JOY BUTTS,

Grievant,

v. **Docket No. 01-HE-100R**

HIGHER EDUCATION INTERIM GOVERNING

BOARD/SHEPHERD COLLEGE,

Respondent.

D E C I S I O N on R E M A N D

Grievant, Joy Butts, Associate Professor of Developmental Mathematics in the Community and Technical College ("CTC"), originally filed this grievance against her employer, Shepherd College ("Shepherd"), on February 26, 2001. Her Statement of Grievance and Relief Sought read:

> **On February 12, 2001, I received a memorandum/letter dated February 12, 2001, alleging that I have been "insubordinate" and other falsehoods of a libelous and defamatory nature and alleging to be a "direct warning" memo/"warning letter" therein. These allegations are misrepresented, malicious, invalid, inaccurate, and unwarranted, and I hereby request as relief that this memorandum/letter be rescinded; that this document and attachment and any and all references to either be removed from my permanent employee personnel file; that such malicious, harassing, discriminatory, and retaliatory treatment toward me immediately cease and desist; and that I, in any and every other way be restored to wholeness and normal faculty employee working conditions, rights, privileges, securities, benefits, opportunities, and responsibilities as per Shepherd College Faculty Handbook and related official documents published at campus, state, and federal levels pertinent to public education and employment.**

This case went through the lower levels of the grievance procedure, and a Level IV decision denying the grievance was issued on October 31, 2001. (See footnote 1)

Procedural History

This case is currently before the undersigned by remand order of the Circuit Court of Jefferson County. Butts v. Higher Educ. Interim Governing Bd./Shepherd College, Civil Action No. 01-C-315 (Sept. 4, 2002). Judge Steptoe, who rendered the circuit court decision, remanded the case to the Grievance Board to apply the West Virginia Supreme Court of

Appeals definition and test on insubordination from Butts v. Higher Education Interim Governing Board/Shepherd College, 569 S.E.2d 456 (W. Va. 2002)(per curiam)(Butts I).

Judge Steptoe noted the West Virginia Supreme Court of Appeals had not issued its Decision at the time the instant grievance was decided. Judge Steptoe sustained the undersigned Administrative Law Judge's rulings on the Findings of Fact, over Grievant's objections. Judge Steptoe also concluded, over Grievant's objections, that the credibility determinations of the undersigned Administrative Law Judge should not be set aside.

On September 9, 2002, the Grievance Board received the remand order from the circuit court. Failing to hear from the parties, the undersigned Administrative Law Judge wrote to them on October 9, 2002, informing them that if they wished to submit arguments on the issue, they should be postmarked by October 30, 2002. Respondent mailed its proposals on October 30, 2002, and they were received on October 31, 2002. On October 30, 2002, Grievant's attorney also wrote to the Grievance Board, and this letter was received on November 1, 2002. Grievant's attorney requested a new hearing for the taking of evidence, especially the testimony of Grievant's supervisor. The focus of this request was a prior grievance relating to grades, and the need for some "latitude in treating [Grievant's] supervisor with suspicion" and given Grievant's understandings, "[Grievant] was within her rights to treat [the supervisor] as a person who intended to wrong her." Since the directions of the circuit court were to apply the new standard to the already accepted facts and decisions of credibility, the undersigned Administrative Law Judge denied Grievant's request. However, Grievant was given until November 14, 2002, to file her arguments, with reply briefs due November 21, 2002, upon which date this case became mature for decision.

(See footnote 2)

Accordingly, the only issue to be addressed on remand is the application of the insubordination definition and test specified by the West Virginia Supreme Court of Appeals in Butts I, to the previously identified facts and findings.

Issues and Arguments

Respondent argues the written reprimand was justified because of Grievant's insubordinate behavior and gross misconduct. Respondent alleges Grievant acted improperly

in front of her students and failed to show respect and/or common courtesy to her supervisor. Respondent pointed out the written reprimand was only issued after Mr. Alan Perdue, Shepherd's counsel, had conducted an investigation.

Grievant asserts she was not insubordinate, but was, in fact, treated improperly by her supervisor in front of her students. She points to the differences in her supervisor's account of the events, and the accounts as reported by student witnesses and herself. She alleges this written reprimand is a part of a continuing pattern of retaliation for the filing of prior grievances. At one time, Grievant was terminated, and found to have been wrongfully discharged. Respondent was ordered to return Grievant to work, and after a time period did so. Since that time, Grievant believes she has been continually harassed. Grievant also notes she files approximately three to four grievances per year. Grievant also asserted her supervisor's, Ms. Cameron, credibility should be called into question.

For clarity in understanding the ruling on remand, the prior Findings of Fact are set out below. (See footnote 3)

Findings of Fact

1. In the Spring of 2000, a family member and the Shepherd College Foundation created the Hendricks Scholarship to honor a former long-term faculty member, who is now deceased. This scholarship would be the first one ever developed for Academic Foundation ("ACFN") students, (See footnote 4) and the faculty was proud of this stipend. Discussions about this scholarship were held during faculty and department meetings.

2. This scholarship was properly created following all the necessary guidelines and regulations.

3. Grievant does not attend faculty and/or department meetings, and had little, to no, knowledge about this scholarship.

4. Shortly prior to January 24, 2001, Ms. Cameron, Coordinator of Developmental Mathematics and Grievant's immediate supervisor, informed the faculty she would be visiting classrooms to introduce herself, explain procedures for student placement, and explain the purpose of the study center. This is her routine practice at the beginning of a semester. Ms. Cameron also planned to present information about the new scholarship. 5. Ms.

Cameron attended Grievant's first two morning classes on January 24, 2001, without incident. Grievant explained at Level IV that she informed the students of Ms. Cameron's misleading and inaccurate information after Ms. Cameron had left the room during the second class.

6. Ms. Cameron came to Grievant's third class of the day to make the same announcements. After these announcements, she called Grievant out into the hall to hand her a sealed envelope addressed to Grievant. Grievant refused this letter and stated it was Ms. Cameron's letter, not hers. Grievant threw the letter on the floor. Ms. Cameron picked the letter up and eventually placed the letter on the podium in the classroom. It is unclear whether Grievant ever took the letter.

7. Grievant believed Shepherd was required, pursuant to an Order of Administrative Law Judge Sue Keller, to deliver her mail to only one place and was not allowed to hand-deliver any mail. This belief is incorrect, and no such Order exists. At one time, Grievant and Shepherd had reached a tentative settlement agreement in another grievance, which would have given Grievant a mail box in the building she had requested. This agreement did not indicate Grievant could not be given mail in any other manner or at any other place. This settlement agreement was never signed, and the grievance was eventually dismissed by Administrative Law Judge Keller, due in part, to Grievant's failure to respond to the mail from her representative, the Grievance Board, and Respondent. (See footnote 5) 8. As Ms. Cameron was leaving, Grievant told the class Ms. Cameron's information was misleading and inaccurate, and they should check their Handbooks and catalogs. (See footnote 6)

9. Ms. Cameron returned to the room and indicated Grievant was incorrect, and if the students had any questions about the scholarship they should contact Monica Lingenfelter in the Shepherd College Foundation Office. Grievant continued to indicate that Ms. Cameron was wrong and was giving the students misinformation.

10. Both Ms. Cameron and Grievant were upset and agitated during this exchange. Both raised their voices, but neither of them was screaming.

11. Ms. Cameron left the room again and Grievant continued to inform the students Ms. Cameron was incorrect in the information she had given about the scholarship. Ms. Cameron attempted to return to the room, but Grievant shut the door and locked it. Grievant did not slam the door.

12. The students were not aware that Ms. Cameron is Grievant's supervisor, and that this status gives Ms. Cameron certain responsibilities when it comes to Grievant's behavior and statements. (See footnote 7)

13. Ms. Cameron complained about Grievant's behavior to her supervisor. She was directed to write up her account of the incident. 14. Ms. Cameron's account exaggerates Grievant's negative behavior, and plays down her response. This is not to say that Ms. Cameron's account of the basic events was incorrect.

15. After receiving Ms. Cameron's account of the incident, Shepherd decided to investigate the incident, and Shepherd's counsel, Mr. Perdue, contacted several students asking opened-ended questions to find out their view of the events of January 24, 2001. (See footnote 8)

16. While varying, these student accounts agree Grievant refused to accept the letter, and that Grievant stated Ms. Cameron's information was misleading, inaccurate, or a misrepresentation. (See footnote 9) Grievant agrees she told the students Ms. Cameron's information was misleading and inaccurate. (See footnote 10) 17. After reviewing the results of the investigation, Grievant's supervisors agreed action should be taken. On February 12, 2001, Grievant received a written reprimand signed by Provost Peter Checkovich and Dr. Howard Seiler, Grievant's second level supervisor. This written reprimand found Grievant had been insubordinate, and she had engaged in gross misconduct. The written reprimand stated:

> Our first concern is that you were insubordinate toward Ms. Cameron in refusing to accept a memorandum from her that was in a sealed envelope. You demonstrated this insubordination in the presence and view of the students who were in attendance for the class, which compounds the problem because it puts the entire institution in a "bad light". This memo will serve as a direct warning that your pattern of insubordinate conduct is unacceptable, it has been repetitious in spite of repeated warnings, and a failure to eliminate your insubordinate conduct, beginning immediately, will result in termination of employment.
>
> This conduct was followed by an even worse episode, with which we are very greatly concerned. When Ms. Cameron attempted to describe the *Hendricks Scholarship* to the class, you argued with her, in front of the class, and then contradicted her explanations. You accused her of making misrepresentations to the class, and you advised the class that the scholarship that Ms. Cameron had described was ILLEGAL, making illusions to problems that developed with the athletics department in the past.

> **Your position on this was totally incorrect. Your statements to the students were a disservice to them and put both the College and the Shepherd College Foundation in a "bad light". We consider this to be gross misconduct.**
>
> **Had you attended at least an occasional departmental meeting, you would have a clearer understanding of the Hendricks Scholarship and you would have been welcome to voice any concerns about its processes. However, in front of the students was not the place for you to initiate such a discussion. You have now impugned the integrity of not only Ms. Cameron, but also the ACFN staff and the hard-working and devoted staff and volunteer support of the Shepherd College Foundation.**
>
> ___
>
> **Generally, the gross extent of this gross misconduct would prompt a complete review of the propriety of continuing your employment. However, inasmuch as you are a tenured member of the Community and Technical College faculty, we are prepared to create one last opportunity for your conduct to improve.**
>
> **The confusion you have created for the students needs to be rectified. We enclose with this warning letter a memorandum from Provost Peter Checkovich to the students of the 2:10 p.m. class. On Wednesday, February 14, 2001, Dr. Seiler will attend the beginning of the class and you will read Dr. Checkovich's memorandum to the class in his presence. Should you fail to conduct class that day or should student attendance be unusually low, for whatever reason, this procedure will be followed and/or repeated on the following scheduled meeting of the class.**
>
> **Again we emphasize that you are formally warned of the gravity of your misconduct and the full scope of action which may include termination of employment if you continue to demonstrate insubordinate conduct.**

(Emphasis in the original.)

18. Grievant responded to this written reprimand with a letter dated February 13, 2001.

This letter stated:

> **I do not concur with the validity or the accuracy of statements published in your February 12, 2001 memorandum/letter to me. I believe independent investigation without the spin will find the contents of your February 12 memo to be sorely lacking in truth and in completeness in many instances. In fact, your joint memo presents a false and misleading slant written only with your own self-interests in mind. As you know, some minds are like concrete _ thoroughly mixed up but permanently set.**

Because I am unclear as the purpose or significance of the memo in light of the manner and timing of its delivery to my classroom in Stutzman - Slonaker Hall on the morning of February 12 by Howard Seiler, the verbal threats made by the two of you in the May 5, 2000, "ambushing" incident at that building, (See footnote 11) and the numerous reported disruptions to my mathematics instructional environment over the past semesters by Cameron and Seiler, I am delivering this note directly to both of you along with a short list of business axioms to begin your joint study:

If you cannot do these little things right for Shepherd College, how then can you do the bigger things right.

It is difficult to run a large-scale business organization with small-scale minds.

Too many people given a small taste of authority immediately overeat.

If you believe a clean car runs better, you might try applying the same standard to your business conduct.

Whitewashing the pump will not purify the water.

What "decisions" are we making here? On what basis? (See footnote 12)

19. On Wednesday, February 14, 2001, Grievant read the memo from Dr. Checkovich. This memo noted Grievant had made several remarks which contradicted Ms. Cameron and were ill-considered. The memo went on to say the scholarship was proper, legal, and a benefit to students.

20. Grievant then read her written reprimand to the class. No clear explanation for this action was given. Several of the students, who testified for Grievant at the Level IV hearing, believed she was required to read this written reprimand, and they found this requirement embarrassing to Grievant.

Discussion

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

Per the directions of the circuit court, the identified behavior of Grievant must be assessed in light of the West Virginia Supreme Court of Appeals' definition and test for insubordination detailed in Butts I. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . an administrative superior." Id. "[F]or there to be 'insubordination,' the followingmust be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Id. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. Id. If an employer's policy forbids certain conduct, an order which directs an employee to engage in the banned conduct, is an unreasonable and/or invalid order. Id. In Butts I, the administrative law judge and the circuit court "suggested" the reason for Grievant's failure to comply with a direct order may have been based on a good faith belief. Id.

"[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Id. Failure to act must be based on "a good faith belief." Id.

In Butts I, the West Virginia Supreme Court of Appeals found "there was a factual basis for [Grievant's] alleged belief that the order was unreasonable, and where there is evidence that [Grievant] refused to obey in the belief the order was unreasonable, the [Court] believes that the act of [Grievant] in refusing to obey the supervisor's order was not contumacious and did not constitute the type of 'wilful' refusal to obey which is inherent in the definition of 'insubordination.'" In Butts I, the West Virginia Supreme Court of Appeals found Grievant's refusal to obey her supervisor's order, based on a good faith belief that the order violated a law, regulation, or policy, was not a wilful refusal to obey and was not insubordination. Id.

In applying the law stated above, the undersigned Administrative Law Judge finds Grievant's conduct in this case was insubordinate. Grievant's supervisor attempted to hand-deliver a business letter to Grievant. As previously noted, Grievant frequently doesnot respond in a timely manner to letters mailed to her. See Butts v. Higher Educ. Interim Governing Bd./Shepherd College, Docket No. 01-HE-021 (Oct. 31, 2001) and Finding of Fact 7.

Grievant refused the letter and stated it was not hers. This letter was clearly addressed to Grievant. Grievant then threw the letter on the floor. Further, Grievant admitted she would not accept the letter. A supervisor has the right to direct an employee to accept mail that is given them during the course of business. This is a reasonable order and a valid expectation. While the accepting of business mail, hand-delivered to an employee, may not be a written order, it is clearly an accepted expectation for which no employer would think a written rule was necessary.

Grievant attempted to excuse her behavior by stating there was a Grievance Board Order specifying she could only receive her mail in one way. This belief was incorrect, and a review of the evidence calls into question how Grievant could have this belief. This belief could not have been a good faith one as found in Butts I, and was obviously not based on any policy. The reason the attempted settlement, which would have given Grievant a mail box in a certain place, was not resolved and the grievance dismissed was because Grievant failed to respond

to her representative, Respondent, and Administrative Law Judge Sue Keller assigned to the case about the settlement agreement. See Finding of Fact 7.

Additionally, Grievant did not just refuse the letter, she said it was not hers and threw it on the floor. This conduct was contumacious, or "wilfully stubborn," and exhibited "a contempt for authority, rather than a legitimate disagreement." Black's Law Dictionary176 (5d ed. 1983). This type of behavior reminds the undersigned Administrative Law Judge of the actions of a small child, not a tenured professor.

Since Judge Steptoe did not direct the undersigned Administrative Law Judge to address the issues of willful neglect of duty and mitigation, they will not be considered, and the findings and discussions on those issues will stand.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

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

2. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . an administrative superior." Butts v. Higher Educ. Interim Governing Bd./Shepherd College, 569 S.E.2d 456 (W. Va. 2002)(per curiam)(Butts I).

3. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Id. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. Id.

4. If an employer's policy forbids certain conduct, an order which directs an employee to engage in the banned conduct, is an unreasonable order and/or invalid order. Id.

5. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Id. Failure to act must be based on "a good faith belief." Id.

6. Respondent has demonstrated Grievant was insubordinate pursuant to the definition and test as set out in Butts I.

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 Jefferson County. Any such appeal must be filed within thirty (30) daysof 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 6, 2002

Footnote: 1

Grievant was represented by Attorney Larry Schultz, and Respondent was represented by Assistant Attorney General Kristi McWhirter.

Footnote: 2

Grievant's attorney did not submit a brief.

Footnote: 3

The credibility discussion from the Level IV Decision is noted in note 10.

Footnote: 4

ACFN students take remedial or developmental courses to prepare them for college courses.

Footnote: 5

Grievant testified she did not have copies of any of this correspondence and the tentative settlement agreement. It is unclear what happened to these documents as Grievant was sent multiple copies of this information.

Footnote: 6

Grievant had called a couple of faculty members after the first class, and they told her it was unusual for scholarship announcements to be made during instructional time. Later, on January 25, 2001, Grievant called Financial Aid, and was told it was incorrect to make scholarship announcements during class time. These individuals were not called to testify.

Footnote: 7

Grievant testified she had several discussions with students both after class and in her office following this incident. Multiple issues were discussed.

Footnote: 8

Mr. Perdue testified about the responses of the students, and his contemporaneous notes were admitted into evidence.

Footnote: 9

Many students, both those interviewed by Mr. Perdue and those testifying at the Level IV hearing, did not see the letter. This may very well be because a portion of this exchange took place in the hallway outside the classroom.

Footnote: 10

As stated in the prior Level IV Decision's discussion on credibility, the testimony of Grievant and Ms. Cameron differed drastically. Both said the other was rude, loud, and out of control. The undersigned

Administrative Law Judge found the truth was somewhere in the middle of the two accounts. Both were upset and agitated, and both raised their voices. What was clear from both accounts was Grievant refused the letter, and she contradicted statements made by Ms. Cameron about the scholarship, in front of the students. It is also clear Grievant lacked knowledge about the scholarship, and did not possess sufficient data to declare that Ms. Cameron's information was misleading and inaccurate.

As for throwing the letter, the undersigned Administrative Law Judge found Grievant did throw the letter. The majority of the witnesses do not remember seeing the letter until Ms. Cameron brought it into the room from out in the hall where Grievant refused it. One student reported seeing Grievant throw the letter, and it is difficult to believe a student could make up this specific story from whole cloth. Additionally, Grievant did not say she did not throw the letter, she said, "I don't remember throwing the letter."

The student witnesses presented by Grievant found Ms. Cameron to be rude andunprofessional and believed Grievant was just presenting another side of the story. They were also unaware Ms. Cameron was Grievant's supervisor, and as such had a right and duty to correct her errors. The undersigned Administrative Law Judge found it was entirely possible Ms. Cameron was not the most pleasant person when Grievant contradicted her about an important subject in front of the students, especially, when she knew Grievant had little to no knowledge about the subject, and the information given to the students by Grievant could cause them not to apply for this scholarship. However, the undersigned Administrative Law Judge, specifically, did not find Ms. Cameron was "screaming" and "out of control."

The hearing testimony of one of Grievant's witnesses was called into serious question, as the information she gave to Mr. Perdue differed drastically from her testimony at Level IV. Interestingly, this witness said her memory of the event was better, six months later, than when she was interviewed by Mr. Perdue, a few days after the incident.

Footnote: 11

This statement was not explained.

Footnote: 12

These statements were not explained.