WILLIAM J. RAINEY,

Grievant,

v. Docket No. 04-ADMN-174

DEPARTMENT OF ADMINISTRATION/
PUBLIC EMPLOYEES INSURANCE AGENCY,

Respondent.

DECISION

William J. Rainey ("Grievant") initiated this proceeding at level two on October 23, 2003, challenging a five-day suspension without pay. As relief, Grievant seeks rescission of the suspension, along with a request that his superiors be directed to "cease and to refrain from further retaliatory and discriminatory actions." (See footnote 1) The grievance was denied at level two on November 3, 2003. A level three hearing was conducted on March 22, 2004, and the grievance was denied in a decision dated April 27, 2004. (See footnote 2) After a level four hearing was scheduled, the parties elected to submit this matter for a decision based upon the lower level record, accompanied by fact/law proposals submitted by July 30, 2004. In order to expedite the decision in this matter, the grievance was reassigned to the undersigned administrative law judge on August 12, 2004. Upon a review of the record, it was discovered that the level three exhibits had been omitted, and they were receivedby the undersigned on August 24, 2004, at which time this grievance became mature for consideration.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Public Employees Insurance Agency ("PEIA") as a Public Information Specialist II since approximately November of 2000.

2. Grievant's primary job duties are to write and edit PEIA newsletters and to manage PEIA's website.

3. Jan Long is Communications Manager for PEIA and Grievant's immediate supervisor. All articles Grievant submits for the newsletters must be submitted to Ms. Long for her approval prior to final admission.

4. On August 11, 2001, Grievant received a written reprimand for failing to complete his newsletter assignments prior to leaving for a two-day vacation. Ms. Long had met with Grievant a few days prior to his vacation to go over the information which needed to be included in various articles for the newsletter. Just prior to leaving, Grievant emailed the articles to Ms. Long, who discovered that only five of them had been completed and seven had been left for her to complete. He was advised this was an unacceptable level of performance.

5. Grievant received another written reprimand on August 18, 2001, for his failure to keep the website information up to date. The website had several areas of information which were months out of date. Ms. Long advised Grievant that he could notallow the website information to be incorrect and out of date, and that it must be maintained by him on a daily basis.

6. Grievant was placed on a Corrective Action Plan ("CAP") in April of 2002 in order to improve his job performance. Specific instructions were included in the CAP regarding Grievant's duties, including:

> **Newsletter development--Including specific schedules, article lists, how article ideas are to be developed, and Grievant's responsibility to write all articles.**
>
> **Website maintenance--instructions for Grievant to check the website daily for functionality and weekly for content, along with making sure all outdated content is removed.**
>
> **Topics for monthly issue posters were to be developed by Grievant to be discussed with other staff members, and the posters were to be printed and distributed each month.**

> **Grievant was to develop "life event packets" to be submitted to management for review by May 1, 2002, and to be ready for printing by July 1, 2002.**
>
> **Grievant was to report all extraneous work assigned by other staff to Ms. Long at time of the assignment.**
>
> **Report all absences at least 24 hours in advance, or as soon as possible.**

Clear all speaking engagements with Ms. Long prior to acceptance.

Take additional training in PageMaker and CorelDraw within 3 months.

Take a refresher course in writing/grammar within 3 months.

7. Grievant was advised in the April, 2002, CAP that failure to comply would result in progressive discipline, up to and including termination. 8. Grievant was sent to the United Way campaign as a "loaned executive" (See footnote 3) **from September 2002 through the end of that year. When he returned in January of 2003, Ms. Long met with Grievant again regarding the CAP and what the expectations would be regarding his performance.**

9. Grievant was suspended in April of 2003 for 14 days without pay, due to inadequate job performance in various areas, including newsletter development, website maintenance, monthly issue posters, life event packets, failures to report absences and other assigned work, failure to take training, and attendance issues. This suspension was rescinded at level two of the grievance procedure by Administration Director Tom Susman, who stated in his decision dated April 18, 2003:

> **The action taken in this decision should not be taken as an approval of your work performance. There are many shortcomings which we must address. This personnel action is a grant of an additional opportunity for you to improve your work performance in the areas which have previously been outlined to you. In that light, please meet with your immediate supervisor and the Deputy Director of Operations, Mike Adkins, upon your return to work Monday to discuss revision of your previously issue [sic] Improvement Plan and steps to address your work's deficiencies.**

10. In April of 2003, Grievant requested accommodation under the Americans with

Disabilities Act ("ADA") for his problems with cluster headaches and migraine headaches. (See footnote 4) In response, Grievant's work space was moved away from the kitchen andodors which aggravated his headaches, lighting was changed in his work area, and a new non-glare screen was placed on his computer.

11. Grievant's performance in the various areas covered by the CAP did not improve between April and October of 2003.

12. By letter dated October 9, 2003, Grievant was suspended for five days without pay for his continued work deficiencies. The letter stated that Ms. Long had met with Grievant on June 27, 2003, to discuss revised deadlines for the matters contained in the CAP and Grievant's progress. Despite this, along with two review meetings in July and two in September, many of the tasks in the plan had not been completed, including:

Deadlines for the current issue of the newsletter had not been met.

The website still contained incorrect information, and Grievant was not meeting the requirement that he send Ms. Long weekly emails regarding the website status.

Grievant had not taken CorelDraw training or a writing and grammar course. He had just taken the PageMaker training on October 7, 2003.

No monthly issue posters had been developed since early spring.

Despite numerous reminders, Grievant had still not completed the life event packets.

In a meeting with Ms. Long and Mike Adkins on September 25, Grievant was advised that he must complete work on the life events packets, along with two other projects, or his annual leave request for the following day would not be approved. Grievant performed some work on the packets that afternoon, but Ms. Long advised Grievant of deficiencies which needed to be corrected. Grievant left for the day without completing the assignment, and took leave the following day without approval. Grievant did not meet the October 1 deadline for completing the packets.

Grievant took sick leave the week of September 29 through October 3, due to a radioactive iodine treatment for an enlarged thyroid. Grievant advised his supervisors that, due to his radioactive state, he was to be confined to home and have no contact with other people for that week. Despite this,Grievant attended rehearsal for a local theater production on October 1, and performed in the play on October 2, 3, and 4.

13. Grievant's articles submitted to Ms. Long for the newsletter have often been "lifted" from other sources, including previous newsletters. His work has also often included inaccurate or inadequate information, which has to be corrected by Ms. Long.

14. Both Grievant and Ms. Long admit that they have a personality conflict and have trouble getting along with one another.

15. Grievant admits that he has not completed many of the tasks contained in the CAP, and has stated that he has been "beaten into confusion and inactivity." He testified that, just prior to the suspension, he had stopped putting forward his best effort. He feels that he is a "whipping boy" for Ms. Long, who has done nothing but criticize his work. Grievant believes that he is one-third of the problem, and that his superiors share the remainder of the responsibility for his performance failures.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 29-6A-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 oftestifying[; 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).

Although not specifically labeled as such, it appears that Grievant has been disciplined for insubordination, specifically with regard to his failure to comply with the requirements set forth in the CAP. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudentemployee complies first and expresses his disagreement later. Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

The evidence of record indicates that there is an unfortunate personality conflict between Grievant and his supervisor, Ms. Long, which has led to general disruption in the operations of the communications department of PEIA. While Grievant's superiors have provided extremely detailed examples of his failure to improve his performance, Grievant has countered with his own plethora of examples of Ms. Long's failure to attend meetings, great lengths of time spent on personal phone calls, and various actions on her part which allegedly delayed Grievant's projects.

While Grievant has admitted some of his shortcomings, such as “overlooking” the requirement to take some of the required training and dragging his feet with regard to the life event packets, he blames most of his failures on the “abusive” and “hostile” actions of his

superiors, chiefly Ms. Long. He contends that meetings were set on short notice when he could not attend, such as when he had scheduled medical appointments, and that he emailed Ms. Long regarding a writing course offered by the Division of Personnel and received no response approving it. Nevertheless, Grievant has failed to explain his failure to perform in other areas addressed by the CAP, such as the failure to keep the website information up to date and development of topics for the monthly issue posters.

While the undersigned is not completely convinced that Ms. Long is without responsibility with regard to some of Grievant's performance issues, it is abundantly clear that Grievant has consistently failed to improve his performance, even with specific instructions contained in a CAP that had been in place for over a year and a half. While Grievant seems to have an explanation for most of his failures--which are usually someoneelse's fault, the fact remains that he allowed several projects to languish for over a year and did not comply with specific directives of his superiors. As noted in Marty v. W. Va. Dep't of Administration, Docket No. 02-ADMN-055 (July 1, 2003), an employee's continuous “failure to take responsibility for [his] mistakes, and insistence on blaming others, only serves to exacerbate [the] situation, and prohibits [him] from reflecting on [his] work habits in a constructive way in order to improve them.” Grievant has been insubordinate in his behavior at work through his continued failure to improve the specific areas contained in the CAP, along with his repeated attempts to blame Ms. Long for his shortcomings.

Throughout this proceeding, Grievant has made some references to harassment and retaliation on the part of his superiors, so those issues will be addressed. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra. Grievant has, in fact, established a prima facie case of reprisal, in that he filed a grievance regarding his previous suspension in 2002, and he has been subjected to continued admonishments regarding his performance since that time. However, Respondent has more than justified its actions as legitimate, in that Grievant continued to fail to improve his performance under the CAP, which had been discussed with him and modified after the 2002 suspension.

W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” In this case, Grievant's evidence does not prove that he has been subjected to harassment. As Ms. Long explained, the actions taken by her and Grievant's other superiors have been necessitated by his repeated failures to perform as directed. A supervisors repetition of directives and instructions under these circumstances does not constitute harassment.

Consistent with the foregoing, the following conclusions of law are made.

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 § 29-6A-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).

2. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

3. Respondent has proven by a preponderance of the evidence that Grievant has been insubordinate through his failure to comply with the Corrective Action Plan which had been in place since 2002.

4. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

5. Although Grievant established a prima facie case of reprisal, Respondent has provided legitimate, non-retaliatory justifications for its treatment of Grievant.

6. Grievant has failed to establish that he has been subjected to "repeated or continued disturbance, irritation, or annoyance . . . which would be contrary to the demeanor expected by law, policy and profession" in order to prove harassment. See W. Va. Code § 29-6A-2(l).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealingparty 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: September 3, 2004

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant had also requested that his performance evaluation of October 30, 2003, be stricken, along with a request that his pay be increased to that of other individuals in his classification. These matters were not addressed at level three, so they are deemed to have been abandoned by Grievant; accordingly, they will not be addressed further.

Footnote: 2

Grievant represented himself, and Respondent was represented by counsel, Heather A. Connolly.

Footnote: 3

Although not explained in any detail in the record, it appears that Grievant maintained his employment with PEIA during his work for the United Way and must have been allowed to take a leave of absence from his position.

Footnote: 4

Grievant was apparently missing a lot of work due to his headaches and complaining that the headaches hindered his work performance.