KENNETH OVERBAY,

Grievant,

v.

DOCKET NO. 97-CORR-429

WEST VIRGINIA DIVISION OF CORRECTIONS,

Respondent.

D E C I S I O N

Kenneth Overbay, Grievant, protests a 12-day suspension, without pay, from his position as Mechanic II with the West Virginia Division of Corrections/Mt. Olive Correctional Complex ("Corrections"), issued by Deputy Warden Howard Painter, on March 12, 1997. Additionally, Grievant alleges that he actually served 17 days without pay for the 12-day suspension. This grievance was filed at level one on March 25, 1997, and was denied by his immediate supervisor, Terry Frye, on March 28, 1997. By mutual consent of the parties, the grievance was advanced to level three, and a hearing was scheduled for July 3, 1997. Subsequently, Grievant filed several other grievances which were interrelated with this grievance, and those matters were consolidated and denied at levels one and two. Thereafter, a hearing was scheduled at level three for September 15, 1997.

Grievant then requested on September 12, 1997, that these matters be heard directly at level four of the grievance process, bypassing level three. That request was granted by Administrative Law Judge Jerry Wright. The matter was reassigned toAdministrative Law Judge Jennifer Meeks on November 3, 1997, and following several continuances for good cause, was transferred to the undersigned in January 1998. A level four hearing was conducted on March 16, 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., and Grievant was represented by Elaine Harris,

Communications Workers of America representative.

SUMMARY OF EVIDENCE

Corrections' Exhibits

Ex. 1 -

March 12, 1997, letter from Howard Painter to Kenneth Overbay, suspending him for 12 days without pay, effective March 13, 1997 through March 28, 1997; June 24, 1997, letter from Howard Painter to Kenneth Overbay reinstating the 12-day suspension without pay, effective June 25, 1997 through July 11, 1997.

Ex. 2 -

West Virginia Department of Corrections Policy Directive 400.00, effective November 10, 1987.

Ex. 3 -

Administrative Rights Warning, dated February 11, 1994, signed by Kenneth Overbay.

Ex. 4 -

Incident Report by Betty Slayton, dated February 10, 1997.

Ex. 5 -

Incident Report by Rita Dunlap, dated February 10, 1997.

Ex. 6 -

February 20, 1997, memorandum from Rita Dunlap to Cheryl Chandler re: Kenneth Overbay.

Ex. 7 -

February 20, 199, memorandum from Cheryl Chandler to George Trent, Warden.

Ex. 8 -

March 23, 1996, handwritten note from Howard Painter to George Trent re: Janice Morgan.

Grievant's Exhibits

Ex. 1 -

Official Statement of Kenneth Overbay taken by Cheryl Chandler on February 4, 1997.

Ex. 2 -

Official Statement of Kenneth Overbay taken by Cheryl Chandler on February 11, 1997.

Ex. 3 -

Official Statement of Terry Frye taken by Cheryl Chandler on January 23, 1997.

Ex. 4 -

February 18, 1997, memorandum from Cheryl Chandler to George Trent, Warden.

Ex. 5 -

1997 Absentee Calendar of Kenneth Overbay.

Ex. 6 -

Incident Report by Kenneth Overbay, dated March 18, 1997.

Ex. 7 -

Official Statement of Janice Morgan taken by Cheryl Chandler on March 15, 1995.

Ex. 8 -

Official Statement of Roy Taylor taken by Cheryl Chandler on February 11, 1997.

Testimony

Corrections presented the testimony of Howard Painter, Betty Slayton, Rita Dunlap, Terry Frye, Linda Coleman (by telephone), Paul Coleman, Cheryl Chandler, and Roy Taylor (by telephone). Grievant testified in his own behalf and presented the testimony of Janice Morgan and Gerald Crist.

BACKGROUND

George Trent, Warden at Mt. Olive Correctional Complex, ordered an official investigation be

conducted into allegations which were made against some individuals in the Maintenance Department. Cheryl Chandler was the Investigator assigned to conduct the investigation. Consequently, she interviewed all of the employees of the Maintenance Department and questioned them about some of the allegations.

On February 4, 1997, Ms. Chandler interviewed Grievant as part of this investigation. Grievant was not the subject of the investigation, but was only being interviewed as a potential witness. Ms. Chandler gave Grievant an Administrative Rights Warning prior to questioning, which stated, among other things, that an employee can be discharged if the statement he gives is found to be untruthful. R. Ex. 3. Grievant signedand acknowledged the Administrative Rights Warning, and was aware that he could be disciplined for being untruthful. Grievant's statement was tape recorded by Ms. Chandler, and the statement was transcribed. G. Ex. 1.

One of the allegations which formed the basis for the investigation involved an unofficial “log” book which had been kept by one of the employees in the Maintenance Department. This log book contained confidential information about other employees in the Maintenance Department. The log book had been copied and placed on Maintenance Director Terry Frye's desk by Gerald Crist, a Maintenance employee. Mr. Frye told Ms. Chandler in an official statement taken on January 23, 1997, that Grievant had made the copies of the log book and placed it on his desk. G. Ex. 3. Later, Mr. Frye corrected his statement, and informed Ms. Chandler that he mistakenly told her Grievant copied the log book, and that he only gave him the copy. G. Ex. 4. During his testimony at level four, Mr. Frye again changed his statement, testifying that Grievant did not give him the copy of the log book, nor did he see Grievant copy the log book. Rather, Mr. Frye testified that Mr. Crist placed the copy of the log book on his desk, but told him he had gotten the copy from Grievant.

During Grievant's questioning by Ms. Chandler, she asked him about the log book, specifically whether he had copied it and placed it on Mr. Frye's desk. Grievant told Ms. Chandler he saw the log book laying on the copy machine and read it, but that he did not copy it, nor did he place it on Mr. Frye's desk. G. Ex. 1. She told him she had a sworn statement from an employee who claimed Grievant copied the log book and placed it on Mr. Frye's desk, but Grievant denied the allegation. G. Ex. 1. Subsequently, following the transcription of Grievant's February 4, 1997, statement, Betty Slayton, who worked for Ms. Chandler, brought the statement into the Maintenance Department on February 10, 1997, for Grievant to sign so that she could notarize it. She arrived in the Maintenance

Department at approximately 2:30 p.m. and gave Grievant his statement to read. She left him in an office with the statement, while she distributed statements to the other employees. Ms. Slayton returned to the office a few minutes later and discovered Grievant was gone. After waiting a few minutes for him to return, she asked Paul Coleman if he knew where Grievant was. He told her Grievant had requested keys to one of the maintenance vehicles and had gone “up front” to the Administration Building. Ms. Slayton did not look in the office where Grievant had been to see if his statement was still there.

Grievant returned to the Maintenance Department about 20 or 30 minutes later, and came into the office where Ms. Slayton was with his statement in his hand. Ms. Slayton asked him to sign his statement, and he refused. She asked Grievant if he had taken his statement with him to the Administration Building, and he said “no”. Grievant's statement consisted of several pages, and Ms. Slayton noticed the original staples had been removed and there were new staple holes in the document he returned to her. Ms. Slayton reported this incident to Ms. Chandler and Deputy Warden Howard Painter, and Mr. Painter instructed her to complete an incident report, which she did on February 20, 1997. R. Ex. 4.

There is no dispute that Grievant went to the Administration Building while Ms. Slayton was waiting for him to sign his statement. Rita Dunlap, the receptionist in the Administration Building, saw Grievant come into the building, and saw him leave thebuilding on February 10, 1997, between approximately 3:15 and 3:30 p.m. R. Ex. 5. Mr. Coleman confirmed that Grievant requested keys for a vehicle to go to the Administration Building on February 10, 1997. Roy Taylor, an Administrative Services Assistant in the Business Office, testified that Grievant came to him in the Administration Building on February 10, 1997, and asked him to make some copies for him. He did not know what he was copying, only that it was several pages, and was not stapled. He thought it had something to do with a forklift warranty, because Maintenance was having some trouble with that piece of equipment, and Grievant was supposed to be locating the warranty papers. G. Ex. 8.

On February 11, 1997, Ms. Chandler again interviewed Grievant, this time with regard to the incident which occurred on February 10, 1997. Ms. Chandler asked Grievant if he had taken the statement with him to the Administration Building and Grievant said “no.” Grievant also denied that he had “any employees working up in this area make copies for [him]”. Grievant also specifically denied making a copy of his statement. G. Ex. 2.

In the meantime, further attempts were made by Ms. Chandler and Ms. Dunlap to get Grievant to sign his statement. Grievant continued to refuse to sign it. On one occasion, Grievant indicated to Ms. Dunlap that he wanted to listen to the tape and go over it with his statement. She called him to set up a time to do that, but he informed her he was not going to sign the statement. He also told her that he needed to consult with his attorney. Later, he told her he had spoken to one of his attorneys, but that he was waiting to speak to another one, and that he had three attorneys. R. Ex. 6. On March 6, 1997, Deputy Warden Painter met with Grievant, and asked him to sign his two statements. Grievant again refused, stating he needed to talk to his attorney. Mr. Painter then gave Grievant a direct order to report to his office no later than 1600 hours on Friday, March 7, 1997, to sign the statements. Grievant did not comply with Mr. Painter's directive, and has never signed his statements.

On March 12, 1997, Deputy Warden Painter again met with Grievant, this time to deliver his suspension letter. Mr. Painter again asked Grievant to comply, and gave him an opportunity to tell his side of the story. Grievant told him he felt pressured by Ms. Chandler to answer the questions. Mr. Painter concluded Grievant had every opportunity to review and correct his statement, and that his failure to sign the statements after being given a direct order, was conduct amounting to insubordination. He issued Grievant a 12- day suspension to run from March 12, 1997, through March 28, 1997.

To further complicate matters, Grievant had injured himself on the job on March 10, 1997. He called in sick on March 11, 1997, but returned to work on March 12, 1997, the day he received his suspension letter. Thereafter, Grievant was off on Workers' Compensation from March 13, 1997, through June 23, 1997. G. Ex. 5. When he returned to work on June 24, 1997, Mr. Painter issued him another suspension letter, indicating that since he had been off on workers' compensation, he had never served his original 12-day suspension. Mr. Painter told him that his 12-day suspension would run from June 25, 1997, until July 14, 1997, taking into account the July 4 holiday. R. Ex. 1.

Grievant served his 12-day suspension from June 25, 1997, through July 14, 1997. However, Grievant did not receive compensation from either Mt. Olive or Workers' Compensation for the time period March 13, 1997, through March 19, 1997. LindaColeman, Mt. Olive's Payroll Clerk, testified she was told he did not receive Workers' Compensation for those days because he did not actually see a doctor for his injury until March 20, 1997. Apparently, Grievant did not submit any sick leave

requests for these days, either.

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; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Grievant was originally suspended for 12 days, without pay, for various violations of Policy Directive 400.00, Employee Standards of Conduct and Performance. R. Ex. 2. Specifically, the charges brought against Grievant in his March 12, 1997, suspension letter are as follows:

C 4 -

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

C 6 -

> Theft or unauthorized removal of state records, state property or other person's property.

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

A 7 -

> Refusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an inquiry or investigation.

C 24 - Other actions of similar nature or gravity.

R. Ex. 1.

The merits of each charge will be addressed separately.

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

This charge originated from Grievant's statement to Ms. Chandler that he did not copy the log book or place it on Mr. Frye's desk. As indicated above, Mr. Frye had originally told Ms. Chandler that Grievant had made the copy and placed it on his desk. G. Ex. 3. Thus, Mr. Painter concluded that Grievant was being untruthful in his statement to Ms. Chandler.

However, it is clear from Mr. Frye's later corrected statement, as well as his testimony at level four, that Gerald Crist actually placed the copy of the log book on Mr. Frye's desk, and Mr. Frye does not know who copied it. Thus, absent any further proof to the contrary, Grievant's statement to Ms. Chandler that he did not copy the book nor lay it on Mr. Frye's desk cannot be found to be untruthful. Corrections has failed to prove this charge by a preponderance of the evidence.

C 6 - "Theft or unauthorized removal of state records, state property or other person's property."

This charge was brought because Mr. Painter concluded that Grievant had taken the statement given him by Ms. Slayton on February 20, 1997, to the Administration Building to make copies of it. Mr. Painter testified that statements taken in the course ofinvestigations are State property. It is important to maintain the integrity of statements used in investigations, and therefore also important to keep a chain of possession of the statements. Further, Grievant denied taking the statement to the Business Office, or having anyone make copies for him there, and Mr. Painter concluded that he was being untruthful.

There is no dispute that Grievant went to the Administration Building and had Roy Taylor make copies for him. However, Ms. Slayton testified she did not look in the office where she had left Grievant to see if his statement was still there. Mr. Taylor testified he did not know what he was copying for Grievant, and assumed it was the forklift warranty. Grievant testified he did not copy his statement, and that the papers were indeed the forklift warranty. While it is understandable how Mr. Painter could find some circumstantial evidence that Grievant had taken his statement with him to have it copied, I cannot find that the evidence supports a conclusion that Grievant more likely than

not had Mr. Taylor copy his statement, and thus cannot find Corrections has proven that Grievant is guilty of “theft or unauthorized removal of state records, state property or other person's property.”

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

This charge stems from Grievant's second statement given to Ms. Chandler on February 11, 1997, where he denied that he had any employee in the Administration Building “make copies for [him]”. G. Ex. 2. Mr. Painter testified this charge was included in the suspension letter because it evidenced another example of Grievant being untruthful when giving his statement to Ms. Chandler. Clearly, Grievant did have Mr. Taylor make copies for him, and so this statement was untruthful. A 7 - “Refusal to cooperate in any official state inquiry or investigation, including a refusal to answer work related questions or attempting to influence others involved in an inquiry or investigation.”

C 24 - “Other actions of similar nature and gravity.”

These two charges both relate to Grievant's continued refusal to sign his statements, and constitute a charge of insubordination.

Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

Grievant acknowledged he was aware that failure to cooperate in the official investigation could lead to disciplinary action. His only defense to this charge is that he felt “pressured” by Ms. Chandler to answer questions. However, despite offers by Ms.Chandler and Ms. Dunlap to listen to the tape of

his interview, and make any corrections on his transcribed statement, Grievant refused to do so or to sign it. Despite the passage of 12 days from the day Ms. Chandler issued Grievant's statement until March 4, 1997, when he first met with the Deputy Warden, Grievant still refused to sign, alleging he needed to talk to his attorney. Finally, despite the Deputy Warden's direct order to report to his office to sign the documents, Grievant did not report and refused to comply with Mr. Painter's order. Mr. Painter testified that he could have dismissed Grievant at that time for insubordination, but wanted to try to work with him on changing his behavior, so he just suspended him.

Grievant, by his conduct, held up the conclusion of an official investigation being conducted at the direction of the Warden of Mt. Olive Correctional Complex. Grievant offered no legitimate excuse or reason for his refusal to sign his statement. Grievant's correct course of action would be to have signed the statement and then grieved that action, if indeed he felt he was being “pressured” into answering Ms. Chandler's questions. A review of the two statements taken of Grievant by Ms. Chandler gives no evidence of any coercion or leading nature on her part to get Grievant to answer questions. Therefore, I must conclude that Grievant was insubordinate in his failure to sign his statements, and specifically, in his direct defiance of an order by his superior. Corrections has proven this charge by a preponderance of the evidence. See also Tolley v. Dept. of Natural Res., Docket No. 94-DNR-629 (May 18, 1995).

Grievant claims he has been discriminated against because at least one other employee at Mt. Olive was not disciplined for refusing to sign a written statement. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment ofemployees 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 another Mt. Olive employee, Janice Morgan, refused to sign a written statement she had given to Ms. Chandler as part of another investigation, but had not been disciplined. Thus, Grievant has made a prima facie case of discrimination.

Ms. Chandler testified that she gets her assignments directly from the Warden, based on incident reports, documentation, verbal communication, or anything he thinks needs looking into. When a complaint is received by the Warden, preliminary questions are asked to determine if there is anything at all to the complaint. That is an inquiry. If theWarden then determines, based upon the inquiry, that there may be something to the complaint, he may order an official investigation.

Ms. Chandler testified that Janice Morgan was interviewed as part of a preliminary inquiry on March 15, 1996, as a result of some complaints which had been made against her. She signed the certification of tape recorded statement before her statement was taken, but she refused to sign the actual transcribed statement. G. Ex. 7.

Mr. Painter confirmed that the difference between Janice Morgan and Grievant was that the questions asked of Ms. Morgan were just preliminary. After Ms. Chandler gave Ms. Morgan's statement to him, he determined there would be no official investigation and the matter was dropped. R. Ex. 8. There was never any formal investigation conducted of Ms. Morgan, and he did not discipline her for her refusal to sign the statement.

In addition to the differences described above, Grievant's conduct over the course of this matter demonstrates a much more serious and egregious course of conduct than that exhibited by Ms. Morgan. Grievant continually and defiantly refused to sign his statements, and openly defied a direct order to report to his superior. There is no evidence that Mr. Painter or any other person in authority

every ordered Ms. Morgan to sign her statement. Grievant's insubordinate conduct far surpasses any conduct exhibited on the part of Ms. Morgan.

Finally, Grievant alleges he is owed compensation from Corrections for March 13 through March 19, 1997, when was off on Workers' Compensation. Grievant admits he was off on Workers' Compensation for that time, and did not submit sick or annual leave slips to Corrections for that time. Grievant simply has not proven by a preponderance of the evidence that he is entitled to compensation from Corrections for that time. If indeedGrievant was off on Workers' Compensation, then he must take up the issue of compensation with that agency.

FINDINGS OF FACT

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

1. Warden George Trent caused an official investigation to be made into certain activities in the Maintenance Department.

2. Cheryl Chandler was the Investigator assigned to the investigation. On February 4, 1997, Ms. Chandler interviewed Grievant as a potential witness in the official investigation. Grievant was not the subject of the investigation.

3. On February 10, 1997, Betty Slayton came into the Maintenance Department to get Grievant's signature notarized on his statement. Grievant left the Maintenance Department while he was supposed to be looking over his statement, and went to the Administration Building.

4. Grievant had Roy Taylor, in the Administration Building, make copies of a multi-paged document for him.

5. Grievant refused to sign his statement for Ms. Slayton.

6. On February 11, 1997, Ms. Chandler again interviewed Grievant, this time with regard to the February 10, 1997 incident. Grievant told her he did not have anyone in the Administration Building make copies for him. 7. Grievant continually refused to sign his statements on the grounds that he did not believe the written statement was correct, and that he needed to talk to his attorneys.

8. Ms. Chandler and Ms. Dunlap offered Grievant the opportunity to listen to the tape of his interview and make any corrections he wanted on his written statement. Grievant refused to cooperate.

9. In March 4, 1997, Grievant met with Deputy Warden Howard Painter, and again refused to

sign his statements until he could talk to an attorney. Mr. Painter ordered Grievant to return by the end of the following day and sign his statements.

10. Grievant did not return to Mr. Painter the next day, nor has he ever signed his statements.

11. Grievant injured himself on the job on March 10, 1997. He called in sick on March 11, 1997, and returned to work on March 12, 1997.

12. On March 12, 1997, Grievant again met with Mr. Painter, who gave him another opportunity to explain why he would not sign his statements. Grievant told Mr. Painter he felt pressured by Ms. Chandler to answer the questions.

13. On March 12, 1997, Mr. Painter issued Grievant a 12-day suspension, without pay, for various violations of Corrections policies, and for insubordination.

14. On March 13, 1997, Grievant went on workers' compensation, and did not return to work until June 24, 1997. 15. On June 24, 1997, Mr. Painter issued Grievant an adjusted 12-day suspension without pay to begin on June 25, 1997, through July 14, 1997, because he had not served his suspension while he was off on workers' compensation.

16.

Grievant served his 12-day suspension.

17. Grievant did not receive compensation from either Corrections or Workers' Compensation for the days March 13 through 19, 1997.

18. Grievant did not submit sick or annual leave requests to Corrections for those days as he was off on workers' compensation.

19. Grievant did not copy the log book which was the subject of Ms. Chandler's original investigation, nor did he place it on Mr. Frye's desk.

20. Grievant did not have Roy Taylor make copies of his statement.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. The preponderance standard generally requires proof that a reasonable person would

accept as sufficient that a contested fact is more likely true than not. Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995);Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993).

3. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

6. As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

7. Corrections has not proven by a preponderance of the evidence that Grievant was untruthful when he told Ms. Chandler he did not copy the log book, nor place it on Terry Frye's desk. 8. Corrections has not proven by a preponderance of the evidence that Grievant took his February 4, 1997 statement to the Administration Building, or had copies of it made by Roy Taylor on February 10, 1997.

9. Corrections has proven by a preponderance of the evidence that Grievant was untruthful when he told Ms. Chandler he did not have anyone in the Administration Building make copies for him.

10. Corrections has proven by a preponderance of the evidence that Grievant was insubordinate in directly refusing to follow an order given by Deputy Warden Painter.

11. Grievant has failed to prove by a preponderance of the evidence that he was discriminated

against in violation of W. Va. Code § 29-6A-2(d) for being disciplined for refusing to sign his statements.

Accordingly, the 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: July 31, 1998

Footnote: 1

Grievant was dismissed from Mt. Olive Correctional Complex effective September 26, 1997, which formed the basis of a separate grievance, Docket No. 97-CORR-423. The suspension and dismissal hearings were conducted on the same dates, but the evidence and testimony relate to different issues. Therefore, the decisions will be issued separately.