WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DEBRA ANN FERRELL,

Grievant,

v. **Docket No. 07-DOH-355**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Debra Ferrell ("Grievant") initiated this grievance on December 26, 2006, as the result of a written reprimand. The grievance proceeded through the lower levels, being denied at each level, and Grievant appealed to level four on July 12, 2007. After the grievance was appealed to the Grievance Board, some confusion ensued, due to a communication from Grievant indicating a desire to withdraw the grievance, resulting in its erroneous dismissal. Thereafter, this grievance was reinstated and scheduled for a hearing, which convened in Elkins, West Virginia, on May 14, 2008. Because neither Grievant nor the Grievance Board had received a witness list from Respondent, as required by the Rules of Practice and Procedure of the Public Employees Grievance Board, 156 C.S.R. § 6.5.1, Grievant objected to witnesses to be called by Respondent at that time. After some brief testimony was taken, the parties agreed to reconvene the hearing on August 8, 2008. The parties submitted post-hearing proposals on September 8, 2008. (See footnote 1)

Synopsis

Grievant received a written reprimand for violation of DOH policies prohibiting unauthorized and improper use of computer information. During the processing of another grievance, it came to light that Grievant had assisted another employee, Matt Tuttle, in viewing the payroll information of Mike Felton, a DOH employee who had been selected for a position over Mr. Tuttle. Grievant denied the allegation at different times prior to and during the instant grievance proceeding, but also made statements to the effect that she should not have been punished for something that was a common practice of other employees, and they had not been informed that it was wrong to access such information.

Because only certain employees have official authorization to access payroll information, and Grievant had to use a “back door” method to do this, her conduct constituted insubordination, and the penalty of a written reprimand was appropriate.

Findings of Fact

1. Grievant is employed by the Division of Highways (“DOH”) as a supervisor in the Equipment Division's warehouse. She has been a DOH employee for more than 20 years.

2. Edward “Matt” Tuttle is employed by the Equipment Division as a truck driver for the warehouse, and he is supervised by Grievant. 3. In 2005, Mr. Tuttle filed a grievance concerning his non-selection for a position for which he had applied. Prior to filing the grievance, in order to ascertain who the successful applicant for the position was, Mr. Tuttle asked other warehouse employees how he could access payroll information on the computer.

4. During the processing of his grievance, Mr. Tuttle testified that Grievant accessed the payroll information, at his request, which revealed that Mike Felton had received the position in question.

5. Once Mr. Tuttle revealed how he had discovered that Mr. Felton had received the position, DOH counsel questioned Grievant regarding her use of the computer system to access the payroll information. Grievant denied doing this.

6. Grievant does not have authorization to access DOH payroll information. Her computer access is limited to inventory information.

7. The computer used to access Mr. Felton's information was located in the warehouse and used by several people, including Grievant and Mr. Tuttle. Some employees who used that computer

had “mainframe” access, which is the computer having the payroll and personnel information. Although it is unknown exactly how Grievant obtained the information, she was the person who accessed the information and gave it to Mr. Tuttle.

8. It is possible to use an unauthorized “back door” method to access payroll information without official authorization. Apparently, DOH employees at the Equipment Division had previously used this method to access this type of information.

9. On January 26, 2006, Robert Amtower, Director of the Equipment Division, issued a written reprimand to Grievant for accessing employee salary information inviolation of DOH's Acceptable Use of Computer Systems and Related Equipment Policy, which specifies that using privileged access for other than official reasons is cause for disciplinary action.

10. In a February 6, 2006, memorandum to Jeff Black, DOH Human Resources Director, Grievant requested removal of the reprimand. She stated that she “was given a reprimand for an accusation on using a mainframe authorization that was not known to have been in violation of any state policies by myself [or other DOH employees]” and “[i]t is very asinine to reprimand an employee for an infraction that . . . others within the complex and the state are in violation of without informing the employee.”

11. Prior to issuance of the reprimand, Grievant was asked by DOH counsel and by Mr. Amtower whether she looked up Mr. Felton's payroll information for Mr. Tuttle, and she denied doing so. The reprimand was based upon Mr. Tuttle's sworn testimony in his grievance hearing.

12. Grievant also wrote a memorandum to Mr. Amtower, dated January 30, 2006, requesting reconsideration of the reprimand, stating that she should have received an “informational meeting or handouts,” such as given to other employees by Marcia Lee, Administrative Assistant, who had met with employees after this incident was discovered, explaining unauthorized computer use. Grievant stated in this memorandum: “If your office drafted a memo and had an informal meeting with my fellow employees to address the unauthorized computer system use . . . , then what would have led your office to believe that I would have had any more knowledge of what constitutes unauthorized use that [sic] they.” 13. Grievant's testimony that she did not access Mr. Felton's payroll information is not credible.

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; (See footnote 2) *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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent reprimanded Grievant based upon the statements Mr. Tuttle made under oath during his grievance hearing. Grievant denies that she accessed Mr. Felton's information and has complained about the handling of the reprimand, contending that it was not investigated prior to its issuance, was not discussed with her supervisor, and was discussed publicly by Ms. Lee during a meeting with other employees. Although Respondent has not attached a specific label to the conduct of which Grievant is accused, discipline for violation of agency policy would be tantamount to a contention of insubordinate behavior. 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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). "[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." *Butts, supra*.

Grievant testified at the level four hearing that she did not access Mr. Felton's information for Mr. Tuttle. This is in direct contradiction to Mr. Tuttle's testimony, both at his own grievance hearing in November of 2005, and at the level four hearing in the instant case. 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 Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., 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 and Human Res./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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Not only does Grievant's testimony in this grievance contradict Mr. Tuttle's statements, but she has taken inconsistent positions regarding her own conduct, at different points in time. While she denied looking up Mr. Felton's information when first asked about it during the processing of Mr. Tuttle's grievance, Grievant's statements in the memorandums she wrote to Mr. Amtower and Mr. Black after she was reprimanded seem to contain tacit admissions that accessing this type of employee information was a common practice, but employees allegedly did not know it was wrong. However, when testifying at level four in 2008, Grievant vehemently denied ever accessing Mr. Felton's information, and she now alleges that Mr. Tuttle himself had accessed payroll information in the past, with Mr. Lilly's assistance. Mr. Tuttle denied this allegation.

As Grievant has noted, Mr. Tuttle's memory was less than stellar when he testified at the level four hearing in this matter in August of 2008. However, while he did state that he “did not recall” in response to several of Grievant's representative's questions, he neverequivocated regarding his acquisition of Mr. Felton's information from Grievant. As to Mr. Tuttle's credibility, no motive has been established which would explain why he would have fabricated this information in 2005 when he was pursuing his own grievance. It is apparent from his testimony in that case that he was reluctant to name Ms. Ferrell as the source of the unauthorized payroll information he acquired. He had been asked numerous questions regarding the computer used to access the information and who had access to that computer, and, while mentioning the names of several other employees, he never named Grievant as being involved. It was only after several minutes of questioning, and only in response to the specific questions “Who was there with you?” and “Who was actually manning the keyboard?” that he finally revealed that it was Grievant who helped him acquire the information.

Grievant was Mr. Tuttle's supervisor at the time, and it is understandable that he was reluctant to reveal that she was the person who helped him.

The undersigned does not doubt that employees commonly used the so-called back door method of viewing other employees' information prior to the incident which gave rise to this grievance. Mr. Tuttle testified in this case that he thought, in 2005, that it was a “public right” to know other employees' salaries. This is similar to Grievant's statements in the memorandums written after she was reprimanded, to the effect that “everybody's doing it.” Indeed, it is publicly known that the salaries of all state employees are published every year on the West Virginia Auditor's website. However, the undersigned cannot ignore the fact that DOH employees, including Grievant, who knew they did not have official access or authorization to view payroll records used an illicit method to do so. It is only common sense that there is a reason for particular employees to have computer access to some information which others do not. Therefore, when one who doesnot have official permission to access the information does so through unauthorized methods, a reasonable person would conclude that this is probably conduct which one's employer would frown upon. While the undersigned sympathizes that Grievant may have been the first person at her office who was disciplined for something which was apparently a common practice, her behavior cannot be excused. A policy prohibiting unauthorized access to sensitive personnel information is reasonable and necessary for any employer, and Grievant's defiance of that prohibition was wilful, constituting insubordination.

The following conclusions of law are appropriate in this matter.

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; *See* 156 C.S.R. 1 § 3; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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). 3. Respondent has proven by a preponderance of the evidence that Grievant engaged in the conduct alleged, which constituted a violation of DOH policy and insubordination.

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. *See* W. Va. Code § 29-6A-7 *(repealed*, *See footnote 2, supra*). Neither the West Virginia Public 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.

Date: October 27, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant appeared in person at both hearings with her representative, Robert Lilly, a coworker. On September 9, 2008, the day after both parties submitted their fact/lawproposals to this Grievance Board via facsimile, Grievant filed an objection to the proposals submitted by DOH counsel Barbara Baxter. However, the undersigned finds this objection to be without substantial foundation, in that Grievant contends that Ms. Baxter "utilized" her submission "in its entirety to complete her facts and findings in rebuttal." In actuality, both parties submitted their proposals on September 8: Grievant's were faxed at approximately 3:30 p.m. and Respondent's at approximately 4:05 p.m. Respondent's 7-page submission, discussing the evidence and applicable law, does not appear to be an inappropriate "utilization" of Grievant's 2-page discussion of the factual evidence in the case.

Footnote: 2

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-

6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007.