WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RANDALL McCLAIN,

Grievant,

v. **Docket No. 06-C&H-417**

Sue Keller

Senior Administrative Law Judge

WEST VIRGINIA DIVISION OF

CULTURE AND HISTORY,

Respondent.

D E C I S I O N

Randall McClain ("Grievant"), employed by the Division of Culture and History ("C&H") as a Building Maintenance Supervisor II, filed an expedited grievance at level four on November 13, 2006, after he was suspended for twenty-one days, without pay. For relief, Grievant requested that he "be made whole and for the restoration of all lost compensation." (See footnote 1) On January 2, 2007, Grievant filed a second expedited grievance following the termination of his employment. Grievant seeks reinstatement with back pay and benefits, as relief. An evidentiary hearing was convened by Administrative Law Judge Paul Marteney on March 20, 2007. Subsequent to ALJ Marteney's resignation, the grievance was reassigned, and the hearing was concluded by the undersigned on May 22, 2007. Grievant is represented by Gordon Simmons, Steward of Local 170, West Virginia Public Workers Union, and C&H is represented by Gregory G. Skinner, Esq., Senior Assistant Attorney General. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before July 5,2007.

Findings of Fact

1. Grievant was employed by C&H as a Building Maintenance Supervisor II, assigned as site

manager at Camp Washington Carver in Fayette County, at all times pertinent to this grievance.

2. As site manager, Grievant's duties included the oversight of the administrative functions of the Camp, including supervising employees, performing certain maintenance work, and security for the grounds and buildings. As a condition of employment, Grievant resided at a caretaker's residence located on the Camp's premises.

3. Grievant was issued a state purchasing card ("P-card"), and attended a purchasing and training seminar in 2005. (See footnote 2) He had been advised that as holder of a P-card, failure to timely submit required documentation to the Auditor's office carries a possible penalty of revocation of all C&H's P-cards.

4. In 2005, Grievant lost the use of his P-card for "stringing" purchases, *I.e.*, purchasing multiple small amounts to avoid the state bidding process. Grievant was required to attend remedial training after which the card was reinstated.

5. Ryan Burns, Assistant Museums Director, verbally reprimanded Grievant on December 19, 2005, for his failure to meet certain employment-related deadlines in his capacity as site manager. In particular, Grievant had not timely completed personnel evaluations. Grievant did not grieve the reprimand.

6. In early 2006, Jenny Boggess Morrison, Division Director of Administration and Personnel, counseled Grievant that it was necessary to obtain written approval inadvance of working overtime.

7. In June 2006, C&H provided Grievant a Housing Agreement and policy concerning the proper use and acceptable conduct, relating to the caretaker's residence. The Agreement included a directive that Grievant either cancel the Dish Network satellite television services at the residence, or transfer the services to a personal account, maintained and paid for by Grievant, no later than July 1, 2006.

8. In July 2006, Grievant was instructed by Deputy Commissioner Virginia "Ginny" Painter to keep a usage log for the camp vehicle. She sent a log book to be used for this purpose, and directed him to send her the relevant portion at the end of each month. On September 8, 2006, Grievant stated that he had misplaced the book and asked for another. Ms. Painter sent a second book on September 11, 2006; however, Grievant did not submit the September log until October 20, 2006.

9. C&H Commissioner Randall Reid-Smith met with Grievant on August 15, 2006, to advise him that all overtime and rescheduled time must be requested and approved in advanced. Grievant

indicated that he understood the directive at that time. Thereafter, he sometimes made the request in advance, and sometimes did not.

10. On September 1, 2006, Mr. Burns issued Grievant a written reprimand citing his failure to cancel the account with Dish Network; his continued failure to timely submit documentation relating to the P-card; and his failure to obtain approval prior to performing overtime work. Grievant received the letter by certified mail on September 11, 2006, and did not grieve the written reprimand.

11. Grievant's P-card was ordered canceled by Commissioner Reid-Smith on September 25, 2006, due to his continued practice of submitting the proper documentationafter the due date.

12. Commissioner Reid-Smith met with Grievant on October 20, 2006, to discuss his continued failure to meet directives and deadlines. He advised Grievant that disciplinary action was being considered. Grievant untruthfully claimed that he had not received the September 1, 2006, written reprimand.

13. By letter dated October 25, 2006, Grievant was suspended for twenty-one days, without pay, for his failure to have the Dish Network account cancelled; failure to keep and maintain a vehicle log as directed by the Division; continued failure to submit p- card documentation in a timely manner; continued failure to request approval to work overtime; violation of the Housing Agreement which requires resident employees to keep their dogs confined to the resident's lot; and, consuming an alcoholic beverage while on duty during the Appalachian String Band Music Festival. (See footnote 3) The suspension was effective from November 6 through December 11, 2006.

14. Grievant was again reminded in the suspension letter that monthly time sheets were due no later than the 10th of the following month, or the next working day if the 10th fell on a weekend or holiday.

15. At the time of the suspension, Grievant was warned that any additional acts of misconduct, insubordination, or failure to meet employment standards would result in dismissal.

16. Sometime prior to the 2006 String Band Music Festival, Grievant testified on behalf of another C&H employee, Frank Ciordia, in a grievance proceeding in which Mr.Ciordia asserted that Mr. Burns had subjected him to discrimination based upon his ethic background.

17. Grievant worked sixty-four (64) hours during the week of October 16, 2006, without obtaining prior approval for overtime.

18. By letter dated October 24, 2006, Grievant sent a written request to Dish Network, to

cancel the service.

19. On December 15, 2006, Grievant submitted attendance sheets for the months of October and November 2006. The due dates for both months fell within the period of Grievant's suspension, but the reports were still not filed for four days after his return to work.

20. Commissioner Reid-Smith met with Grievant on December 19, 2006, at which time he notified Grievant that his employment was to be terminated based on his failure to obtain prior approval before performing overtime work during the week ending October 20, 2006; failure to sumit his monthly time and attendance sheets by the tenth day of the month; and his failure to reimburse the Division the balance owed for the Dish Network for the time he had failed to cancel the service.

21. By letter to Grievant dated December 26, 2006, the Commissioner confirmed his verbal notification of dismissal, and, in addition to the reasons discussed on December 19, 2006, noted that during an inspection of the residence on December 20, 2006, a number of firearms were found in the residence, in violation of the C&H Housing Agreement and Division of Personnel ("DOP") Regulations.

Discussion

C&H asserts that Grievant's failure to comply with directives, rules, and DOPRegulations was insubordination, and good cause for dismissal. Grievant argues that the dismissal was reprisal for his participation in another grievance, and/or was based on his failure to comply with unreasonable rules.

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 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 Res*., Docket No. 92- HHR-486 (May 17, 1993). 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).

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.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See 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). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). At level four, C&H presented the testimony of Commissioner Reid-Smith, Assistant Director Burns, Payroll Benefits Coordinator Elaine Britt, Chief of Staff Martha McKee, Deputy Commissioner Virginia Painter, and Accountant Barbara Ratliff, who credibly confirmed the above-cited facts which led to the dismissal. Additionally, James Wells, Assistant Director of Employee Relations for the West Virginia Division of Personnel ("DOP"), testified that C&H had acted in compliance with all DOP rules, and that dismissal was appropriate in this case.

Grievant elected not to testify, as is his right. *W. Va. Code* §29-6A-6(e). In response to C&H's case-in-chief, Grievant offered the testimony of Frank Ciordia, a previous site coordinator at Camp Washington Carver, who testified as to difficulties he experienced with the telephone and telefax machines during his six month tenure. Joy Smith, a Secretary at Camp Washington Carver from July 2006 to January 2007, testified that documents were sent to Charleston, but were then apparently lost, and that both she and Grievant had made attempts to cancel the satellite services during the months of August and September. Three custodial employees at the Cultural Center testified that they observed Grievant hand delivering documents to that building.

The evidence establishes that despite counselings and warnings, Grievant continued to fail to comply with numerous rules, regulations and policies. Specifically, Grievant did not request prior permission to work overtime, as is required by C&H Policy No. 1, "Work Hours," which states in part that,

when circumstances require an employee to work in excess of forty hours in one workweek, it is necessary for the overtime to be approved in writing by the Commissioner in advance.

The evidence further establishes that Grievant failed to comply with the followingprovisions of C&H Policy No. 11, "Resident Employees":

-The possession of firearms or dangerous/deadly weapons in the workplace by an individual, including any individual who possesses a license to carry a concealed weapon, is prohibited. Any

employee who violates this prohibition shall be subject to disciplinary action, up to and including dismissal and may be subject to arrest and criminal prosecution.

-The possession, use, distribution, or dispensation of alcohol; the reporting to work under the influence of alcohol, or having alcohol in the body system at work, whether the alcohol was consumed at work or away from work, are all prohibited in the workplace. . . Any resident employee, of legal age, may possess and consume alcoholic beverages only inside his or her resident quarters. No alcoholic beverages may be consumed on any porch or in any yard of any State owned residential disciplinary action, up to and including dismissal.

-Satellite dish antennas (i.e., Direct TV or the like) for television reception to serve the caretaker's residence are authorized subject to the following restrictions:

1. All cost of installation and operation of the antenna shall be borne by the resident employee.

-The resident employee shall secure to the confines of her or her lot any dog or cat that he or she may own. . . any employee who violates this section shall be subject to disciplinary action, up to and including dismissal.

Grievant's continued failure to comply with these rules and regulations establishes insubordination, which is good cause for dismissal.

Grievant's arguments do not invalidate the disciplinary action. First, he has failed to establish that the dismissal was the result of reprisal. *W. Va. Code* § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative 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 engaged in protected activity, *e.g.* filing or participating in a grievance;

2) that he 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.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

Grievant asserts that he was “set up” on the drinking charge by Mr. Burns in retaliation for testifying in a prior grievance hearing. It is not clear when that grievance hearing took place, and the suggestion seems unlikely in any event, since Mr. Burns also received a twenty-one day suspension for that incident. There is no evidence that Grievant's testimony in the prior grievance was pivotal to the outcome, or that Mr. Burns had suffered any consequences as a result of the matter. Further, the consumption of the alcoholic beverage was only one of many reasons for Grievant's dismissal. Finally, Mr. Burns did not make the decision to terminate Grievant's employment. (See footnote 4)

Neither does Grievant's unwillingness to comply with what he characterizes as a“highly restrictive and draconian” Housing Agreement serve to undermine the dismissal. (See footnote 5) The Grievance Board has regularly held that an employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res*., Docket No. 97-HHR-042B (Sept. 30, 1997). Grievant should have filed a grievance challenging the Housing Agreement rather than simply disregarding those portions he disliked.

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 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 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 Res*.,

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 & 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).

3. 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.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). See 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).

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

5. C&H has proven by a preponderance of the evidence that Grievant engaged in insubordination when he failed to complete his duties as directed, and to abide by the terms of the Housing Agreement.

6. "Reprisal" is defined by *W. Va. Code* § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." 7. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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

2) that he 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.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

8. Grievant has failed to prove that the termination of his employment was the result of reprisal. Accordingly, the grievance is **DENIED.**

Any party 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. *See W. Va. Code* § 29-6A-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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 circuit court.

DATE: JULY 19, 2007_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.This grievance, assigned Docket No. 06-C&H-417, is hereby consolidated with Docket No. 07-C&H-002 for decision.

Footnote: 2

[2]A P-card is a credit card in all respects, issued by Citibank, to the employee under his or her own name.

Footnote: 3

[3]Grievant concedes that he drank one-half of a beer with Mr. Burns on the front porch of the residence during the String Band Festival. Mr. Burns was also suspended for twenty-one days as a result of this incident.

Footnote: 4 *Apparently in support of his claim of reprisal, Grievant's Exhibit 12 is a story from the April 29, 2007, edition of The Charleston Gazette regarding C&H's alleged attempt to abandon Camp Washington Carver. The story references the eviction of Grievant, and his videotaping of food disposal in March of 2007. Since these events occurred after his dismissal, they cannot be interpreted as reprisal.*

Footnote: 5 *Grievant specifically cites the provision of the Agreement which allows firearms to be kept in a locked vehicle, but not in the residence.*