written follow-up to the meeting and verbal request made to you on, or about, Friday, April 20, 2001. As you know, I have been enrolled in classes at Marshall over the past two years. Cisco Systems is my field of studies with a CCNA certification as an end goal. In this program, the fourth semester requires an internship. Because I am the only income earner in my household, I could not afford to leave this job in order to continue in the program.
>
> About two weeks ago, an internship was brought to my attention. I have applied for the position and have been granted two interviews. This opportunity would not only permit me to complete my Cisco program, but it would also provide the necessary income to sustain my family.
>
> In the employees' handbook there is a provision that allows a personal leave of absence up to 260 workdays. I am requesting a leave of absence for 130 workdays in order to participate in this program. I have 24 vacation days, which I would like to use to carry me through the end of May. The additional leave of absence days will allow me to accomplish my goal.
>
> I would appreciate your assistance in this matter.

4. Grievant had not yet completed the required third semester course in the Cisco Systems program, nor was he taking any courses in May 2001. In order to be eligible for an approved internship in the program, he had to be enrolled in the fourth semester course in the program, and he

had to apply for an internship through the program. Grievant had not applied for an internship through the program.

5. Dale Allman is Director of the Physical Plant. He met with Grievant and Charles Young, Interim Supervisor of Roads and Grounds, sometime in April, 2001. He told Grievant he did not have the authority to grant him an educational leave of absence, and that request would have to go through the President's office.

6. Grievant's request was for his vacation to begin April 30, 2001. April 30 through May 5, 2001, was commencement week. The Physical Plant has a policy that it does not allow its employees to take time off during commencement week. The reason for this policy is that the Physical Plant is asked to do many tasks during that week in preparation for graduation and needs all of its employees. One exception has been made to this policy for a female employee, Terry Thacker, whose son was graduating from a college in another state on the same day as Marshall's graduation. This occurred in 1993, under a different Physical Plant Director, the employee requested the leave in January of that year, and she was absent only graduation day. Mr. Young denied a request by an employee other than Grievant to take annual leave on Monday, April 30, 2001, based upon this policy.

7. Employees who are sick during commencement week are allowed to take time off. Two employees called in sick one day each during commencement week 2001, and were allowed to take sick leave. One employee called in sick three days during commencement week, and also on graduation day. He presented a doctor's excuse, and was allowed to take sick leave. 8. On April 24, 2001, Mr. Young sent a memorandum to Mr. Allman, stating that Grievant had on April 20, 2001, asked for a leave of absence and 25 vacation days, to begin on April 30, 2001. The memorandum stated that the purpose of the leave “is for an internship to complete his educational requirements.” He noted that he had denied the vacation request due to the “no vacation during commencement week” policy, but he could reverse his decision if Mr. Allman felt the leave of absence would be approved. However, he went on to state that he did not think it would be a good practice to let an employee take such leave for several reasons, noting that the grounds department would be short a person during the height of the grounds maintenance season, and that he was concerned it would open the door for other employees to take a leave of absence so they could try out another job to see whether they liked it.

9. On April 24 or 25, 2001, Mr. Young called Gary Carpenter at Applied Card Systems to verify the internship. Mr. Carpenter told Mr. Young that all the internships were filled, and Grievant had not been offered an internship; rather, Grievant had been offered full-time employment in the maintenance department, which could help him to get an internship when one became available. Mr. Young then sent a memorandum to Dale Osborne, Assistant Director of the Physical Plant, relaying this information. He stated he believed Grievant had mislead him about the internship, he was denying Grievant's request to take vacation time during commencement week, and he recommended the leave of absence be denied.

10. It is not a requirement that an individual be employed by Applied Card Systems in order to land an internship with the company.

11. Grievant was advised that his request for leave during commencement week was denied.

12. On April 27, 2001, Grievant met with Jim Stephens, Marshall's Director of Human Resource Services. Mr. Stephens concluded that there was no basis for a leaveof absence. Grievant told him he had to report to Applied Card Systems the week of April 30 through May 4, 2001, for orientation, and the following week he was assigned to work a 12:00 p.m. to 9:00 p.m. shift. Grievant then inquired about reducing his work hours to part-time. Mr. Stephens told him this was possible, but the department probably would not want to do this because of the need for a full-time employee, and the potential difficulty in getting the position restored to full-time.

13. It is the policy in the Physical Plant Department that employees must request leave two weeks in advance. Employees who need to take sick leave or emergency leave are to call the front desk and their supervisor to report this on the day the leave is taken. Emergency leave is leave requested without the required two weeks notice, due to some unforeseen, unavoidable circumstance, such as car trouble.

14. Grievant did not report to work at Marshall during commencement week 2001. He called in on Monday, April 30, 2001, and Tuesday, May 1, 2001, and left a message that he would not be at work due to personal challenges. Grievant did not report to work from Wednesday, May 2, through Friday, May 4, 2001, and he did not call in to report that he would not be at work on any of those days. Physical Plant employees are also required to work graduation day. Grievant did not report to work on graduation day, May 5, 2001, nor did he call in.

15. On Monday, May 7, 2001, Grievant reported to work shortly after 8:00 a.m. He was not in

uniform. He handed Mr. Young and Mr. Farley a letter asking that his hours be reduced to 25 hours a week, from 6:00 a.m. to 11:00 a.m., Monday through Friday. Mr. Young told him that a suspension was in progress. Grievant left. Grievant reported to work on Tuesday, May 8, 2001, in uniform. Mr. Young called Mr. Osborne, who brought him a letter suspending Grievant until further notice. Mr. Young gave the letter to Grievant, and Grievant left. 16. Grievant reported to work at Applied Card Systems on April 30, 2001, and worked at that job from 8:00 a.m. to 5:00 p.m. He was paid by Applied Card Systems for this time. He worked at Applied Card Systems during the day for the rest of the week. He did not work at Applied Card Systems on Saturday, May 5, 2001. Grievant reported to work at Applied Card Systems on Monday, May 7, 2001, at 11:56 a.m., and worked until 9:05 p.m. He worked at Applied Card Systems on Tuesday, May 8, 2001, from 11:55 a.m. until 9:29 p.m.

17. On May 14, 2001, Mr. Allman terminated Grievant's employment for gross misconduct arising from job abandonment, insubordination, violation of Marshall's rules regarding outside employment by accepting other employment which conflicted with his work hours at Marshall and in failing to obtain the President's approval of the outside employment, and substantial misrepresentation of the facts.

18. One employee, Tammy Matthews, who was a custodian at Marshall, was allowed to work part-time for nine months so she could complete her education. Charlie Brown was the supervisor of the custodians at Marshall. She was enrolled at Southern West Virginia Community and Technical College at the time.

19. There are approximately 55 custodians employed in the Physical Plant Department at Marshall. The Physical Plant employs approximately 17 people in Roads and Grounds.

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 § 18-29-6. Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997). Grievant does not dispute that his request for leave for the week of April 30 through May 5, 2001, was denied; that he failed to call in to report that he would not be at work on May 2, 3, 4, and 5, 2001; and that hefailed to report to work the entire week. Grievant argues Marshall discriminated against him by refusing to allow him to take his annual leave during this week, and seems to believe that he

was justified in not calling in because he was frustrated. Grievant denies that he accepted employment with Applied Card Systems, stating he intended to report only the week of April 30 through May 4, 2001, for orientation, and then he was going to delay his employment with that company. Grievant also denied that he had told his supervisors he would be working as an intern, stating he said it was an opportunity.

Marshall's Classified Staff Handbook states:

> Any employee who is absent from duty for three consecutive work days, without proper notification to or authorization by the supervisor, shall be considered to have resigned his or her position.

The Handbook also provides that such an absence is job abandonment, and is grounds for suspension or dismissal. Grievant missed work for three consecutive work days without proper notification to or authorization by his supervisor.

Grievant was also charged with insubordination for his failure to report to work. 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.).

"'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 to respect 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 citationsomitted]." Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). "An 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. (June 29, 1998).

Respondent has demonstrated Grievant was insubordinate. Grievant was told he could not take time off during commencement week. He did not like this answer, so he just did not report to work anyway for five days, in addition to graduation day itself.

In addition, Grievant violated Marshall's policy on outside employment, found in the Classified Staff Handbook. The policy states:

> Your position at Marshall University is expected to be your primary source of employment if you are a regular full-time employee. Outside employment is allowed as long as you adhere to the following guidelines: The hours of outside employment shall not coincide or conflict with University scheduled work. Outside employment shall not conflict with your University job responsibilities of affect your ability to meet expectations in a University position. If you are involved in other employment, you should submit a letter to the president disclosing your additional employment.

This policy leaves no doubt that Grievant's primary employment responsibility was to Marshall. Grievant, however, accepted another job which conflicted with his work hours at Marshall, and then expected Marshall to accommodate the work hours of his other place of employment. Under these circumstances, outside employment is not allowed by the policy.

The policy does not require Marshall employees to disclose their outside employment to the president as is stated in the dismissal letter. The policy only says this should be done. However, Grievant not only failed to disclose his outside employment, he made material misrepresentations about it to his employer in an effort to obtain a leave of absence. Grievant denied he had misrepresented his employment with Applied Card Systems as an internship, stating he had told Mr. Farley and Mr. Young that this was an opportunity. He stated he never said “it's a lock.” Grievant also denied that he had accepted employment with Applied Card Systems which conflicted with his employment at Marshall, stating he intended only to go through orientation and then somehow postpone his employment. It is necessary to assess Grievant's credibility.

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, Docket No. 97-BOT-011 (Aug. 29, 1997).

The undersigned does not find Grievant's testimony to be credible. Grievant's testimony is completely at odds with his written request for a leave of absence. The written request states, “an internship was brought to my attention. I have applied for the position and have been granted two interviews. This opportunity would not only permit me to complete my Cisco program, but it would also provide the necessary income to sustain my family.” The only normal reading of this is that Grievant had applied for an internship position. No where in this request does Grievant mention that he would be working in maintenance at Applied Card Systems until an internship was available. Grievant also testified he had completed three semesters of the Cisco program. Grievant's third semester instructor testified he had given Grievant an incomplete for the third semester. There was no suggestion that this instructor had any reason to fabricate this.

Grievant testified that Mr. Stephens had told him, “that is the policy that you have five days of unexcused absence. He said, 'I don't think they would suspend you or you'd get fired for it. You'd probably have some kind of reprimand that you would have to deal with.'” Grievant had also written in his written request for part-time employment that Mr. Stephens had “suggested I request a work schedule of twenty-five (25) a week.” Mr. Stephens' testimony was that Grievant had asked about part-time employment, and he had told him how to apply for it, but he had told him it was discretionary, and a department was not likely to agree to it. To characterize Mr. Stephens' statements to Grievant as a suggestion that he make application for part-time employment misrepresents the facts. Likewise, the undersigned does not believe Mr. Stephens told Grievant he would only be reprimanded if he did not show up for work during commencement week. First, Marshall does not have a policy which allows an employee five unexcused absences. The Physical Plant has a policy which allows an employee five days of sick leave during a period of one year “without a verifiable reason.” Further, the undersigned cannot imagine that the Director of Human Resource Services told Grievant that such a policy existed, or that if he simply did not come to work during commencement week, after his request for leave was denied by his supervisor, that he would likely get “some kind of reprimand.” Mr. Stephens' testimony demonstrated that he is cautious in his

statements.

Finally, Grievant's testimony that he was intending to not work at Applied Card Systems after the orientation week is bogus. Grievant had applied to take his 24 days of vacation and a leave of absence so he could work at Applied Card Systems. He showed up at Marshall on the Monday of the week following orientation not in uniform, and handedMr. Young a letter asking to reduce his employment to part-time, ending his work at 11:00 a.m. each day. He then reported to work at Applied Card Systems at noon, which was when his employment at Applied Card Systems was scheduled to begin each day. When asked how he was going to delay his employment at Applied Card Systems, he was unable or unwilling to provide an adequate explanation.

Respondent has proven the charge of gross misconduct. Grievant did not report to work and did not notify anyone that he would not be at work for three consecutive days. Grievant's frustration does not represent a valid excuse for his failure to notify his employer that he would not be there, nor does it excuse his insubordination. An employer has a right to expect that its employees will be at work, and that its employees will take measures to notify the employer when they cannot report to work. If an employee cannot be counted on to report to work as required, then the employee need not be retained. In this case, Marshall needed all of its employees in Grievant's department during commencement week, and Grievant's supervisors made this crystal clear to him. Grievant made a choice to attend orientation at his other place of employment, rather than fulfill his obligations to Marshall, and to accept employment which conflicted with his work hours at Marshall. Further, it is quite understandable that Marshall would no longer trust Grievant after his material misrepresentations to his supervisors about his outside employment.

Grievant argued he had been discriminated against because other employees had been allowed to take time off during commencement week, work part-time while taking classes, and work at other jobs. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the

> other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant is not similarly situated to the employee who was granted leave in 1993 on graduation day. She requested the leave four months in advance for a special event in her family's life which could not be postponed. Grievant requested leave only a few weeks before commencement, so that he could start another job because he had decided this was a good opportunity for him. The two events bear no resemblance whatsoever to each other. Even if Grievant had been discriminated against, however, it would not justify his actions.

Grievant likewise is not similarly situated to employees who become ill during commencement week and cannot report to work. These employees obviously would not be able to perform their duties. There was no evidence that any employee who had called in sick was not, in fact, sick.

Grievant is not similarly situated to the employee who was allowed to work part-time so she could take classes. Grievant was not completing course work, he was working at another job. Further, he was not a custodian, he was a roads and grounds employee. There are many more custodians than roads and grounds employees, their duties are substantially different from those of Grievant, and Grievant was requesting reduced hours heading into the busiest time of the year for roads and grounds employees. Finally, Grievant's claim of discrimination in regard to other Marshall employees having other jobs is difficult to discern. There was no indication that any other Marshall employee had accepted a second job with work hours that conflicted with his Marshall work hours and gotten Marshall's blessing. While other employees may well work at another job when they use their Marshall vacation days, Grievant's request for vacation during commencement week was denied because of the Physical Plant policy which precludes this. Grievant has not demonstrated that any other Physical Plant employee was granted vacation time during commencement week so they

could go work at another job.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a preponderance of the evidence. W. Va. Code § 18-29-6. Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).

2. Respondent proved the charges against Grievant, and had good cause for dismissing Grievant for gross misconduct.

3. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant did not demonstrate he was treated differently than any other similarly situated employee.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 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

Dated: December 18, 2001

Footnote: 1

Grievant did not identify how Marshall had violated any of these policies, bills, regulations, or guidelines, or the Marshall Handbook, or exactly what he believed was violated. Accordingly, these allegations cannot be addressed.

Footnote: 2

The record does not reflect what occurred at Level I. A Level II hearing was held on July 3, 2001, and a decision denying the grievance was issued on July 9, 2001. Grievant bypassed Level III, appealing the Level II decision to Level IV on July 18, 2001. A Level IV hearing was held on October 18, 2001. Grievant was represented at Level IV by Terrence E. Olson, and Respondent was represented by Kristi A. McWhirter, Esquire. This matter became mature for decision upon receipt of the last of the parties' written arguments on November 27, 2001.