DANIEL WILEY,

Grievant,

v. **DOCKET NO. 96-DNR-515**

WEST VIRGINIA DIVISION OF NATURAL RESOURCES, PARKS AND RECREATION,

Respondent.

D E C I S I O N

On January 5, 1996, Daniel Wiley (Grievant), a Supervisor I employed by Respondent West Virginia Division of Natural Resources (DNR) at Beech Fork State Park (BFSP), filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., challenging a written reprimand he was issued on December 26, 1995. Following denial of his grievance at Levels I and II, Grievant appealed to Level III where an evidentiary hearing was conducted on June 5, 1996. Subsequently, on August 9, 1996, Jack McClung, Hearing Examiner, issued a written decision denying the grievance at Level III. Grievant appealed to Level IV where, at Grievant's request, this matter was held in abeyance until two related grievances could be processed through the lower levels of the grievance procedure. Ultimately, a Level IV evidentiary hearing in this matter was scheduled to be held in this Grievance Board's office in Charleston, West Virginia, on November 4, 1997. The parties appeared at that hearing, and agreed to submit this grievance for decision on the recorddeveloped through Level III, further agreeing on a schedule to submit written arguments. This matter became mature for decision on January 26, 1998, following receipt of Respon dent's proposed findings. Consistent with W. Va. Code § 29-6A-4, and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer.

Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Consistent with the foregoing standards, the undersigned administrative law judge has carefully reviewed the testimony and evidence presented at Level III, made credibility determinations where necessary, and arrived at the following findings of fact pertinent to resolution of this matter.

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Division of Natural Resources (DNR) as a Supervisor I at Beech Fork State Park (BFSP). Grievant supervisesthe maintenance crew at BFSP, which consists of two full-time employees and up to five or six seasonal or part-time employees.

2. On March 1, 1995, Deborah Keener became Superintendent of BFSP. In that capacity she serves as Grievant's second-level supervisor.

3. Grievant's immediate supervisor is BFSP Assistant Superintendent (A/Supt.) Stanley Mathis.

4. On December 26, 1995, Supt. Keener issued a written reprimand to Grievant (R Ex 2), pertinent portions of which state the following:

> The purpose of this letter is to establish my expectations of you relative to the performance of your assigned duties as a Supervisor I with the West Virginia Division of Natural Resources, Beech Fork State Park. In addition, it will document and express my concern over recent acts of insubordination as well as serving as a disciplinary instrument for the same and establish my future expectations relative to your respect for the authority of the management of Beech Fork State Park.
>
> I became superintendent of Beech Fork State Park on March 1, 1995, and I believe that I now have had an adequate amount of time to assess your work performance and behavior. Quite candidly, I have serious concern about your support for the mission of this park. It is clear that your energies are often devoted to your own agenda rather than that of the park. Your position here as the immediate supervisor of much of the work force multiplies the potential detrimental effect of your negative tendencies and makes them even more of a concern.
>
> Although on numerous occasions I have attempted to discuss certain of my

concerns and offer suggestions to improve your performance, you often openly ignore directives, challenge my authority, and question my basis for making even the most routine decisions, requests, or interpretations of policy. Examples of this type of behavior follow:

> On October 1, 1995, I issued a written directive instructing all staff to adhere to divisional and state governmental policy mandating advance approval of annual leave. Despite the clear, proper, and reasonable nature of this directive you not only have personally failed to comply but also have notrequired compliance of those employees under your immediate supervision.

> On July 4, 199[5], I initiated a discussion with you in which I expressed my concern over the standard of productivity I had observed at Beech Fork from you and those you supervise and asked that you try to improve in this respect. Your response was that I was expected and required to prove myself in the form of salary increases for staff before any changes would occur. I could only take your comments to mean that improvement was possible, but to date there has been no change in the productivity standards you set as our maintenance supervisor. Regardless of whether improvement is possible or not, your response indicated a misunderstanding of the proper way to respond to my observation and request. It also does not due (sic) justice to the crew under your immediate supervision who I believe are all interested individually in doing the best job possible for Beech Fork.

> On November 28, 1995, you questioned my decision and authority not to approve purchase of several gallons of paint you had intended for use at the park maintenance area. No reasonable superintendent would have any difficulty with resubmission by a supervisor of such a purchase request with a stronger justification that would better support the need for the purchase. However, your method was to call into question my decision-making ability, integrity, and compliance with state purchasing and budget control practices by comparing my decision on the paint with the replacement at state expense of carpeting in the superintendent residence. Furthermore, on the following day, November 29, 1995, without discussing this request with me, you misused your work time and that of the park office assistant, and violated virtually every component of proper supervisor/subordinate relationship by entering park headquarters and demanding and receiving form (sic) the office assistant, and in the presence of other subordinate staff members, copies of budgetary and purchasing documents for which you have no job-related need or right to review. Your intent to follow-up and reinforce your insubordinate, potentially intimidating, and unacceptable questioning of my integrity from the preceding day was abundantly clear and made even worse by your involvement of other employees.

On December 15, 1995, I came to the maintenance area to remind you to turn in your annual leave slip for the previousday. You responded, in the presence of another employee whom you directly supervise and who was in your company, by questioning my motives for making such a request and indicating your continued resistance to such a policy and your intent not to comply. Furthermore, you questioned why compli ance by staff with such a policy was necessary or fair when staff had no access to the review of my own annual leave requests.

At that point, I advised you of the highly unprofessional manner of this discussion and explained that this was not something that should be undertaken in the presence of subordinate employees. You responded in the presence of this staff member that you felt it was necessary that you have "witnesses" to our conversations. When I suggested that we meet in my office with Assistant Superintendent Mathis to continue the discussion, you expressed your "distrust" of me and Assistant Superintendent Mathis. In the course of this discussion, and still in the presence of the other employee, you continued to make numerous inappropriate and insubordinate remarks. For the sake of brevity, I paraphrase a few of the most representative and significant below:

When my concern over your copying of my office records came up, you asked me ". . . what are you hiding?"

When I explained that you obtained office records without authorization, you told me, "They are public knowledge." I explained that you did not follow proper channels, and you stated, in the course of the discussion, that I was using my title to elicit power and control.

When I recommended that you meet with Stan and I, you made it very clear your lack of trust toward either of us. Further, you commented that you were going to find out if I was "snow balling" you.

I believe these statements made in the presence of another staffer as well as the other incidents mentioned in this section, were either designed to have or did have the practical effect of attempting to undermine my authority, credibility and integrity as well as intimidating me to the point where you couldcontinue to pursue your own agenda and follow your own policies.

5. On more than one occasion between March 1, 1995 and December 26, 1995, Supt. Keener met with Grievant, and discussed her concerns that Grievant was placing too much emphasis on maintaining the non-public use areas around the maintenance facility and the sewage treatment plant, as opposed to the public campgrounds and related facilities.

6. During a meeting between Supt. Keener and Grievant on July 4, 1995, when Supt. Keener expressed disappointment with the productivity of Grievant and his crew, Grievant told Supt. Keener "off the record" that he did not believe productivity would improve until she obtained increased salaries for the maintenance personnel.

7. When Supt. Keener learned that Grievant was planning to purchase paint to paint the floor in the maintenance garage, she told Grievant that such a project was not a priority at BFSP and denied approval for the purchase. Grievant responded by challenging her purchase of carpeting for the Superintendent's residence on BFSP. Grievant told Supt. Keener there should be money in the budget for two cans of paint, if there was money to put new carpet in her residence.

8. Grievant asked Supt. Keener to let him see the budget records relating to her carpet purchase and she denied his request. Thereafter, Grievant approached Geraldine Perry, the Office Assistant, and obtained copies of official records relating to that and other purchases which Grievant had no job-related reason to review.

9. On at least one occasion prior to December 15, 1995, Supt. Keener explained to Grievant the requirement for all personnel to prepare a leave slip in advanceof taking annual leave. Prior to Supt. Keener's arrival, the practice at BFSP had been for employees to turn in their leave slips when they accounted for their time at the end of each month. On October 1, 1995, Supt. Keener issued a memo advising all full-time employees that annual leave in excess of one working day would have to be requested, in writing, at least two weeks in advance. See R Ex 3. In addition, Supt. Keener required employees to make verbal requests in advance of taking annual leave for one day or less. Subsequent to October 1, 1995, Grievant requested annual leave in accordance with Supt. Keener's memo on some occasions, but failed to request leave in advance on other occasions, claiming he simply forgot the earlier practice at BFSP had been changed.

10. On December 15, 1995, Supt. Keener spoke to Grievant, reminding him to turn in a leave slip for the previous day. Grievant responded by telling Supt. Keener that she was "hounding" him

about the issue, further suggesting that the policy was unfair because employees were not told in advance when she and A/Supt. Mathis were going to be on leave. Grievant and Supt. Keener got in a heated argument in front of Ronnie Davis, a Park Aide under Grievant's immediate supervision. When Grievant requested Supt. Keener allow him to review her leave slips, Supt. Keener responded that such matters were "none of his damn business." This argument went on for approximately fifteen minutes.

11. Prior to Supt. Keener's arrival, Grievant's supervisors had generally rated Grievant's work performance in a highly favorable manner. See J Ex 1.

12. A/Supt. Mathis, who served as Acting Superintendent at BFSP for eleven months prior to Supt. Keener's arrival, generally rated Grievant as an excellent employee. However, A/Supt. Mathis also observed that Grievant tended to follow his own agenda insetting work priorities, generally resisting efforts by his supervisors to reduce the emphasis on the maintenance facility.

13. Grievant's maintenance crew is generally unable to keep all public use areas at BFSP mowed during the summer months. The areas around the maintenance facility and sewage treatment plant are usually mowed because that is where the employees "test" the lawn mowers each time they are repaired.

14. On September 12, 1988, BFSP Superintendent William E. Moon issued a memo to Grievant advising Grievant of his specific responsibilities, noting that he expected Grievant to place more emphasis on maintaining the public use areas at BFSP. See R Ex 2.

Grievant's reprimand generally involves allegations of insubordination. Customarily, 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). However, this Grievance Board also recognizes 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 Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10. Moreover, "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), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

Grievant's effort to obtain the budget records for BFSP from Ms. Perry, after Supt. Keener told him he could not have that data, explicitly represents such defiance of authority as to constitute outright insubordination. See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995). The reprimand issued to Grievant could be sustained on this basis alone.

The evidence presented in this matter suggests that Grievant has a fundamental misperception of the normal relationship between supervisors and the employees they direct. As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors. See Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97- BEP-412 (Dec. 31, 1997). See generally Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981). Accordingly, Supt. Keener properly expected Grievant to set an example for his subordinates and other non-supervisory personnel by complying with leave approval procedures. Grievant explained that he tried to comply, but failed to request leave in accordance with her policy on occasion, because he found it difficult to deviate from his established "habits." Although Grievant appears to have made some effort to comply with Supt. Keener's expectations regarding leave approval, his admitted failure to fully comply, and set a proper example, warrants reference to this item in the letter of reprimand. It should have been apparent that when Supt. Keener asked Grievant what she could do to assist him in improving productivity at BFSP, she was referring to matters within her control. Although the undersigned is not convinced that Grievant intended to forestall improved productivity until the maintenance employees received a meaningful pay raise, Grievant's lack of understanding of the compensation system applicable to state employees necessarily detracts from his ability to fulfill his duties as a Supervisor I at BFSP.

Grievant's argumentative and defiant conduct toward Supt. Keener in the presence of Mr. Davis was not denied. A preponderance of the evidence indicates that Supt. Keener did not go to the maintenance area to criticize Grievant, but rather to remind him to turn in a leave slip after the fact. Grievant turned that request into a challenge to her authority in such matters in the presence of Mr.

Davis.

The remainder of Supt. Keener's letter to Grievant is not disciplinary in nature, consisting essentially of explicit instructions for Grievant to follow in an effort to avoid any future misunderstandings, and suggesting ways Grievant could improve his work performance. According to the record, Grievant has consistently complied with all of Supt. Keener's directives, and does not challenge the propriety of those requirements in this grievance.

In addition to the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving thecharges against an employee by a preponderance of the evidence. Wellman v. W. Va. Dept. of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. 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). Insubordination also "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 Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

3. Generally, an employee must immediately obey a supervisor's order and later 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 v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

4. DNR established that Grievant was insubordinate when he went to Geraldine Perry to obtain copies of BFSP budget records, after being denied access to those documents by BFSP Superintendent Deborah Keener, his second-level supervisor.

5. DNR established that Grievant did not consistently comply with the agency's policy, as enforced by BFSP Superintendent Keener, to request all leave in advance, and to turn in required leave forms promptly. DNR further established that Grievant improperly challenged Superintendent

Keener's authority and questioned her integrity regardingaccounting for her own leave, in the presence of an employee under Grievant's direct supervision.

6. Grievant did not refrain from taking appropriate action to improve productivity in the BFSP Maintenance Department unless and until employee salaries were meaningfully increased.

7. Superintendent Keener did not abuse her authority or otherwise act in an arbitrary and capricious manner when she issued a written reprimand to Grievant on December 26, 1995.

Accordingly, this Grievance is **DENIED**.

Any party 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 26, 1998