PATRICIA CARMAN,

Grievant,

v. DOCKET NO. 01-HEPC-578

HIGHER EDUCATION POLICY COMMISSION/
MARSHALL UNIVERSITY BOARD OF GOVERNORS,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Patricia Carman, contesting her five day suspension without pay by Marshall University ("Marshall"). As relief she sought to have the suspension rescinded, back pay for the five days, and an apology from Dr. James Harless, and Kay Hesson, with a copy of the apologies sent to Dr. Barbara Tarter. Grievant amended the relief sought at the Level IV hearing, stating she was no longer seeking an apology. (See footnote 1)

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

Findings of Fact

1. Grievant has been employed by Marshall for 15 years. She is a Program Assistant I in the Admissions Office.

2. Kay Hesson, Office Administrator for the Admissions Office, became Grievant's supervisor in January 2000. Grievant had previously worked for Linda Templeton, Director of Orientation.

3. Grievant was suspended for five days without pay by Dr. James Harless, Director of Admissions, on August 20, 2001, for insubordination and poor work performance. The act of insubordination is described in the suspension letter as “advice to the work-study students with regard to resolving issues of their assignments, and your subsequent actions of going directly to

supervision above your own." The poor work performance is not further identified.

4. Since being moved to Ms. Hesson's supervision, Grievant has worked in the reception area of the Admissions Office. Her duties under Ms. Hesson were to assist in answering the telephone, assist in opening the mail for the office, make sure the mail was properly distributed, help schedule appointments for Dr. Harless, provide information to students about receiving credit for military service, assist students with CLEP test information and set up tests, provide general information to students about admissions, direct students to appropriate staff, assemble undergraduate applications, take and maintain minutes of PBST Team, check work-study time cards, proofread, order supplies and prepare encumbrances and purchase orders, request equipment maintenance, assist with mailings and open house programs, type correspondence and forms, and maintain files. Dr. Harless and Ms. Hesson put Grievant's job duties in writing on more than one occasion, and they spoke with her about her job duties, explaining to her that she no longer had orientation duties. Nonetheless, Grievant maintained she had orientation duties which took priority over the duties assigned to her by Ms. Hesson, and on more than oneoccasion told Ms. Hesson she did not have time to do the work Ms. Hesson would assign to her.

5. Although Ms. Hesson did not believe Grievant was performing her assigned duties, and spoke with Dr. Harless about this several times, Ms. Hesson did not complete a performance evaluation on Grievant for the calendar year 2000. She completed a performance evaluation on Grievant for the calendar year 2001, but it has not been finalized, as Ms. Hesson is awaiting the outcome of this grievance.

6. In August of 2001, Ms. Hesson and Dr. Harless decided the Admissions Office would use graduate assistants to work in the office, rather than work-study students. Grievant did not supervise any work-study students, she was not involved in making the decision, and she was not informed of this decision. The students were informed of this decision. The work-study students would be moved to another office.

7. After the work-study students were informed of this decision, Grievant brought a work-study student to Ms. Hesson's office, telling Ms. Hesson the student wanted to know why she was not being brought back to the Admissions Office. Ms. Hesson excused Grievant and explained the decision to use graduate assistants to the student.

8. Shortly thereafter, Grievant called Dr. Barbara Tarter, Dean of Enrollment Management, told

her she had a student complaint, and asked if she could bring a student to her office, by-passing Ms. Hesson and Dr. Harless, who were out of the office at the time. It was the same student she had accompanied to Ms. Hesson's office. She took the student to Dr. Tarter's office. Grievant told Dr. Tarter she did not think it was right that this student had been dismissed from the Admissions Office.

9. On August 15, 2001, Grievant sent an e-mail to Linda Templeton in which she stated one of the former Admissions Office work-study students who had been assigned to the Library had called in, and was very upset about the reassignment. Grievant stated in the e-mail that she knew she "should not be interfering in this matter, but Dr. Harless mentioned that he thought that both Work Study and G.A.s were going to be used in the office." She stated she thought it was terrible that the work-study students were being treated this way, and hoped Ms. Templeton would side with the work-studies if she spoke with Dr. Harless about them. She concluded the e-mail by stating that the work-study student would be calling back the next afternoon to see if anything had changed.

10. On August 17, 2001, Grievant forwarded her August 15, 2001 e-mail to Dr. Tarter, adding the following:

> I am extremely irate about this matter. About 5 minutes ago, in a closed door session in Kay Hesson's office, Jessie Estep was told that Admissions was not hiring any Work Study students, even the ones who have been working in the office for several years. The other day when I talked to Dr. Harless about this, he told me that he was under the impression that Work Study students and G.A.s were going to be working in the office. In other words, Kay Hesson has done it again - - making decisions over Dr. Harless' head. No one was informed about this, especially the students. I want to know what is going on!!!
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> I am going to lunch now. If you need to talk to me about this, I will be available any time. It is very sad when the Director of Admissions' supervisor is an Office Administrator. I am making this my business.

11. Grievant had previously been told by Dr. Harless and Ms. Hesson that it was not her responsibility to intervene on behalf of the work-study students, that she was not to get involved in office hiring practices or supervision of work-study students, to focus on her job duties, and that she needed to follow proper procedures in the office.

12. On November 10, 2000, Grievant received a written warning for unprofessional conduct in the office after she had thrown a calculator. Grievant did not grieve the written warning.

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 apreponderance of the evidence. Latassa v. Bd. of Trustees, Docket No. 96-BOT-477 (July 24, 1997).

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.). However, “[t]his Grievance Board has previously noted that insubordination 'encompasses more than an explicit order and subsequent refusal to carry it out.'” Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

"'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 citations omitted]." 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).

Grievant denied she went over her supervisor's head to Dr. Tarter. She testified she did not interfere with the work-studies, and was just trying to get an answer to theirquestions. She stated she felt she should have been informed of the decision to use graduate assistants. She stated she always referred the work-study students to Ms. Hesson. She testified she never felt she “was insubordinate jumping over people's heads. I tried to go to the people in order and if the person didn't happen to be there and I felt it was a pressing matter I would go to the next person or someone I thought would

know the answer. And people do that in the office all of the time when their supervisors aren't there. I'm not trying to make an excuse but that's what I feel really has happened, insubordination. I think it's just some confusion." She stated, "I've never tried to go over anybody's head. I mean, if it seemed like that to somebody it's not been the case. I've been trying - - I just try to give the right information to people and sometimes if I have to make a phone call - - if I don't know the answer I just try - - I want to get an answer to somebody. I've always done that." She testified that the day she took the work-study student to Dr. Tarter's office, the student worked another job and needed to let her supervisor know within an hour what her schedule would be.

Grievant's statements make her action of going to Dr. Tarter sound innocent enough. However, Grievant's actions at the time, most particularly the e-mails she sent to Ms. Templeton and Dr. Tarter which are described in the Findings of Fact, contradict her testimony at the hearing. Grievant's explanation of this incident at the Level III and Level IV hearings is not credible. Respondent has proven Grievant was knowingly and intentionally defiant of authority when she took the work-study student to Dr. Tarter, and when she sent her the e-mail challenging the decision of her supervisors not to use work- study students, and berating her supervisors to Dr. Tarter.

The charge of poor work performance was not clearly identified. Further, it is apparent from the testimony that Ms. Hesson has believed Grievant's work performance has been poor since she began supervising her, as several of the incidents she described occurred in 2000. Nonetheless, Ms. Hesson did not complete a performance evaluationfor Grievant for the calendar year 2000, which would have put Grievant on notice that she was not performing her work in a satisfactory manner. Thus, under normal circumstances, this charge would not be sustained. However, the testimony offered makes it clear that Grievant knowingly and intentionally refused to do the work assigned to her by Ms. Hesson, at any point, which is unacceptable.

Grievant testified she had never had a clear job description, and it was never made clear to her at what point she no longer worked for Ms. Templeton. She testified Ms. Templeton would bring her work to do, and she thought Ms. Templeton, Ms. Hesson, and Dr. Harless had worked this out. She testified it was very confusing at times when she had a lot to do, and she did not know what took priority. She stated she did not know that her work performance was considered inadequate, and thought she had been doing a good job, that she was never told otherwise.

Grievant denied that she had ever told Ms. Hesson she was too busy to complete an assignment

she had given her. She testified she had always performed any proofreading assignment given to her, while Ms. Hesson pointed to an instance in June 2000 in which she had assigned Grievant proofreading to do while Ms. Hesson was on vacation, and when she returned, Grievant had not completed the assignment and Ms. Hesson completed it herself. Grievant further stated she was never properly trained to perform her job duties. However, she also stated she had a lot of work to do, and “felt it was common courtesy sometimes to ask if, you know, 'Can you do this,' and a lot of times I couldn't stop what I was doing.”

Grievant denied other specific accusations, which need not be detailed. However, many of her denials are contradicted by written memoranda authored by Grievant, which make it abundantly clear that Grievant's denials are not credible. One of the best examples is Grievant's denial that she had watched what time staff came to work. However, Grievant sent a memorandum to Dr. Harless dated September 27, 2000, which stated:

> Kay is certainly no role model for the students. She is constantly late. She didn't come in until 8:30 on Wednesday, September 13 (just one example). I know because Joe Dragovich was in the office looking for her and then saw her unlocking her door. I thought all employees were supposed to be in the office at 8 A.M. every day. I am in the office every day before 8 A.M. (unless I am ill or have car trouble - - then I always call in). The folks back in the Records area are always here on time. I think it would be a good idea to put a time clock in the office (like Financial Aid) to crack down on certain people who are always late and seem to take very long lunches every day. I'm tired of taking messages for Kay when she's late. I'm only the back-up. I've got other things to do. I've worked at Marshall as long as Kay has. I seem to be doing more without an upgrade and Kay does less after she got an upgrade! When the students are sick or going to be late, they call in. But they are supposed to call Kay and she is not in when they call! They then call me because they know I am always there. Where is their supervisor? It would be nice if she would let me know when she's going to be late since I'm out front. If she leaves you a message, I don't know until you get in. And Jill is retiring soon. Does Kay always notify you when she's going to be late? Who verifies her hours? And who verifies the students' hours when Kay isn't here?
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> . . .
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> Also, Kay left around 12:30 last Thursday, was out all day on Friday, and on Monday. I don't believe she was out sick. I need to be informed about when people in the office are going to be out. Does Kay always put her requests in writing? If not, why the double-standard? If one person in the office has to put a request in writing, then why not everybody?

In that same memorandum, Grievant referred to herself as “the only full-time Orientation

employee that Linda has," even though Ms. Templeton had not been her supervisor since January of that year. She further complained that Ms. Hesson was giving her work to do when she could do it herself, and stated she wanted her to stop, that it was ridiculous. She stated Ms. Hesson "needs to stop chit-chatting and go back to her office and do some work." She concluded the memorandum by stating, "I hope I have given you a few things to think about, Dr. Harless. Do you not realize what goes on when you are not here? I see no point in discussing these things with you. I just wanted to let you know about them." It is surprising that Grievant did not receive a suspension earlier.

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, Docket No. 96-BOT-477 (July 24, 1997).

2. 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.). However, "[t]his Grievance Board has previously noted that insubordination 'encompasses more than an explicit order and subsequent refusal to carry it out.'" Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

3. "'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 citations omitted]." 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). 4. Respondent proved the charges against Grievant.

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: March 8, 2002

Footnote: 1

This grievance was filed on August 29, 2001, and was denied at Level I on September 5, 2001. Grievant appealed to Level II, and a decision denying the grievance at that level was issued on September 18, 2001. Grievant appealed to Level III, where a hearing was held on October 29, 2001. The grievance was denied at Level III on November 1, 2001, and Grievant appealed to Level IV on November 13, 2001. A Level IV hearing was held on January 16, 2002. Grievant represented herself, and Respondent was represented by Jendonnae L. Houdyschell, Esquire. This grievance became mature for decision upon receipt of Respondent's written argument on February 15, 2002.