KENNETH OVERBAY,

Grievant,

v.

DOCKET NO. 97-CORR-423

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Kenneth Overbay, Grievant, protests his dismissal from his position as Mechanic II with the West Virginia Division of Corrections/Mt. Olive Correctional Complex ("Corrections"), effective September 26, 1997. A level four hearing was conducted on March 16, 1998, April 24, 1998, and May 15, 1998, and this case became mature for decision on June 15, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1) Corrections was represented by Leslie K. Kiser, Esq., Corrections' Director of Legal Services, and Grievant was represented by Elaine Harris, Communication Workers of America representative.

SUMMARY OF EVIDENCE

Corrections Exhibits

Ex. 1 -

September 11, 1997 dismissal letter from Deputy Warden Howard Painter to Kenneth Overbay.

Ex. 2 -

West Virginia Division of Corrections Policy Directive 400.00.

Ex. 3 -

Classification Specification for Mechanic II.

Ex. 4 -

Official Statement of Ed Smith taken from Cheryl Chandler on June 18, 1997.

Ex. 5 -

May 6, 1997 memorandum from Terry Frye, Maintenance Director, to Michael Coleman, Associate Warden Operations.

Ex. 6 -

May 1, 1997 memorandum from Alfred Falls, Mechanic III, to Terry Frye, Maintenance Director.

Ex. 7 -

January 30, 1996 handwritten note from Alfred Falls.

Ex. 8 -

Official Statement of Alfred Falls taken by Cheryl Chandler on June 12, 1997.

Ex. 9 -

Official Statement of Tim Whittington taken by Cheryl Chandler on June 10, 1997.

Grievant's Exhibits

Ex. 1 -

M.O.C.C. Mechanic II Job Responsibilities.

Ex. 2 -

Resume of Kenneth A. Overbay.

Ex. 3 -

September 25, 1997 letter from F.E. Jugo, M.D. to Mount Olive Corrections.

Ex. 4 -

Workers' Compensation Pay Stubs for Kenneth Overbay.

Ex. 5 -

Performance Evaluation Forms for Kenneth Overbay, dated May 2, 1996 and September 23, 1996.

Ex. 6 -

Certificate of Recognition awarded to Kenneth Overbay, dated May 9, 1997.

Ex. 7 -

Handwritten memorandum from Tim Whittington, Building Maintenance Supervisor, to Terry Frye, Maintenance Director, with attached inventory list.

Ex. 8 -

Requisition Forms from Maintenance Department.

Ex. 9 -

March 13, 1996 Second Level Grievance Decision, with attached performance evaluation form.

Testimony

Corrections presented the testimony of Howard Painter, Edward Smith, Terry Frye, Tim Whittington, and Alfred Falls. Grievant testified in his own behalf and presented the testimony of Gerald Crist.

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; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

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. Dept. of Finance and 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); see also Sections 12.02 and 12.03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

Grievant was dismissed from employment effective September 26, 1997. He was notified of this dismissal through a letter from Deputy Warden Howard Painter, dated September 11, 1997. R Ex. 1. The stated reason for Grievant's dismissal was his violation of Corrections Policy 400.00, specifically the following offenses:

A-1 -

Unsatisfactory attendance or excessive tardiness.

A-5 -

Inadequate or unsatisfactory job performance.

B-4 - Careless workmanship or negligence resulting in spoilage or waste of materials or delay in production.

C-4 - Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

R. Ex. 2. These charges will be addressed separately. A-1 -

Unsatisfactory attendance or excessive tardiness.

Deputy Warden Painter testified that the charge of excessive absenteeism and tardiness was substantiated by a review of the printout of the Maintenance Department time clock. Grievant was responsible for punching in and out of the time clock. Grievant's regular shift in the Maintenance Department was from 8:00 a.m. to 4:00 p.m. The time clock showed that from July 14, 1997, through August 19, 1997, a total of 21 days, Grievant had reported in to work late 19 of those days. In addition, during that same time period, Grievant depleted 57.25 hours of his accrued sick leave.

Grievant had been counseled before about his work performance. On January 30, 1996, he was counseled by Terry Frye, Maintenance Director, and Alfred Falls, his direct supervisor, about taking too much time for lunch. R Ex. 7. Mr. Falls, Grievant's supervisor in 1996, gave a statement to Cheryl Chandler on June 12, 1997. R. Ex. 8. In February, 1996, he evaluated Grievant. It was not a poor evaluation, but he did give Grievant some “does not meet standards” ratings. Grievant felt the evaluation should be higher, and filed a grievance. G. Ex. 9. Grievant was then moved under Mr. Frye's direct supervision. As result of the grievance, Mr. Falls' evaluation was voided, and another scheduled after Frye and Falls had attended Performance Evaluation training, and all three attempted

to resolve their conflicts. G. Ex. 9.

Grievant was evaluated by Mr. Frye in May 1996 and again in September 1996. These performance evaluations indicate that Mr. Frye gave Grievant “meets” or “exceeds” standards in the areas of absenteeism and tardiness for the time periods encompassed in those evaluations. G. Ex. 5. On October 22, 1996, Mr. Painter spoke with Grievant regarding tardiness and absenteeism, and issued him a letter of reprimand. However, after meeting with Grievant, Mr. Painter agreed to rescind the reprimand. Grievant pointed out to him that his supervisor at the time had given him a good performance evaluation, and Mr. Painter decided to give him another chance. No evidence was presented regarding the amount of leave Grievant had used or the number of times he had been tardy between his September 1996 evaluation and his October 22, 1996 reprimand from Mr. Painter. Nevertheless, Mr. Painter testified that following the counseling sessions, Grievant's performance with regard to attendance did not improve.

Grievant conceded his tardiness, but testified he believed there was a policy at Mt. Olive which permitted employees to be up to 7 minutes late before they would be charged with tardiness. Grievant also argued that he was dismissed while off on Workers' Compensation in violation of W. Va. Code § 23-6A-1. Finally, Grievant claimed he was discriminated against in being terminated, as another employee, Susan Cantrell, received only two suspensions for excessive tardiness, one for 3 days and the second for 15 days. Mr. Painter testified that there is no policy at Mt. Olive that an employee can be 7 minutes late before he will be charged as tardy. He testified that disciplinary action is determined on a case-by-case basis. If an employee is consistently late, he will look at all tardys to determine whether discipline is warranted. If an employee is one minute late once in awhile, Mr. Painter conceded he probably would not do anything about it. However, Grievant was consistently late, and Mr. Painter decided disciplinary action was warranted in his case. Corrections has proven that Grievant was excessively tardy during the time period in question. With regard to his claim of discrimination under W. Va. Code §§ 23-5A-1, et seq., Grievant was off work on Workers' Compensation on September 11, 1997, when he received his dismissal letter. Grievant had been injured on the job on March 10, 1997, and had been on Workers' Compensation during the period March 10, 1997, through June 24, 1997. On August 30, Grievant woke up in pain, and scheduled an appointment with his physician, F. E. Jugo, M.D., on September 9, 1997. Dr. Jugo concluded that the pain was from his initial injury, and Grievant went on Workers' Compensation again. G. Ex. 3.

Grievant received payment from Workers' Compensation for the period September 9, 1997, through September 16, 1997, for the same claim as the initial March 20 injury. G Ex. 4. Grievant was dismissed on September 11, 1997.

W. Va. Code § 23-5A-1 provides that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter."

W. Va. Code § 23-5A-3 provides, in pertinent part:

> (a) It shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [§ 23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

In order to make a prima facie case of discrimination under this section, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, and (3) the filing of a workers'compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991); Pannell v. Inco Alloys Int'l, Inc., 188 W. Va. 76, 422 S.E.2d 643 (1992); Sizemore v. Peabody Coal Co., 188 W. Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-Division of Gatewood Prods., Inc., 484 S.E.2d 481 (W. Va. 1997). When an employee makes a prima facie case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge. In rebuttal, the employee can then offer evidence that the employer's proffered reason for the discharge is merely a pretext for the discriminatory act. Powell, supra.

In determining whether there is a nexus between the filing of a Workers' Compensation claim and an employee's discharge, there is usually a lack of direct evidence, and courts look to a variety of factors, including proximity in time of the claim and the firing, evidence of satisfactory work performance, and any evidence of an actual pattern of harassing conduct for submitting the claim. Powell, supra.

In this case, Grievant has substantiated a prima facie case of discrimination under W. Va. Code §§ 23-5A-1, et seq. Grievant has established that an on-the-job injury was sustained in March 1997, for which he again went on Workers' Compensation in September 1997. Grievant was discharged in part for excessive absenteeism and tardiness during the period immediately preceding his going on Workers' Compensation. Grievant testified that he took sick leave during July and August 1997, because of the recurring pain he was experiencing, and at that time did not want to go on Workers'Compensation. Eventually, he did see his physician and was advised to go on Workers' Compensation, which he did beginning September 9, 1997.

While it is true that Grievant was not actually on Workers' Compensation during the period of time for which he was disciplined, Grievant has satisfactorily proven that the reason for his absences during that time were related to his on-the-job injury. In addition, Grievant had received “meets” or “exceeds” standards ratings on his past two previous performance evaluations in the areas of absenteeism and tardiness. While it is clear that Grievant was counseled by Mr. Painter in October 1996, no evidence was presented as to the amount of leave Grievant had used or the amount of days he was tardy which precipitated that counseling session. No explanation was given as to why Grievant was counseled for absenteeism one month after receiving an exceeds standards evaluation in September 1996. Thus, there is at least an appearance, on its face, that Grievant was dismissed for absences incurred because of his on-the-job injury and for his Workers' Compensation claim for that injury.

However, Grievant was also dismissed for factors not related to his absenteeism and tardiness. Grievant was dismissed for unsatisfactory performance, falsifying records, and careless or negligent workmanship, which Corrections asserts are legitimate, nondiscriminatory reasons supporting Grievant's dismissal. These claims will be now be addressed.

A-5 -

Inadequate or unsatisfactory job performance.

B-4 -

Careless workmanship or negligence resulting in spoilage or waste of materials or delay in production.

C-4 -

Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

These charges all relate to a series of incidents which occurred over a period of time from approximately Summer 1996, through the Fall of 1997. Mr. Painter testified that Grievant was charged with the repair and maintenance of lawn mowers in the Maintenance Department. As part of this task, Grievant was directed to prepare a list of parts and service needed for each Corrections lawn mower in February 1997, so that the equipment would be ready for the Spring and Summer seasons. Grievant prepared a list which indicated, among other things, that six (6) lawn mowers had "blown engines" and were unusable. It was later determined that this list was inaccurate, as the 6 mowers were repaired and operable. Mr. Painter concluded Grievant was either not doing his job, or was doing it carelessly and unsatisfactorily.

Grievant had, at least on 3 occasions, placed lawn mowers behind the "P" Building, one of the buildings outside the secure perimeter, and adjacent to the Maintenance Building. LIV Painter; Smith; R. Ex. 4. It was a common practice for maintenance employees to place equipment that was inoperable or designated as surplus behind that building.

Edward Smith, the Corrections Officer supervising the lawn crew, testified he had seen as many as 3 mowers stored behind "P" Building at one time. The last time he saw mowers there was in the Spring of 1997. Grievant told him he put the mowers there, because they were blown up and he was going to surplus them. Mr. Smith gave an official statement to Corrections Investigator Cheryl Chandler on June 18, 1997. He told Ms. Chandler that in the Summer of 1996, they were experiencing lots of problems with lawn mowers, weed eaters, and small engine equipment. Most machines were down or broken, or had been sent away for repairs. It was difficult to keep the yard mowed. Mr. Smith hadone of the inmates bring one of the mowers behind "P" Building to the Maintenance shop, and Mr. Falls, another mechanic, cleaned it up, put a spark plug in it, and had it back on line. R Ex. 4.

Terry Frye, Maintenance Director, testified that Grievant was responsible for maintenance of lawn mowers. Mt. Olive is an 88-acre property, and there were major problems with lawn care in the Summer of 1996, because they were working under the assumption that six mowers were blown. Mr. Frye had received a call from Michael Coleman, Associate Warden Operations, telling him to get

some lawn mowers up front to mow the grass. By the time Mr. Frye got the call from Mr. Coleman, there were no mowers running. Mr. Frye directed Grievant to evaluate the equipment, and make a list of repairs and/or parts that were needed to get it operational. On May 6, 1997, Mr. Frye wrote to Mr. Coleman that Grievant had performed a check of the lawn mowers for the upcoming Summer 1997 season, and found numerous problems with them. Grievant reported that six mowers had blown motors.

On July 1, 1997, Mr. Frye gave a statement to Cheryl Chandler. Grievant had told him the mowers were not usable. He looked at the mowers himself, and concluded they did not need rebuilt, and ultimately got all the mowers running. Some still had small problems, but the engines were not blown. He had depended on information provided by Grievant which turned out to be wrong, and he could no longer rely on Grievant to do his job. With the experience that Grievant was supposed to have, Mr. Frye testified he did not know how it would be possible for him to conclude the mowers had blown engines. Grievant had provided a list of parts that needed to be ordered for mowers. Mr. Fryeconcluded that they did not need to order new parts, except spark plugs, and they used existing parts in Maintenance to fix the mowers.

Tim Whittington, Building Maintenance Supervisor I, gave a statement to Cheryl Chandler on July 10, 1997. R. Ex. 9. Sometime in January or February 1997, Mr. Frye had asked Grievant to look at the mowers and determine what parts were needed, and what repairs were necessary. Grievant gave him the information, Mr. Whittington wrote it up, and forwarded the list to Mr. Frye by memo. G. Ex. 7. The equipment was rechecked at Mr. Frye's request, and repaired by another mechanic, Mr. Falls. As of July 1, 1997, all of the lawn mowers were back on the line and running.

Mr. Falls was given a copy of the information Grievant had given to Mr. Whittington by Mr. Frye. G. Ex. 7. Mr. Frye gave the list to Mr. Falls so he could check out the equipment. None of the mowers had blown engines which needed to be replaced. The following summarizes Mr. Falls' report:

Item # 839 - Grievant had indicated the motor was blown and had a bent crank. Mr. Falls cleaned the fuel lines and the engine started right up. He did other minor maintenance on it and got it back on line.

Item 3288 - Grievant had indicated the motor was blown. Mr. Falls found the timing key was broken. He replaced that and a spark plug. He could determine just by looking at the motor what the problem was.

Item 850 - Grievant had indicated the motor had no compression and was blown. Mr. Falls found it did have compression. There was nothing wrong with the motor. The starter housing was bent, which he straightened. The kill switch wire was broken, but would not keep the engine from running. He replaced with these parts with material found in the shop.

Item 7163 - Grievant had indicated the motor was blown and the body was broken. This mower had been behind the “P” Building for at least a year. Mr. Falls found the engine was dirty due to exposure, and the brake handle cable was broken. He cleaned and serviced it, replaced a spark plug and a brake handle cable. One of the Corrections Officers had an inmate cleaning debris behind the “P” Building, and he brought the mower over to the shop for Mr. Falls to use as parts. He checked the engine, and found nothing wrong with it, except the spark plug.

Mr. Falls did not have to order any parts to get the mowers running. The only new parts used to repair were spark plugs and mower blades, which were already in stock.

On May 1, 1997, Mr. Falls sent a memorandum to Mr. Frye regarding the lawn mowers. R. Ex. 6. He stated what problems the equipment had, and what he did to repair them, concluding that all the equipment was back in service.

As a result of the foregoing events, Mr. Painter concluded that Grievant had provided misleading information, concealed the fact that the lawn mowers were not actually “blown”, and was not performing his job in a satisfactory manner, if he could not repair the mowers himself.

Grievant acknowledged that he had ““full responsibility” for the maintenance and operations of the garden shop, including lawn mowers, weed eaters, and other equipment. Grievant admitted he provided Mr. Whittington with the information regarding parts needed for repairs and maintenance of the mowers for the upcoming Summer of 1997. Grievant provided a stack of requisition forms ordering various parts, which were denied by theBusiness Office. G. Ex. 8. Grievant testified that Mike Spaulding, his former supervisor, told him to put the mowers behind “P” building, because Susan Cantrell, the Business Manager, would not approve requested parts. Grievant testified Mr. Spaulding told him that was the only way they would be able to get new parts.

Gerald Crist, a co-worker of Grievant's, testified that Grievant was instructed by Mike Spaulding to evaluate the mowers, find out what parts were needed, and make a list. Mr. Crist testified that Grievant had to order some parts twice, because Ms. Cantrell would not approve the parts orders. Mr. Crist also testified that Mike Spaulding instructed Grievant to place the mowers behind “P”

Building, when Grievant asked him where he could put mowers that needed repaired.

As neither Mr. Spaulding nor Ms. Cantrell were called to testify at the level four hearing, this testimony raises more questions than it answers. One, was Mr. Spaulding simply relying on Grievant's report that the lawn mowers were blown and unoperable when he told him to place them behind the “P” Building? Two, did Grievant and/or Mr. Spaulding, frustrated at their inability to get parts, attempt to “scam” the Business Office into thinking there was a crisis in order to get the parts they requested? Either way, Grievant is at fault here. If he told Mr. Spaulding the motors were all blown when they were not, then he misled Mr. Spaulding, and failed to perform his job satisfactorily. If Mr. Spaulding and Grievant were attempting to get the parts they wanted by creating a crisis in the groundskeeping shop, then Grievant again was providing misleading information to Corrections, and again failing to perform his job. In any event, a crisis did arise with regard to the lawn mowers, and it appears to have backfired in Grievant's face. Grievant also claimed the list of information he provided to Mr. Whittington was not complete; that there was another column that showed what had been ordered and replaced by Grievant. He claimed he already fixed some of the equipment listed, which Mr. Falls claimed he repaired. In Grievant's opinion, motor #839 was vibrating way too much to be in service. He was afraid it might break and the blade would fly across the yard. This is not the information he provided to Mr. Whittington, however, regarding that motor. Grievant had merely informed him that motor #839 was blown and had a bent crank.

Grievant received performance evaluations in May 1996 and September 1996. He was given meets or exceeds standards in all areas on the May 1996 evaluation, by Terry Frye. He was given meets or exceeds standards in all areas on the September 1996 evaluation, also by Terry Frye. G. Ex. 5. Grievant received a Certificate of Recognition for dedicated public service from Mt. Olive on May 9, 1997, signed by Warden George Trent. G. Ex. 6. The certificate was passed out with payroll checks. Grievant claims he was surprised when he was terminated for unsatisfactory performance in September 1997. No one had ever talked to him and told him the work he was doing was unacceptable or unsatisfactory. Again, this merely begs the question: Was Mr. Frye relying on Grievant's representations that the lawn mowers were blown? Mr. Frye testified he did rely on Grievant's information, and until it was confirmed otherwise, felt Grievant was doing his job. This would explain the satisfactory evaluations Grievant received before it was discovered that the lawn mowers were not irreparable.

Corrections has succeeded in proving the three charges against Grievant relating to poor work performance, careless or negligent work performance, and providing misleading information about the state of the lawn mowers. Thus, Corrections hasrebutted Grievant's prima facie case of discrimination under the Workers' Compensation statute. It is clear that during the period of time Grievant was not off on Workers' Compensation or sick leave, he was simply not doing his job, or if he was, he was doing it very poorly and at great risk to the safety and operations of the Mt. Olive Correctional Complex.

Finally, Grievant claims his dismissal was discriminatory under the provisions of W. Va. Code § 29-6A-2(d), which defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Grievant presented evidence that Susan Cantrell, another Corrections employee, only received two suspensions for excessive

tardiness, while he was dismissed. Ms. Cantrell is the Business Manager for Corrections, an administrative position. She is a classified-exempt employee. Mr. Painter testified that Ms. Cantrell's deficiency was limited to tardiness. With Grievant, there were several deficiencies, including tardiness and poor performance, as well as a track record of disciplinary actions. Grievant has failed to make a prima facie case of discrimination. Grievant, an hourly classified employee, is not similarly situated to Ms. Cantrell, a classified-exempt administration employee. Grievant is required to punch a time clock and is paid on an hourly basis. Ms. Cantrell is salaried. While both individuals may have been guilty of excessive tardiness, the discipline imposed on Ms. Cantrell as opposed to Grievant cannot be found to be discriminatory. In addition, Grievant was counseled at least twice in the past for his tardiness and absenteeism. There is no evidence that Ms. Cantrell was subject to the same warnings prior to her suspensions. Further, as discussed above, there is no evidence that Ms. Cantrell was not satisfactorily performing her job despite her tardiness, while there is ample evidence that Grievant was not performing his job.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed by Corrections as a Mechanic II.

2. Grievant was dismissed from employment effective September 26, 1997. He was notified of this dismissal through a letter from Deputy Warden Howard Painter, dated September 11, 1997. R Ex. 1. 3. The stated reason for Grievant's dismissal was his violation of Corrections Policy 400.00, specifically the following offenses:

A-1 -

Unsatisfactory attendance or excessive tardiness.

A-5 -

Inadequate or unsatisfactory job performance.

B-4 -Careless workmanship or negligence resulting in spoilage or waste of materials or delay in production.

C-4 -Falsifying any records whether through misstatement, exaggeration, or concealment of facts.

R. Ex. 2.

4. Grievant was tardy 19 out of 21 days from July 14, 1997, through August 19, 1997.

5. Grievant used 57.25 hours of sick leave from July 14, 1997, through August 19, 1997.

6. Grievant went on Workers' Compensation on September 9, 1997, for recurring pain residual to an injury he had received on-the-job in March 1997.

7. Grievant received his dismissal letter on September 11, 1997.

8. Grievant's absences during the time period July 14, 1997, through August 19, 1997, were related to his on-the-job injury.

9. Grievant was in charge of and responsible for the full operations of the groundskeeping shop at the Mt. Olive Correctional Complex, including lawn mowers, weedeaters, and a variety of other equipment. 10. In the Summer of 1996, there were no lawn mowers operating at Mt. Olive. Grievant had placed 3 lawn mowers behind the “P” Building, to be used as scrap and surplus.

11. Grievant told his superiors and co-workers that the motors were blown on six of the lawn mowers, and that they were inoperable.

12. Mr. Alfred Falls, another mechanic at Mt. Olive, serviced all six of the lawn mowers which were supposed to be inoperable, and got them back on line, using parts already in stock.

13. Susan Cantrell, Business Manager at Mt. Olive, and a classified-exempt, salaried employee, was suspended twice for excessive tardiness.

CONCLUSIONS OF LAW

1. In disciplinary proceedings involving state employees, W. Va. Code § 29-6A- 6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 20, 1990).

2. State employees who are in the classified service can only be dismissed for “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. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 141 S.E.2d 364 (W. Va. 1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept.

of Motor Vehicles, DocketNo. 89-DMV-569 (Jan. 22, 1990); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

3. W. Va. Code § 23-5A-1 provides that "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter."

4. W. Va. Code § 23-5A-3 provides, in pertinent part:

> (a) It shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [§ 23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

5. In order to make a prima facie case of discrimination under W. Va. Code § 23-5A-3, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991); Pannell v. Inco Alloys Int'l, Inc., 188 W. Va. 76, 422 S.E.2d 643 (1992); Sizemore v. Peabody Coal Co., 188 W. Va. 725, 426 S.E.2d 517 (1992); St. Peter v. AMPAK-Division of Gatewood Prods., Inc., 484 S.E.2d 481 (W. Va. 1997).

6. When an employee makes a prima facie case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reasonfor the discharge. In rebuttal, the employee can then offer evidence that the employer's proffered reason for the discharge is merely a pretext for the discriminatory act. Powell, supra.

7. In determining whether there is a nexus between the filing of a Workers' Compensation claim and an employee's discharge, there is usually a lack of direct evidence, and courts look to a variety of factors: proximity in time of the claim and the firing is relevant; evidence of satisfactory work performance and supervisory evaluations before the accident can rebut an employer's claim of poor job performance; and any evidence of an actual pattern of harassing conduct for submitting the claim

is persuasive. Powell, supra.

8. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

9. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

10. Grievant established a prima facie case of discrimination under W. Va. Code §§ 23-5A-1, et seq., by showing that the excessive absences for which he was disciplined were directly related to his claim for Workers' Compensation for an injury received on-the- job.

11. Corrections successfully rebutted Grievant's prima facie case of discrimination under W. Va. Code §§ 23-5A-1, et seq., by showing that he was terminated for poor performance, careless or negligent work performance, and providing misleading or false information to Corrections with regard to the lawn mowers.

12. Grievant has failed to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), because he has failed to establish that he, a classified, hourly employee, was similarly

situated to Susan Cantrell, a classified-exempt, administrative salaried employee.

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. W. Va. Code §29-6A-7(1998). 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 12, 1998

Footnote: 1

Grievant was suspended from Mt. Olive Correctional Complex on March 12, 1997, which formed the basis of a separate grievance, Docket No. 97-CORR-429. The suspension and dismissal hearings were conducted on the same dates, but the decisions issued separately.