MICHAEL MASSARO,

Grievant,

v v.

Docket No. 04-ADMN-070

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Grievant, Michael Massaro, was employed by the General Services Division ("GSD") within the Department of Administration. He filed this grievance about his termination on February 17, 2004. His Statement of Grievance reads, "My statement was taken out of context (can explain better)." Relief Sought by Grievant is "Reinstatement of employment."

As the grievance was a termination, it was filed directly to Level IV. A Level IV hearing was held on April 2, 2004. This case became mature for decision on April 22, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1) This grievance was expedited because it was a dismissal.

Issues and Arguments

Respondent maintains it has met its burden of proof and established Grievant's termination on February 21, 2004, for attempted theft was appropriate. Grievant asserts he was not going to steal the object in question, but was going to lock it up in a building and turn it in the following Monday. (See footnote 2) After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by GSD on the evening shift to ensure the buildings within the Capitol Complex were secure and to perform any routine maintenance that was needed during that time.

2. On Friday, January 30, 2004, around 10:15 p.m., Grievant found a black leather briefcase in the vend-a-teria. (See footnote 3) He unzipped the case and found a laptop computer inside. He believed someone who took a computer course in the building had left it by mistake.

3. Grievant picked up the case and took it and his cloth lunch bag with him as he made his final rounds. While on these last rounds, Grievant placed these bags behind an air-conditioning unit at 10:27 p.m. The temperature outside was approximately 5 degrees.

4. A security guard in the main complex saw this behavior on one of the surveillance cameras and thought it looked suspicious. He drove to the air-conditioning unit and found the briefcase with the laptop in it, and saw it was marked as property of the State Department of Education. The security guard took the briefcase back to his office, and called his supervisor, Sgt. Randall Mayhew.

5. At 11:21 p.m., the security guard also observed Grievant going past the unit with a co-worker at the end of his shift. Grievant glanced quickly behind the unit as he passed. 6. At 12:22 a.m. on January 31, 2004, Grievant returned to the unit in a different vehicle than the one he left in, retrieved the lunch bag, and drove away. (See footnote 4)

7. When Grievant arrived to work on Monday, February 2, 2004, he was told to go home and return the following morning.

8. Sgt. Mayhew called the State Board of Education to check on the computer and found out it had been turned into surplus property in 1993, it had no hard drive and was seen as worthless. (See footnote 5) At the time Grievant had possession of the briefcase, he did not know it was worthless. Surplused computers are frequently stored in the basement of Building 6. Resp. No. 1.

9. On Tuesday, February 3, 2004, Grievant met with David Pentz, the Director of GSD, Sgt. Mayhew, and Bill Thaxton, the Assistant Director of GSD. At that time Grievant admitted he had taken the briefcase, knew it was wrong, and was willing to pay the consequences. Resp. No. 1. Mr. Pentz indicated Grievant would be transferred and demoted, and he was

again sent home to report to work the following day.

10. On February 4, 2004, Grievant talked with James Burgess, Deputy Director of GSD by phone. Grievant apologized for his behavior, admitted he took the computer, and said he had been drinking, but stated he thought he could eventually receive the computer as unclaimed or salvage property if no one claimed it. Mr. Burgess informed Grievant he was terminated effective immediately. The letter confirming this action wasdated February 5, 2004, and signed by Tom Susman, Acting Cabinet Secretary. Jt. No. 1. The certified termination letter was returned as unclaimed.

11. On February 11, 2004, Grievant responded to Secretary Susman's letter and attempted to explain his view of the events of January 30, 2004. He admitted he had been drinking heavily for some time, considered himself an alcoholic, and had been drinking during his work hours on January 30, 2004. Grievant also stated he had been drinking the day he talked to Director Pentz. Grievant stated he was drinking "the night I did what I did" and "what I did was out of charter of [sic] me."

12. At hearing when asked about checking on the computer at the end of his shift, Grievant stated he saw it was gone and thought to himself, "someone beat . . . someone took it."

13. During the Underwood administration, it was possible for employees to fill out a form called the "Salvage Request Form" to request State-owned items typically tossed in the dumpster for their personal use. Grievant received a vacuum he found in the trash through this process. **(See footnote 6)** **This "Salvage Request Form" is not used now and has not been used for approximately three years. Grt. No. 1.**

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 § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generallyrequires 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 & 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.

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

I. Credibility

The first issue to address is one of credibility, as Grievant testified he did not do the things of which he was accused. Grievant admitted he had been drinking at work because of personal problems, but maintained he was going to lock the computer up in his supervisor's office and turn it in on Monday. He also asserted he was going to fill out a salvage slip so he could receive the computer if no one claimed it.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235(Dec. 29, 1995); Perdue v. Dep't of Health & Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. (See footnote 7) **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

The testimony of Respondent's witnesses was credible. Their statements were believable, clear, consistent with each others' and with the written documents, and internally consistent. Additionally, there was no demonstration of bias. On the other hand, Grievant's testimony was implausible, and this fact calls the credibility of Grievant into question.

Grievant's story just did not make sense. Key questions that arise with his version of the facts are: 1) Why would he place the bags behind the air conditioner; 2) If, as he testified, Grievant went by the air-conditioning unit four times instead of three, why was this action not on the tape when the tape runs continuously; 3) Why, if the computer was not in the trash, would it be available to Grievant through the salvage process, even if thisprocess were still in place; 4) Why did he not take the computer to his supervisor's office as he had planned; and 5) Why would Grievant apologize and blame his drinking for his actions, if he did nothing wrong. Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony to be false and perhaps influenced by alcohol.

II. Gross misconduct

While not specifically stated as such, the charge against Grievant was considered gross misconduct. See Evans v. Tax & Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sept. 13, 2002). The next issue to address is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant intended to steal the computer and was prevented from doing so by the action of the security guard. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985)).

Clearly, an employee in Grievant's classification of night maintenance worker and the person who is to ensure the security of the Capitol Complex buildings is in a position of trust. He is not expected to take items he finds and believes to be of worth for his own personal use. The undersigned Administrative Law Judge finds Grievant did indeed plan to steal the computer, and was only prevented from doing so by the actions of the security guard. Grievant's actions demonstrate "a willful disregard of the employer's interest or awanton

disregard of standards of behavior which the employer has a right to expect of its employees." **(See footnote 8)**

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

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The 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 & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard ofstandards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Respondent has met its burden and established Grievant was guilty of gross misconduct - attempted theft.

5. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public.

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." Any 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. Theappealing 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: May 4, 2004

Footnote: 1 ***Grievant represented himself, and Respondent was represented by Heather Connolly, Esq.***

Footnote: 2 ***Grievant attached additional documents to his proposals as well as making an argument of favoritism/discrimination. Since these arguments, documents, and evidence were not presented at hearing, they must be disregarded.***

Footnote: 3 ***The vend-a-teria has numerous vending machines and is open during the evening hours.***

Footnote: 4 ***Grievant asserts he could tell the briefcase was gone, and the only reason he returned was because his teeth were in his lunch bag.***

Footnote: 5 ***Because of the value of the computer, no criminal charges were filed.***

Footnote: 6 ***Contrary to the findings in the termination letter, the undersigned Administrative Law Judge does not find Grievant stole a vacuum approximately five years ago.***

Footnote: 7 ***The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).***

Footnote: 8 ***It is unclear to the undersigned Administrative Law Judge why Grievant's drinking on duty was not identified as an issue in the termination letter, as the State of West Virginia maintains a Drug Free Workplace.***