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PATRICIA ANN DEAK

v.

Docket No. 91-DOH-513

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

Patricia Deak (hereinafter Deak) filed this claim against her employer, the West Virginia Division of Highways (hereinafter DOH), wherein she alleged that she had been improperly reprimanded as a result of her role in an incident which occurred on June 5, 1991, between Gerald Ball, District III Maintenance Assistant (hereinafter Ball), Harry Griffith, Ritchie County Supervisor (hereinafter Griffith), and herself. Deak was issued the written reprimand, dated June 12, 1991, which was approved by Carl Thompson, District III Engineer. She requested that this reprimand be removed from her personnel file.

The reprimand at issue in this case reads as follows:

On June 5, 1991 at approximately 11:30 a.m. you did enter the office of your supervisor and took exception to the markings on an envelope addressed to your supervisor, Mr. Griffith. You then accused the Maintenance Assistant, Mr. Gerald Ball, of harassment and of being the ringleader of all the trouble in Ritchie County. Those statements are unsubstantiated. You were told by Mr. Ball to return to the supervisor's office. At that time, in a loud voice, you told Mr. Ball that you didn't have to come back in there and you didn't have to do anything he said, that he wasn't your boss, or words to

that effect. This is an act of insubordination since Mr. Ball is an in-line supervisor as outlined in the organizational chart. You were given a verbal warning in 1990 for a similar outburst. This type behavior is contrary to good order and discipline and will not be condoned.

Although the stated reason for Deak's receiving of discipline in this case was insubordination, an insightful reading of the reprimand and a thorough review of the record indicates that she was disciplined not only for insubordination but also based upon her overall behavior. Griffith, in concluding his testimony, stated that in his view, Grievant's actions which led to her receiving discipline and which could be called insubordination were her outburst, her screaming, her statement that Ball was the troublemaker in Ritchie County and her refusal to discuss the matter (regarding the address on the envelope) with Ball and him.

The Respondent argues that Grievant's actions warranted the discipline imposed and that it has proven the charges by a preponderance of the evidence. Grievant contends that she did not make the statements attributed to her and that she was made to feel intimidated by Griffith and Ball. Therefore, she avers that she was neither insubordinate nor acted in an inappropriate manner. Because the versions of the facts of this case as related by both parties are inconsistent, a determination of the credibility of the witnesses through their respective testimony, both at level two and at level four, is at the heart of this matter.

Ball prepared a report of what happened on June 5 and submitted it to Thompson. In that report he recounted what he perceived to have transpired in Griffith's office on that date;

his statement reads as follows:

On June 5, 1991, at approximately 11:30 a.m., I was seated in the office of Mr. Harry Griffith, County Supervisor of Ritchie County, when Ms. Patty Deak burst through the door with a pink envelope in her hand. I recognized my own handwriting on the outside of the envelope. I had written "To be Opened by Harry Griffith" on the envelope as the contents were of a potential embarrassment to one of the employees under Griffith's supervision. Ms. Deak stated that I had written "To be opened by" as a way of harassing her. She then left the room. I was totally flabbergasted at this outburst and, in an attempt to make some sense of the situation, called to Ms. Deak and said, "Patty, would you come back in here?" She then stated, "I don't have to come back in there and I don't have to do anything you say. You're not my boss!" At this point, she started screaming that if I had something else to say to her to just wait till she got someone else in there as a witness. She then opened the door to the break room and started screaming at me that I had put that on the envelope to harass her. I attempted to reason with her to no avail and finally just walked off. A few moments later she stated, "I'm getting tired of you harassing me." At that point, I told her if she had any more harassment charges to make, to make them official. She then screamed, "I can sure do that and don't think I won't." She then screamed, "you said the backbiting in Ritchie County was going to stop. You're the ringleader of all the backbiting and trouble that goes on around here." At that point she left the building.

His testimony at level two is substantially consistent with this statement presented as evidence at level four. He expounded upon this statement by clarifying that it was the policy in District Three that all interdepartmental mail is addressed in the same manner as was the letter handed to Griffith by Deak. He further indicated that he did not address the letter in any manner or with any intent to harass Deak. In explaining the reason why he marked the envelope "to be opened by," he stated that it contained material of a private nature, relating to some other employee's job duties, and that he did not want the information in that letter to

be made public. Finally, he stated that he considered Deak's statements and actions to be insubordinate and he, therefore, recommended that she receive a three-day suspension.

Ball's account of the incident, as he testified at level two, was as follows:

OK. Harry Griffith and I were out checking in some purchase order paving contract work. We returned to the headquarters at approximately 11:20 a.m. At about 11:30, Patty Deak brought in a pink envelope, an interdepartmental type envelope and handed it to the supervisor, Harry Griffith. She took exception to the writing that I had placed on the outside which stated, "To be opened by Harry Griffith" and an arrow drawn from the statement to his name. As she handed it to him, I recognized my hand writing [sic] on the envelope. Ms. Deak made a statement something about management writing things on envelopes or something to that effect, exactly . . . , I don't recall exactly what was said. At that moment I said that is my hand writing [sic] or I wrote that on there or words to that effect. She said yes I know that is your hand writing and you put it on there to harass me. She left the office, went across the room to the exit door and made the statement, I'm getting tired of you harassing me. I told her at that time that if she wished to make any harassment charges, to make them official. She told me not only could she do so but she would. She then went into the break area opened the door and said any statements you've got to make, make it in front of witnesses. I said, very little more and she went over around the desk area and I believe left for lunch very shortly thereafter. I did tell her to come back over to the office where the supervisor, Harry Griffith and I were. She informed me that she didn't have to do anything that I told her to do, that I was not her boss. That's about the way I recall it.

At both hearings, he stated that he spoke in a voice loud enough for Deak to hear him from across the room and also out into the lunchroom but that he did not feel he was speaking in an overly loud or abusive manner. He also stated that he at no time got out of his chair and walk toward Deak. Again, Ball's testimony at level four is materially consistent with that which he presented at

level two.

Griffith's account of the incident at level two dealt mainly with the conversation he had with Deak which is set forth as follows:

When Patty brought the envelope in and stated to me that this is for you Harry, I want to hand deliver it to you since upper management's playing games. And I stated at that time, what do you mean, Patty? And [sic] she indicated the markings on the envelope. I recognized that to be Gerald's hand writing [sic] at that time and I stated to Gerald, Gerald is this your hand writing [sic]? Of course he saw it about the same time I did and he stated, yes. I said to him, Gerald, was [sic] you being childish when you did this? And he stated, no. That's actually the only comments I had with Patty was [sic], you know, when she made the statement that management was being childish.

At level four, Griffith reviewed Ball's statement of June 5 and agreed to its accuracy. He further testified consistently with the testimony he presented at level two. He also said that he concurred with the manner in which the facts were presented in the written reprimand and that he had prepared that document.

On direct examination at level four, Deak contended that she did not make all of the statements attributed to her in either the written reprimand or in Ball's written statement. She testified that she was involved in a verbal confrontation with Ball and Griffith which escalated into an argument, however, she stated that at the point when the conversation "escalated" she departed their company, exited the room because she feared for her own safety and went to obtain witnesses. She said that she feared for her safety because of past incidents which had previously taken place in Ritchie County involving Ball. She contended that he has a bad

temper and had become violent at times but that she personally had had no other verbal confrontations with Ball before June 5.¹ She testified that she was afraid of Ball and that when she went towards the lunchroom to get witnesses that he followed her slinging his arms, stomping his feet and yelling. She testified that she did not raise her voice during the conversation until towards the end. She expressed that Griffith never said a word to her because Ball did all the talking. Finally, she concluded that she would have been willing to continue the conversation if she would have been allowed to have witnesses.

On cross-examination, Deak stated that she purposely went into Griffith's office and handed him the mail because "she did not want to be accused of anything." She testified that she did not say that the envelope was prepared in order to harass her until after Ball began yelling at her. Finally, she contended that Ball did not ask her to come back into the office. When asked whether she made the statement "I don't have to come back in there and I don't have to do anything you say, you're not my boss," she replied, "No,

¹ She testified to various alleged incidents involving Ball and also to a prior grievance which she had filed against him that had not yet been decided as of the date of the incident in question. Regardless of the truth of these allegations made by Deak, which are unsubstantiated by the record, Ball's reputation is not relevant for decision in this case. The record contains no evidence that Ball harbored any animosity towards Deak nor does the evidence support the conclusion that either Ball or Griffith acted in any manner which could be considered outwardly threatening towards her. This case involves the simple matter of whether Deak acted in an insubordinate manner during the conversation between the three individuals. Whether Deak was insubordinate or acted inappropriately in any manner must be judged upon the facts as of the time of the incident.

I did not tell him that he was not my boss." She testified that she did not like being harassed by him or by anybody else and that she also stated in regard to Ball's comment that she make any charges of harassment against him official, "If need be, I would if my hand were forced." She also averred that she requested he not harass her in anyway. She testified that she did not say to Ball that he was the "ringleader of all the backbiting and that the backbiting was going to stop."

Deak's testimony at level two concerning the statements made during the conversation in question was as follows:

At approximately 11:30 on that date Mr. Griffith and Gerald Ball had come back in the office and after stamping all the mail, I hand delivered the mail to Mr. Griffith and I handed this particular envelope to him because it was marked as it was and I didn't want to be accused of pilfering through his mail and eyes [sic] dropping and one thing or another. So I handed it directly to him. and told Mr. Griffith at that time that if it was sent up there addressed the way it was to try to upset me, that it didn't do so. At that time Gerald Ball jumped up out of his chair and started slinging his arms around and said, I'll have you to know I sent that up here like that. And [sic] I said, I know you did Gerald. He started screaming and yelling and I turned around and walked out. And [sic] you know, I felt threatened because of his actions at that time. I was afraid he may hit me the way he jumped up and started carrying on. I walked back out and sat down at my desk and he followed me out the door into the main office where this one gentleman was sitting filling out a job application. And [sic] he started ranting and raving. I told him, I said . . . , at that time he did ask me to come back in the office and I told him, if he wanted to discuss anything with me, I'd prefer he do it out in the lobby in the presence of other people. I won't have a discussion two against one. So he said, fine. So we went out in the lobby and we did have our discussion and he said that he did that, addressed the envelope that way because other County clerks open the mail and he didn't want this particular piece of mail opened. I said, you know, that was fine but he didn't have to insinuate that I was opening the mail because I never had. He went on to

. . . I told him, you know, that I . . . He wasn't intimidating me and he wasn't going to harass me by doing that. So he went back in Mr. Griffith's office and he sat down in Mr. Griffith's office and I went over to my desk to get my purse to go to lunch and from Mr. Griffith's office, Mr. Ball yelled out to me, let me state the facts of life to you. And [sic] I said, no, I might be a woman but I'm not stupid and ignorant and you're not going to treat me as such. So I got my purse and I went on out the door to eliminate any further confrontations because it was my lunch break at 11:30. That very same day Mr. Ball did send the exact same information up to Bob Carpenter in an envelope with Bob's name on it but it wasn't marked up the way he had Harry Griffith's. And [sic] I distribute the mail, not only for Ritchie County but for Greenwood because all the mail comes into the Ritchie County office. But he only saw that Mr. Griffith's mail needed to be marked that way, not Bob Carpenter's.

It is determined that Deak's version of the conversation and acts which took place on June 5, 1992, is not believable and that her testimony is not credible for a number of reasons.

First and foremost, Deak's version of the facts and of the statements made is vastly different from that of either Ball's or Griffith's. Although this in and of itself cannot solely support the conclusion that her version is unbelievable, in this case, the testimony of the Respondent's witnesses is determined to be more believable. Both Ball and Griffith testified in a frank, straightforward manner, they were responsive to questions and their respective testimony was consistent with each other's. Even though it can be argued that both gentlemen had an incentive to tailor their testimony to support the allegations contained in the reprimand, this inference is no more helpful in assessing their credibility than the inference that Deak also had an obvious interest in describing that facts in question differently from that contained in the disciplinary letter.

Second, Deak's testimony at level four was materially inconsistent with her testimony at level two, moreover, she does not provide any justification for the differences. Third, her demeanor at level four made her appear less credible than the witnesses for DOH. Finally, the testimony at both hearings support the fact that there were witnesses in the lunchroom located directly outside of Griffith's office and that Deak walked toward the lunchroom as she continued to talk to Ball. Deak testified that she knew the names of those individuals in the lunchroom but none of them were called as witnesses to corroborate her testimony. It is recognized that the Respondent has the burden of proof in this case and that a grievant's failure to provide corroborating testimony is normally not held against him or her. However, because Deak's version of the facts have been disputed by the Respondent's witnesses and because she has testified inconsistently herself, those employees in the lunchroom could have gone a long way in rehabilitating her testimony but such was not the case.

In dealing with Ball's direct command to Deak for her to come back into Griffith's office, Deak testified at level four that he never asked her to come back into the office. However, at level two, she stated under oath that "at that time he did ask me to come back in the office and I told him, I'd prefer he do it out in the lobby in the presence of other people." On cross-examination, Deak was evasive in answering the questions levied by DOH's lawyer concerning statements she made at level two about Ball's request. She insisted on not verifying the accuracy of her testimony from

level two when presented with the transcript of that earlier hearing. This evasiveness has negatively effected her credibility.

Concerning other inconsistencies in Deak's testimony, she stated at level two that "if it [the envelope] was sent up there addressed the way it was to try to upset me, that it didn't do so." However, at level four, on cross-examination, she stated that she did not say the envelope was prepared in such a manner as to harass her until after Ball started yelling at her and she did not say that she made the former statement. In essence, it can be inferred from Deak's version of the facts as presented at level four that she did not enter into Griffith's office to "make a point." This inference, however, is not supported by her statements made at level two.

Deak presented no justification for why Ball or Griffith would have been concerned with her or with accusing her of mishandling the mail. The record clearly indicates that the whole incident would never have taken place had Deak not interrupted the conversation in Griffith's office and, more importantly, the testimony further establishes that if she had not initiated the controversy about the address on the front of the envelope, no escalation of the conversation would have taken place. All reasonable inferences from the testimony indicates that Deak intended to hand Griffith the envelope, and then, after doing so, made an inflammatory comment to both Ball and Griffith about the manner with which it was addressed. The testimony at both hearings establishes that Ball did not address the envelope with any

intention to harass Deak but only to guarantee that the contents remain private.

Deak testified at level two that it was not common practice for interdepartmental mail to be addressed in the same manner as the envelope in question. She stated that the normal procedure was that she would receive the mail, stamp it, and then deliver it to the person to whom it was addressed. It has not been Deak's practice to open other employees' mail regardless of the manner with which the envelope was addressed. Therefore, since Deak was not responsible for opening the mail, then there should have been no problem with the way that the envelope in question was addressed.

At level two, the following questions were posed to Deak by DOH's attorney and the corresponding answers were given:

Q: So you basically took exception to it being marked as to be opened by Harry Griffith only, is that correct?

A: I wouldn't even say that I took exception to it. I handed it to Mr. Griffith because the way it was marked so that he would know that I did not open his mail. I didn't want to take it in there and lay it on his desk and somebody else come in and open it and then them say, you know, Harry say, well Patty you opened my mail. This way he knew I didn't open it. It was handed directly to him for him to open himself.

Q: Has that been a problem that other people have opened mail?

A: I've not been out and out accused of it until this envelope came in and then I kind of suspicioned [sic] it. But there had been a lot of remarks prior to that that made me suspicious of a lot of things.

Q: You say there has been other mail that's been opened then prior to getting to it [sic] getting to the person, I guess, that's the way you indicated that it was set up there. There has been situations where its been opened

prior to that?

A: I'm saying that I felt as though I was trying to be set up by Mr. Ball sending this envelope to Mr. Griffith that way. That is why I handed it directly to him that day so that I eliminated myself from being accused of anything.

This testimony establishes, first of all, that there has never been an existing problem of mail being improperly opened before it has reached the addressee. Second, that if Deak had only wanted to assure that she was not going to be accused of opening mail improperly, all she had to do was make sure that Griffith received the envelope. She did not have to make any comment about her impression that she was being "set-up." There is no evidence in the record which would even remotely support this conclusion. Finally, the testimony establishes that Ball and Griffith were only in Griffith's office because Deak had called them, from out on a job, on the radio, to request that they come back to the office. The weight of the evidence supports the conclusion that the two gentlemen were not in the office to harass Deak in any manner.

Insubordination is usually defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Department, Docket No. 90-H-128, citing Gill v. West Virginia Dep't of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). "Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore

clear instructions." Reynolds, citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988); Daniel v. United States Postal Serv., 16 M.S.P.R. 486 (1983); and Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). Further, it has also been stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988),² citing Weber v. Buncombe County Board of Education, 266 S.E.2d 42 (N.C. 1980).

A thorough discussion of what constitutes insubordination was made in In re Burton Manufacturing Company, 82 L.A. 1228 (March 2, 1984). In Burton, the Arbitrator recognized that

In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management. In most cases that come before Arbitrators, the employee either denies the alleged subordinate act or gives reasons why it was justified.

Burton, p. 1234, citing Trotta, Arbitration of Labor-Management Disputes, New York: AMACOM, 1974, pp. 282-283. The Arbitrator in Burton went further to state a generally recognized principle of employer-employee relations that

Furthermore the company has the right to demand that

² Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court which reversed the circuit court's ruling. The cite to that Supreme Court case is Sexton v. Marshall University, 387 S.E.2d 529 (W.Va. 1989).

subordinate personnel not manifest disrespect toward supervisory personnel which undermine their status, prestige, and authority, thus mitigating against plant efficiency.

Burton, p. 1234.

In Sexton, the grievant acted in a manner similar to the way Deak did in this case. Sexton was informed that he was to attend a meeting held in one of the personnel offices at the University in order to deal with disciplinary charges brought against him. Once the meeting began to take place, Sexton stood up, interrupted the speaker and began to read a statement of grievance aloud. When he was asked to sit down, he refused and continued to read more loudly. The meeting was finally adjourned because Sexton would not respond to the requests to cease interrupting the speaker. The Administrative Law Judge in Sexton held that

Moreover, it was not just the grievant's refusal to comply with directions which constituted the act of insubordination but also his blatant disregard for the authority Mr. Welty [the Director of Axillary Services who was speaking] was exercising by calling the meeting and attempting to conduct it in a reasonable manner. The complete disruption of a conference called by the grievant's supervisors demonstrated an unwillingness on his part to submit to any authority and he cannot escape the consequences of these actions simply because his supervisor's directive was politely phrased.

Sexton. p. 10. Although Deak's behavior was not as extreme as that of the grievant's in Sexton, she did exhibit the same lack of respect for authority by disrupting the meeting being held between Ball and Griffith.

The testimony in this case is indicative of a troubling human relations problem within DOH's Ritchie County office. Nonetheless, neither the evidence of record nor Deak's internalized feelings of

distrust for her supervisors or paranoia relating to her job security establishes that she had in any way been harassed by the manner in which the envelope in question was addressed. This is not to say that if any employee subjectively feels that he or she is being treated improperly by their employer that they can do nothing to rectify the situation. However, the proper manner with which to address one's management is not to do so in an argumentative, abusive or disrespectful manner.

The record does not support the finding that Ball was acting in an overly aggressive manner towards Deak, who, as the record indicates, was the instigator of whatever verbal assault occurred between Griffith, Ball and herself. More importantly, Deak's actions did not reflect the actions of an employee who was afraid for her safety. Finally, her impression that Ball was going to hit her or harm her in any way is neither reasonable nor persuasive. Again, there is no evidence of record which supports the conclusion that Ball was upset with Deak before she entered Griffith's office. Secondly, it would have been utterly foolish for him to have even threatened to physically harm her given the number of employees in the office around the time of lunch and within the presence of Griffith.

Undoubtedly, the incident should never have escalated to the point in which it was allowed; however, that is not justification for Deak's refusal to calmly and rationally deal with her anxieties in a more appropriate manner. Also, Deak's apparent unwillingness to discuss problems within the appropriate DOH chain-of-command and

to take all personnel matters "directly to Charleston" does nothing more than compound the human relations problem which exists at the Ritchie County office. It is hereby concluded that DOH has met its burden of proving by a preponderance of the evidence that Deak acted insubordinate on June 5, 1992. According to the holdings in Sexton, Reynolds, and Burton, Deak's actions of initiating a conversation with two of her supervisors which subsequently became abusive, and further, by not calmly and rationally discussing any perceived problems with the two individuals when asked amounted to insubordination as broadly defined.³

The foregoing discussion of the facts of the case and of the applicable law to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. Insubordination has generally been defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Department, Docket No. 90-H-128, citing Gill v. West Virginia Dep't of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988).

2. "Generally, an employee must obey a supervisor's order

³ Deak makes a disparate treatment argument by alleging that other employees in Ritchie County have engaged in similar activities and have failed to be disciplined. It is hereby determined that she has not established a prima facie case of discrimination or disparate treatment within the context of this case. Further, at both hearings, much testimony was presented which involved at least one prior grievance between DOH and its employees which had settled and there was no specific evidence as to the exact nature of the claim but only to the ultimate outcome.

and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds, citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988); Daniel v. United States Postal Serv., 16 M.S.P.R. 486 (1983); and Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).


3. Further, it has been held that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Board of Education, 266 S.E.2d 42 (N.C. 1980).

4. The Division of Highways has established by a preponderance of the evidence that Patricia Ann Deak was insubordinate on June 5, 1992, and that the written reprimand she received was an appropriate form of disciplinary action.

5. Ms. Deak has failed to meet her burden of proving any disparate treatment on behalf of DOH with regard to the incident in question on June 5, 1992.

Therefore, this grievance is hereby 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 of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.


ALBERT C. DUNN, JR.
Administrative Law Judge

Date: January 20, 1993