DEVENDRA MISRA,

Grievant,

v. **Docket No. 01-HEPC-535**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Devendra Misra, employed by West Virginia University (WVU or Respondent) as a Food Service Lead Worker, filed a level one grievance on January 10, 2001, regarding his demotion to Food Service Worker, effective the same day. Grievant alleges the action was in violation of an unspecified WVU Disciplinary Procedure, and requests to have two counseling letters, a warning letter, and the demotion letters removed from his personnel file, reinstatement as Lead Worker, back pay, and benefits. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, and advanced his claim to level four on October 12, 2001. A level four hearing was conducted on December 3, 2001, at which time Grievant appeared pro se, and WVU was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The matter became mature for decision upon receipt of final post hearing filings on January 15, 2002.

The following facts derived from the record developed at levels two and four are undisputed, and may be set forth as formal Findings of Fact.

Findings of Fact

1. Grievant has been employed by Respondent as a Food Service Worker in the Dining Services Department since 1993.

2. In August 2000, Grievant was promoted to a Lead Food Service Worker position at McCoys, a fast food establishment located in the Mountainlair. 3. Grievant began a two-week training period on August 7, 2000. During this time, prior to the arrival of students, Grievant was assigned a new duty each day. For example, on day one he was taught to make submarine sandwiches, the next day he learned to use the cash register, and the third day, to do reconciliations on the register.

4. Following a verbal counseling session on September 1, 2000, Peggy Walden, Manager of

Dining Services Cash Operations, issued Grievant a counseling letter on September 5, 2000, after a Temporary Food Service Worker alleged that Grievant had grabbed her shoulder and yelled at her, causing her to feel intimidated and threatened. Grievant was advised that he had handled the situation improperly, and that it was inappropriate to ever place his hands on an employee. Grievant was also provided a copy of WVU's policy on Workplace Violence.

5. On September 6, 2000, Ms. Walden and David Friend, Assistant Director for Catering and Cash Operations, conducted a counseling session with Grievant at which time Ms. Walden noted that Grievant continued to have problems reconciling the cash register, and making sure McCoys was ready for closing before he left at night. Grievant was provided with a list of 24 items to be checked during a walk through at the end of each night shift, and written instructions on how to reconcile a cash drawer and close the cash register. Additionally, Grievant was given the following “Plan for Improvement”:

The following areas must be improved upon to satisfy job expectations:

1. Follow the procedures received for reconciliation of all deposits for McCoys. Reports should be done in a timely and accurate manner. This procedure should take approximately 15 minutes. The a.m. drawer should be counted and deposited by 1:45 p.m. The p.m. report should be completed by and deposit made by 8:00 p.m.

2. Implement the guidelines for processing credit card transactions as provided.

3. Train and develop student workers to expedite guests quicker. The current level of service for customers is too slow.

4. Implement the closing procedures as outlined in the Walk Through training document for McCoys.

Improvement in these areas are [sic] expected immediately. An assessment of these current deficiencies will be reviewed again in two weeks. At this time, a decision will be made in regards to your current position at McCoys.

6. Grievant was on sick leave from September 15 - 24, 2000, but was given a follow-up letter for the September 6, 2000, counseling session, dated September 15, 2000, upon his return.

7. Ms. Walden issued Grievant a “First Letter of Warning” dated September 29, 2000, and

received by Grievant on October 4, 2000. Ms. Walden noted that no improvement had been demonstrated in Grievant's performance, and cited a number of incidents which had occurred since September 7, 2000, including:

- On September 7 Grievant took the cash register off without taking the charge machine off. The cashier rang up a charge sale, unaware that the job had not been properly completed, resulting in both the cash bags and charge slips being inaccurate that day. - Also on September 7, Grievant reported a problem in counting the cash drawer, stating that he had counted it five times and couldn't find the error. Ms. Walden found a $100 bill mixed in with the $20 bills.

- September 8, Grievant made errors three times in a row on the charge machine, and was having trouble with the cash register, causing the customer line to become so bottlenecked that Ms. Walden replaced him on the register. That night when he took the charge machine off, he did not wait until the report was completed causing the cash office to be unable to complete their report that day. - September 8, Grievant failed to refrigerate cheese as directed by Ms. Walden, to be in compliance with the County Health Department food code, causing a loss of the product. It was also noted by Ms. Walden that she had frequently found items in the merchandiser which were brown, crusty, overcooked, or did not look fresh, after advising Grievant that the most important element in a successful cash operation is the freshness of the products being sold.

- September 11, Grievant set the cash register up wrong by punching in $3.00 as the starting post instead of $300, and failed to correct the matter, causing a problem for the cash office.

- Grievant repeatedly kept the student workers past their quitting time, causing extra labor cost for McCoys.

- Complaints were filed by co-workers stating that Grievant treated them disrespectfully.

8. By memorandum dated October 12, 2000, Mr. Friend requested that the Human Resources Department remove the First Letter of Warning placed in Grievant's personnel file, based upon his “recently demonstrated ... ability to address numerous areas cited in this document.” Consistent with WVU policy that letters of warning remain in an employee's file for one year, the letter was not removed from Grievant's file.

9. Grievant responded in writing to the counseling sessions, plan of improvement, and letter of warning, but did not file a grievance for any of them.

10. Ms. Walden issued “An Intent to Demote” letter on November 17, 2000, citing Grievant'

unsatisfactory performance. Specifically, Ms. Walden cited loss of food products which were not properly processed, problems with reconciling the cash register, refusal to follow directions regarding use of equipment, and failure to complete proper sanitation procedures in cleaning the floors and equipment. 11. Because Grievant was on personal leave from the end of November through January 3, 2001, he was given until January 9, 2001, at 2:00 p.m. to demonstrate why he should not be demoted.

12. Grievant was demoted to Food Service Worker effective January 9, 2001.

Discussion

The employer bears the burden of proving the charges in this case 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). Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000). 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. Dept. 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 asserts that it properly demoted Grievant who had not satisfactorily performed the duties of a Lead Worker, and had failed to demonstrate consistent or adequate improvement after two counseling sessions, a plan of improvement, and a letter of warning. Grievant argues that he should not be demoted because he was not adequately trained, and that many of the reasons for his dismissal were inaccurate or incorrect. The WVU “Disciplinary Procedure” provides a number of disciplinary measures which might be taken, including demotion which:

occurs when an employee is voluntarily or involuntarily moved to a vacant position in a lower pay grade than his/her former position for disciplinary reasons. Demotion may occur when an employee unsatisfactorily performs on the job, however, can satisfactorily accomplish the responsibilities of a vacant position within the control, and at the discretionary approval, of the supervisor or higher administrative authority. . . .

Respondent has proven, with Grievant's own admission, that he experienced ongoing problems

with the cash register, kept students working past their scheduled hours, and did not maintain some food products in the manner described by Ms. Walden. Grievant explains each of these situations stating it was the result of inadequate training, that the students had to stay until the work was done, and that he had told one of the workers to “take care of” the cheese. He assumed the food had been properly stored because “that is what help is meant for.” Grievant also noted that he is short of stature and could not see when the food on the top shelves of the merchandiser was no longer attractive.

Grievant denies that he treated the employees at McCoys with a lack of respect. Addressing the incident in which he allegedly grabbed the shoulder and yelled at an employee, Grievant explained that he had mistakenly given her and another employee an order for an Italian turkey sandwich, instead of an Italian chicken sandwich. When the workers were laughing (because they had known a few Italian turkeys) he thought they were making fun of him, and he merely placed his hand on the shoulder of one of the employees and told her that making fun of him was no way to teach him. In response to another complaint that he had said, “she's just an old lady,” in reference to anotheremployee, Grievant stated that it was simply an explanation of why the employee had reacted a certain way, and was not meant in a derogatory manner. Grievant does concede, however, that he demonstrated a lack of cooperation and failed to follow the directions and instructions given to him by other employees, because he wanted to be trained by “professionals,” not another Lead Worker or Food Service Workers.

This situation has clearly been unfortunate for both parties. Grievant expressed a desire to advance to a higher level job, and was granted that opportunity. However, the Lead Worker position in a fast food establishment was much different from the duties of a cook in a dormitory which Grievant had previously held. Grievant indicated that he was not given two weeks of training because the first week he worked at McCoys as a cook. That is true only regarding the classification he held during that week. The purpose of his being assigned to McCoys beginning August 7, 2001, was to train him, including in the food preparation. Grievant also states that he was not given training comparable to that of other Lead Workers, but fails to establish what training others received. Further, Grievant was not receptive to the training which was provided because he did not want to be trained by his peers or employees in a lower classification. It also appears that Grievant may have overestimated the actual amount of authority he was to exercise as a Lead Worker.

At the same time, Respondent had an obligation to efficiently operate as a fast food business on campus. This responsibility did not allow for extensive remedial training or ongoing disciplinary measures being imposed on a Lead Worker. Therefore, while Grievant may feel that he was not given a fair chance to succeed, the facts establish that he was given training and a plan of improvement, but was unable to perform satisfactorilyin the position of Lead Worker. Since his work as a Food Service Worker had been acceptable, a demotion to that position was correctly made by Respondent.

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. The employer bears the burden of proving the charges in this matter 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). Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000).

2. Respondent has proven by a preponderance of the evidence that Grievant was unable or unwilling to perform in the position of Lead Worker, and that it properly demoted him to Food Service Worker, a position he previously held.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and 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: February 26, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE