KATHY BURDELL,

Grievant,

v.

DOCKET NO. 96-BOD-023

BOARD OF DIRECTORS/WEST VIRGINIA STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Kathy Burdell, filed this grievance originally on September 7, 1995, protesting her dismissal for cause from Respondent West Virginia State College. The original grievance was remanded back to West Virginia State College on November 13, 1995, for a lower level hearing, pursuant to W. Va. Code §§ 18-29-1, et seq. A level two hearing was subsequently held on December 19, 1995, and a decision upholding Grievant's dismissal was rendered by the President's designee, Charles T. Ledbetter, on January 8, 1995. President Hazo W. Carter, Jr., adopted the findings of the level two hearing examiner and so informed Grievant on January 9, 1996. Grievant appealed that decision on January 18, 1996. Hearing was held on April 22, 1996, and this case was held open for a period of time to allow Respondent to call an additional witness. Following several inquiries to Respondent, to no avail, to schedule the additional witness, this matterbecame mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or about October 9, 1996.

Background

Grievant, a secretary employed by Respondent, was notified on August 28, 1995, by her immediate supervisor, Jenny Fertig, Director, Collegiate Support & Counseling, of the following:

This letter serves as notification that disciplinary action is being taken against you for insubordination on July 14 and August 23, 1995.

On July 14 you were verbally abusive, hostile, belligerent, threatening and insubordinate to me as your supervisor. As a result of this conduct I gave you a Letter of Warning which was placed in your personnel file. On July 14, 1995 you came to my office and harassed and threatened me for writing you the letter of warning for noncompliance with instructions and your insubordinate behavior.

On August 22, 1995 a memorandum was issued directing you assume certain staff duties and instructing you as to the coverage of the front desk area.

On August 23, 1995, you came to my office and verbally harassed me for what you termed to be "changing your job description", in reference to this memorandum. On two separate occasions during the time in which you were in my office on the morning of August 23, you made threatening remarks and when asked by me to cease yelling at me, you continued to threaten me and call me a liar.

Your behavior on July 14 and August 23, 1995, was insubordinate to me as your supervisor, and just cause for disciplinary action.

Despite continued counseling by me as your current supervisor, and previously by Tom McClure when serving as your supervisor, regarding your insubordinate behavior to your supervisor and other professional staff in this unit you continue to persist in your behavior. I have no confidence that lesser disciplinary action will result in lasting improvement in your willingness to take direction or conduct your self appropriately toward me asyour supervisor. As a result, I have requested that you be terminated from your position with Collegiate Support and Counseling effective immediately.

You are to remove your personal belongings by 5:00pm today. You are to return and/or leave all other items belonging to West Virginia State College, including keys, parking permit, staff identification card, etc. on your desk and vacate the premises by 5:00pm today.

LII HE Ex. D. (See footnote 1)

Ms. Fertig had discussed her desire to terminate Grievant on that date with her immediate

supervisor, Ervin V. Griffin, Vice-President, Student Affairs, who approved the decision at that time. LII HE Ex. D. President Hazo Carter was copied on the above letter.

An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6. Respondent contends it has proven two specific instances of Grievant's insubordination against her employer. (See footnote 2) Grievant alleges she was not insubordinate on these two occasions, and also contends that Respondent violated its own policy on dismissals because there were not two letters of warning in her personnel file prior to her dismissal.

The Board of Directors of the State College System of West Virginia and West Virginia State College's personnel policies provide for immediate dismissal of an employee for insubordination or willful violation of rules, regulations or standards of acceptablebehavior or performance. However, insubordination is not defined in or by the Staff Handbook of West Virginia State College. Grievant's Proposed Findings of Fact and Conclusions of Law, Finding of Fact 9, p. 3.

While insubordination may not be defined, it has been held to encompass more than an explicit order and refusal to carry it out. It may also involve flagrant or willful disregard for implied directions of an employer. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996); Sexton v. Marshall Univ., Docket No. BOR2-88- 029-4 (May 25, 1988). Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. Browning, supra; Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

It must be noted that Grievant's own proposed finding of fact acknowledges that an employee can be immediately dismissed for certain offenses, including insubordination. Barbara Rowell, Director of Personnel for West Virginia State College, testified that dismissal can occur after two written warnings are placed in the employee's personnel file; or immediately for certain types of misconduct, including insubordination. LII Tr., Rowell, pp. 143, 149. Therefore, Grievant's claim that she was improperly terminated because she did not have two letters of warning in her personnel file fails in this instance. Grievant was dismissed based upon insubordination. Thus, this inquiry will focus on whether Grievant's conduct on the two identified instances constituted insubordination.

Jenny Fertig testified that, on Friday, July 14, 1995, the Counseling Center was assembling packets of information for a student orientation scheduled for the next day. As was the usual practice, all of the staff present assisted in assembling the orientationpackets. At some point, it became

apparent that some of the materials were not ready to be inserted into the packets. Fertig asked Grievant to copy materials regarding Academic Affairs for insertion into the packets. Grievant refused, stating Academic Affairs had the material. Fertig called the Academic Affairs office and learned they did not have them. She asked Grievant again to make the necessary copies, and Grievant again refused, stating the Academic Affairs secretaries should have to make them. Fertig ended up making the copies herself.

Fertig wrote Grievant a letter of warning that same day (R. Ex. 8). Fertig gave Grievant a copy of the letter, and on the following Monday, sent a copy to Personnel to be placed in Grievant's personnel file. Fertig later found out the letter had never been placed in Grievant's personnel file. She had put it in the outgoing interoffice mail in a sealed envelope and assumed it had gone to Personnel. Grievant was responsible for the mail delivery in the Counseling Center.

When Fertig realized it was not in Grievant's personnel file, she hand-delivered a copy to Barbara Rowell, Director of Personnel, who placed a hand-written notation on the copy that it had been delivered to her, and date-stamped it August 24, 1995 (G Ex. 1). LII, Rowell, p. 136, Fertig, p. 93.

Later, after Grievant's dismissal, Fertig sent a packet of all materials she had regarding Grievant to Personnel to ensure they had a complete file. Another copy of the July 14, 1995, letter was in that packet and was date-stamped by Personnel on September 7, 1995. LII, Fertig, p. 93. (G Ex. 2). The only difference in the letters is a notation that Barbara Rowell was copied on the letters. Fertig also talked to Ervin Griffin, Vice-President of Student Affairs, regarding the incident, and told him Grievant refused to accept the warning letter, and that she (Fertig) mailed it to Personnel. LII, Griffin, p. 34.

Fertig testified that Grievant "flat out" refused to make the copies, and she had to do it herself. LII, Fertig, p. 81. Fertig wrote the letter towards the end of the day and gave it to Grievant. Grievant came into Fertig's office with the letter wadded up in her hand and said "Don't do this." Grievant was very threatening, telling Fertig not to do this, that she (Grievant) had a file an inch and a half thick on Fertig, and if she sent the letter, it wasn't going to be pretty. LII, Fertig, p. 82. Fertig testified they talked for about 45 minutes, and by the end of the meeting, Grievant had calmed down.

The July 14, 1995 letter of warning informed Grievant that her refusal to follow Fertig's directive to make copies was being treated as insubordinate behavior. It states that the letter will be placed in Grievant's personnel file for six months, and that any further insubordinate behavior would be reported.

Fertig believes Grievant came into her office to intimidate her into not sending the letter of warning. She believed Grievant thought she succeeded in this, because she did not write a reply to the letter, as was her customary practice. LII, Fertig, p. 111. It was customary for Grievant to respond in writing nearly every time she was given a written directive from Fertig.

Gloria Carper testified she left the building on July 14 about 5:00 p.m. with Grievant. Grievant did not tell her about receiving a letter of warning, and stated Grievant would have told her if she had gotten it. LII, Carper, p. 119. Carper does not know whetherGrievant refused to do work for Fertig. She helped put the orientation packets together, but does not recall anyone besides Grievant doing any copying. LII, Carper, p. 122.

Kristi Ingram, a student worker assigned to the Counseling Center, was responsible for helping Grievant with anything that needed to be done, and was in charge of assembling the student orientation packets. Ingram testified she had made up a number of packets earlier in the week, but did not work on Thursday or Friday, July 14, 1995. Ingram testified that she always copied the materials from Academic Affairs to insert into the packets, except for the very first time when that department provided the materials. LII, Ingram, p. 189.

Tom McClure, a counselor, testified he assisted in copying evaluation materials for the orientation packets on July 14, 1995. He testified Fertig made the copies of the Academic Affairs material because Grievant refused to do it. LII, McClure, p. 292. McClure testified he witnessed the exchange between Fertig and Grievant, witnessed Fertig calling Academic Affairs about the materials, and her asking Grievant again to make the necessary copies. He did not recall whether Grievant was doing anything else at time. LII, McClure, p. 294.

Kelli Dunlap, another counselor, was out of the office most of July 14, but came in later in the day and helped assemble the orientation packets. When she arrived, Pat Cline, one of the counselors, told her things were tense because Grievant had told Fertig she was not going to make copies. LIV, Dunlap. Dunlap did not actually witness the incident. Pat Cline testified she was in the office on July 14, 1995, and helped stuff the folders for orientation. She witnessed Grievant refusing to make copies, heard her state it was Academic Affairs's responsibility, and that Fertig should find one of their secretaries to copy the material. She does not recall what Grievant was doing in the office at that time. LIV, Cline.

Grievant denies ever receiving the July 14, 1995 letter of warning. LII, Burdell, p. 229. She also

denies threatening Fertig that day. Grievant testified that the first time she saw the July 14, 1995 letter was in August, after her termination. LIV, Burdell. Grievant explained that there was only one copier in Hill Hall, where the Counseling Center was located in July, 1995, and that she was already running back and forth to the copier to make 500 copies of other materials for the packets. She testified she told Fertig that is why she could not copy the Academic Affairs materials, and she insisted that Academic Affairs should have the materials, or one of their secretaries should have made the copies. She remembers having a meeting at the end of the day with Fertig, but that it was a good meeting.

In the summer of 1995, the Counseling Center moved to Sullivan Hall. The layout at Sullivan Hall required Grievant's desk to be out in the open in the front of the office near the doors. Fertig gave Grievant a memorandum dated August 22, 1995, regarding coverage of the front desk area. Fertig told Grievant that it was important to keep the front desk area covered to provide assistance to visitors and students, especially handicapped students, who might need assistance with the doors and the elevator. Fertig told Grievant she had made arrangements with a student worker to cover the desk during lunch and thetimes Grievant was running errands, such as the mail delivery. Fertig requested that Grievant let her know when she would be away from her desk, and that, other than the times scheduled, Grievant was to arrange to have the front desk covered in her absence. R. Ex. 10.

Fertig testified that Grievant was very angry over the August 22, 1995, memorandum, and the next day, called her on the telephone to tell her she was leaving the building. Fertig asked Grievant where she was going, and Grievant replied that it was personal and Fertig had no business asking her where she was going. Grievant then came into Fertig's office yelling for about 10 or 15 minutes that Fertig could not do this, that she was asking Grievant to do things outside of her job description, and told Fertig that she better get an attorney. LII, Fertig, p. 85-86. Grievant then left the building, and Fertig later learned she went to the Personnel office. LII, Fertig, p. 86.

Kelli Dunlap's office is located beside Fertig's. Dunlap testified that on August 23, 1995, toward the end of the day, she heard Grievant speaking in a very loud voice from Fertig's office. Grievant was yelling, but she could not hear specific words. LII, Dunlap, p. 309. Dunlap testified that Sullivan Hall was an old dormitory, and the walls between the offices are cinderblock. Dunlap's door was open, but Fertig's was closed. She testified that Grievant sounded upset. The incident concerned her

enough that she asked Pat Cline, another counselor, if she could hear what was going on. Cline's office was on the other side of Fertig's. Cline could hear it too and they wondered what was going on, as Grievant's voice was "really loud". LIV, Dunlap. Pat Cline testified she could hear Grievant's raised voice for some time, and went to Kelli Dunlap to find out what was going on. Cline left the office before it was over, as it was at the end of the day. She testified she couldn't hear Fertig's voice, but that Grievant's voice was loud. She stated that Grievant had a normally loud voice, but what she heard through the walls was louder, and she could tell she was upset. LIV, Cline.

Grievant admits she told Fertig to get a lawyer on August 23, 1995, after receiving the memorandum regarding the front desk coverage. LII, Burdell, p. 243. She testified that she was mad, and she felt Fertig was telling her to do things outside her job description, specifically regarding assisting handicapped students and visitors. She also wondered how she was to get other work done if she had to stay at her desk. When she got the memorandum, she made an appointment with Barbara Rowell in Personnel, and told Fertig she was leaving the building. Fertig asked her where she was going, and she told her it was personal. She then went into Fertig's office to discuss the memorandum, but denies yelling at her. LIV, Burdell.

Grievant contends that these acts did not constitute insubordination, and apparently asserts that she had legitimate reasons for questioning Fertig's directives on each occasion, specifically, that she was too busy doing other things. While it may be true that Grievant was busy and had concerns about how she was to get other tasks accomplished, Grievant's responses to Fertig, her immediate supervisor, on each occasion were inappropriate and not examples of the type of behavior an employer is entitled to expect from an employee. While Grievant claims she was copying other materials for the student orientation on July 14, 1995, and thus could not make the copies Fertig requested of her,her "flat out" denial to perform that task can only be deemed as insubordinate. Respondent offered the testimony of other employees who were present at the time to corroborate that Grievant refused to comply with Fertig's directive, and that Fertig ultimately had to make the copies herself. Indeed, Grievant did not ever deny that she refused to make the copies; she merely offered what she considered to be legitimate reasons for not making the copies. Nonetheless, as a subordinate to Fertig, Grievant's refusal to comply with her directive, and in front of other employees, served to undermine Fertig's authority.

Grievant's assertion that she never received the July 14, 1995 letter of warning is nothing more

than a red herring. Grievant does not deny the incident occurred, nor does she deny having a discussion with Fertig about this incident when it happened. Further, other evidence produced by Respondent regarding Grievant's behavior in that office tends to suggest to the undersigned that Grievant was not being truthful when she denied receiving the July 14, 1995 letter of warning. Specifically, Grievant also denied that Fertig gave her a copy of her dismissal letter. LII, Burdell, p. 241. However, Fertig testified that she did give Grievant a copy of the letter when she verbally informed her she was dismissed, but that Grievant refused to take it. Fertig put the copy she intended for Grievant in her mailbox that day, but Grievant never picked it up, and at the time of the level two hearing, it still remained in Grievant's mailbox. Fertig also mailed Grievant a copy of the letter by certified mail, which was accepted by Grievant. Fertig's testimony that she gave Grievant the July 14, 1995 letter of warning is the more plausible version, and the undersigned finds that Grievant did receive the letter on July 14, 1995. With regard to the August 23, 1995, incident, Grievant does not deny having a conversation with Fertig regarding the memorandum on front desk coverage, but denies yelling at her. Grievant also does not deny telling Fertig she needed to get a lawyer. Grievant instead offered as an explanation for her raised voice that she needed to speak loudly in order to be heard over Fertig's air conditioner. Again, Respondent's witnesses, Kelli Dunlap and Pat Cline, corroborate Fertig's version of the "discussion", in that Grievant was clearly upset and was yelling at Fertig. The incident was striking enough to cause both Dunlap and Cline to come out of their own offices and seek the other out to find out what was going on. If it were true that someone in that office needed to raise their voice to be heard over air conditioning, it does not follow that such an occurrence would cause much ado among the other employees. All things considered, the undersigned concludes that Respondent has met its burden regarding the second incident.

Grievant alleges that this conduct also was not insubordinate, in that she had legitimate concerns regarding her work load and Fertig's expectations. While that may be true, yelling at Fertig, and making threatening remarks regarding getting a lawyer, are not the types of behavior one would normally associate with an employee having concerns about how they are to get their work accomplished. Further, Grievant deliberately and intentionally disregarded the contents of the memorandum almost immediately when she told Fertig she was leaving the building, would not tell her where she was going, and did not make any arrangements to cover the front desk in her absence. Thus, Grievant's behavior in this instance also constituted insubordination. Based upon

the testimony, evidence and the foregoing discussion, it is appropriate to make the following findings of fact.

Findings of Fact

1. On July 14, 1995, Grievant blatantly refused to make copies requested by her immediate supervisor, Jenny Fertig, for a student orientation package.

2. On July 14, 1995, Jenny Fertig presented Grievant with a copy of a letter of warning regarding the above incident. Following receipt of this letter, Grievant yelled at and threatened Jenny Fertig for writing the letter of warning.

3. On August 22, 1995, Jenny Fertig wrote Grievant a memorandum containing some directives regarding coverage of the front desk area.

4. On August 23, 1995, Grievant approached Jenny Fertig in her office, told her she could not issue such directives, she needed to get a lawyer, and she was leaving the building, without telling Fertig where she was going.

5. On August 28, 1995, Jenny Fertig recommended Grievant be dismissed, and discussed her recommendation with Ervin Griffin, Vice President of Student Affairs. Dr. Griffin approved the recommendation for dismissal, and Jenny Fertig wrote Grievant a letter of that same date, informing her she was terminated. President Hazo Carter received a copy of that letter.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. An employee of Respondent can be immediately dismissed for insubordination or willful violation of rules, regulations or standards of acceptable behavior or performance.

3. Insubordination has been held to encompass more than an explicit order and refusal to carry it out. It may also involve flagrant or willful disregard for implied directions of an employer. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

4. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. Browning, supra; Reynolds v. Kanawha- Charleston Health

Dept., Docket No. 90-H-128 (Aug. 8, 1990).

5. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate to her supervisor, Jenny Fertig, on two separate occasions, July 14 and August 23, 1995, warranting her dismissal from employment.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office to the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 10, 1996

Footnote: 1

References to the level two transcript are identified as LII Tr., p. ___. Level two exhibits are referenced as LII Grievant's (G), Respondent's (R), or Hearing Examiner's (HE) Ex. __. Level four exhibits are referenced as LIV Grievant' s (G) or Respondent's (R) Ex. __.

Footnote: 2

Evidence was presented by Respondent of numerous other instances of alleged insubordinate behavior on the part of Grievant. However, because of the outcome of this decision, it is unnecessary to consider that evidence.