ROGER CARROLL

v. **Docket No. 93-DOH-381/382**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS

DECISION

The grievant, Roger Carroll, is employed by the West Virginia Division of Highways (DOH) as a Storekeeper II assigned to its Mercer County Garage. He filed a grievance at Level I April, 16, 1993, protesting his one-day suspension without pay for insubordination. (See footnote 1) The grievant's supervisor was without authority to grant relief and the grievance was denied at Level II following a conference held on May 10, 1993. The grievance was again denied at Level III following a hearing held August 10, 1993 and an appeal to Level IV was made September 13, 1993. The parties subsequently agreed to submit the case for decision on the record developed atthe lower levels. The parties submitted proposed findings of fact and conclusions of law by November 15, 1993.

FACTS

There is essentially no dispute over the facts of the case. The record developed at Level III supports the following findings.

1. The grievant has been employed by DOH as a Storekeeper II since 1986. His supervisor in the Mercer Garage, Buddy Campbell, has always rated his performance highly.

2. It is the grievant's responsibility to receive requests from Mechanics for vehicle parts and other equipment from the Garage's storeroom. The requests are normally made via an "SE-82", a form which denotes the part required and the mechanic or other employee making the request.

3. Upon receipt of the request, the grievant locates and issues the part and completes a "DOH-6" form. Completion of the DOH-6 requires that the grievant record the code number for the part, the Mechanic to whom it was issued and the vehicle for which it was intended. The grievant must also sign the form in a space labeled "Authorized by." The employee requesting the part must also sign the document in an area designated "Received by." The form is then tendered to a Clerk who logs this information into a computer.

4. It has been common practice in the Mercer Garage since at least the grievant's initial employment there, that in the event the Storekeeper is absent, Mechanics themselves obtain any parts needed and leave the Storekeeper an SE-82 or a note reflecting whatparts were taken. The grievant has, on numerous occasions, completed the necessary DOH-6's upon his return from sick or vacation leave. He has also followed this practice when Mechanics assigned to night shift duty have obtained parts.

5. A severe snow storm hit the Mercer County area on the night of March 12, 1993, a Friday. Before leaving on that day, the grievant asked a foreman in the garage if he should report for overtime work during the weekend and was told that he would be called if his services were required. The grievant, who has no telephone, was not called. Due to road conditions, several employees, including the grievant, could not report to work on Monday, March 15, 1993. The grievant returned to work on March 16, 1993.

6. During the grievant's absence a number of parts were obtained from the storeroom. Acting Shop Foreman David Dobbins signed SE-82s for the parts and left them on the grievant's desk.

7. Upon the grievant's return, Mr. Dobbins asked him to complete and sign DOH-6s for the parts used. The grievant advised Mr. Dobbins that he was not responsible for the completion of the forms since he had not issued the parts. Mr. Dobbins advised Mr. Campbell of the grievant's refusal.

8. Mr. Campbell held a meeting with the grievant and Mr. Dobbins on March 22, 1993.

9. During the meeting, Mr. Campbell asked the grievant at least four times to complete the DOH-6s. He also advised that unless he did so he would be "written up" or disciplined. Eachtime, the grievant responded that he should not be held responsible for completing forms on parts he had not personally issued. Mr. Campbell considered the grievant's responses to be a refusal to carry out a direct order. Mr. Dobbins and a clerk subsequently completed the forms.

10. At no time prior to or during the meeting, did the grievant have reason to believe that there had been misappropriation of the property involved or that the parts had otherwise not been issued as reflected by Mr. Dobbins' SE-82s.

11. Neither the agency's written directions for completing a DOH-6 nor the form itself require the storekeeper or other employee who signs the "Authorized by" section of the form to personally issue the property involved or attest that he has done so. The import of the directions and past practice of the agency is that the form is not used to verify the manner in which equipment or parts

were obtained but to simply provide a record of their issuance and use.

12. Via a "Form RL-544" dated March 22, 1993, the grievant was advised that Mr. Campbell was recommending to DOH District Engineer Bruce Leedy that he be suspended for one day without pay. The notification contained the following statement:

> Mr. Carroll did not call in or report to work on March 13th or 14th, during an emergency snow storm. On the 15th he called in and said he couldn't get here due to the snow. On the 18th Mr. David Dobbins gave him his work orders (SE-82s) to charge out parts used on March 13, 14, and 15, which he refused to charge out. He called in for a sick day on March 19th. On March 22nd Mr. Campbell called him into his office and instructed him to charge out the parts which were used and he still refused to do so.

13. The grievant met with Mr. Leedy on April 2, 1993 and was allowed to respond to the charges. During the meeting, the grievant signed an "Employee's Verification of Disciplinary Action" form which contained the statement, "I feel that I was not given overtime for the dates of March 13, and 14, 1993 and the continuance of the storm and was not given a reason for this by my supervisor. My grievance procedure will go into detail and explain this."

14. By letter dated April 12, 1993 from Mr. Leedy, the grievant was suspended for one day for "failure to follow instructions." Mr. Leedy advised that the specific reason was that the grievant, "on Thursday, March 18, 1993 refused to charge out parts that were used on March 13, 14, and 15." No mention was made in the letter to any failure to report for work during the snow storm.

15. During the conferences held at Levels I and II of the grievance procedure, the grievant was apparently advised that the suspension was for insubordination only and that the charge of failure to report to work had been dropped.

16. DOH's written disciplinary policy specifically provides that an employee may be suspended for one to three days for the first offense of "Failure to follow major instructions."

ARGUMENT

The grievant advances two arguments for reversal of his suspension. First, he asserts that he was never insubordinate in that he never refused Mr. Campbell's order but merely advised thathe should not be responsible for completion of the task ordered. Second, he asserts that by signing the DOH-6s in question, he would be falsely acknowledging that he had issued the parts identified therein. It is assumed from this assertion that the grievant maintains that a refusal to commit an illegal or improper

act does not constitute insubordination.

DOH responds that completion of the forms in question is merely a "mechanical" process by which the transfer of parts is recorded and that by signing off on the documents, the grievant incurred no responsibility for any misappropriation of equipment. DOH further asserts that the grievant was insubordinate regardless of whether he expressly refused to obey Mr. Campbell's direct order in the March 22 meeting. The agency maintains that the grievant's failure to carry out the order constitutes the offense.

CONCLUSIONS

After a thorough review of the parties' positions, the applicable law and the foregoing findings of fact, the undersigned makes the following conclusions of law.

1. In disciplinary matters, the employer bears the burden of proving the charges against the employee by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). The employee has the burden of production of evidence on any defense he or she presents. Webb v. Mason County Bd. of Educ., Docket No. 26-88-206 (Jan. 5, 1989).

2. Insubordination may be defined as willful failure or refusal to obey reasonable orders of a superior entitled to givesuch order. Martin v. W. Va. State Fire Comm., Docket No. 89-SFC-145 (Aug. 8, 1989). An employee protesting a charge of insubordination may prevail by showing that the individual giving the order was without authority to do so or that the order required him to commit an illegal act. Webb; Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (August 8, 1990).

3. DOH has established by a preponderance of the evidence that the grievant, on May 22, 1993, refused to obey the direct order of County Supervisor Buddy Campbell, a superior entitled to give the order. The grievant has failed to establish that the order was a direction to commit an illegal act. Since the record reflects that prior to May 22, the grievant, without objection, completed numerous DOH-6s without having personally issued the equipment involved and provided no plausible explanation for his refusal to follow this practice as ordered, it establishes that motives other than the legality of the order prompted his refusal.

Accordingly, the 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 of the intent to appeal and provide the civil actionnumber so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: May 31, 1994

Footnote: 1The grievant actually filed two grievances. He initiated a March, 29, 1993 complaint upon his receipt of a notice of impending disciplinary action and filed the April 16, 1993 grievance once the action was taken. Because the two grievances included slightly differing accounts of the events which led to the suspension, and varying requests for relief, they were assigned different docket numbers. Despite the differences, there is only one cognizable grievance.