RIKI BUTCHER,

Grievant,

v. DOCKET NO. 98-HHR-303

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU OF PUBLIC HEALTH,

Respondent.

D E C I S I O N

This grievance was submitted by Grievant Riki Butcher directly to Level IV, pursuant to W. Va. Code § 29-6A-4(e), on August 13, 1998, after she was dismissed from her employment with Respondent Department of Health and Human Resources ("HHR"), effective August 7, 1998. Grievant sought as relief to be reinstated with full backpay plus interest, restoration of all benefits, including leave time, retirement pay, and seniority, and to be made whole in every way. Three days of hearing were held at Level IV on November 9, December 17 and 18, 1998. (See footnote 1) This matter became mature for decision upon receipt of the parties' written arguments on February 1, 1999.

Dr. Henry G. Taylor, Commissioner for the Bureau of Public Health, sent Grievant a letter dated July 15, 1998, which stated:

> The reason for your dismissal is that you altered your personal Time and Attendance records after they had already been approved and signed by a member of management. You also have a recent history of leave abuses for which you were disciplined. Specifically:
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> > You altered your time and attendance records, after they had been approved by signature, by deleting 8 hours of annual leave which was taken on May 13, 1998.

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> You submitted the altered records to the Office of Personnel Services for processing.

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> On July 29, 1997, you were given a written reprimand for violation of Time and Attendance policies and for excessive use of leave, which was subsequent to a written warning issued on May 23, 1997 for the same offense. You were also placed on a performance improvement work plan which lasted from July 31 to September 26, 1997.

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> You have failed to maintain a significant leave balance since completion of the performance improvement plan by continuing the practice of excessive use of leave. Your leave balance as of May 31, 1998 is 18.25 hours of annual and 12.75 hours of sick leave.

The foregoing actions would appear to come under the prohibition in WV Code § 61-3-22, concerning falsifying accounts.

WV Code § 61-3-22 reads, in part, as follows:

> If any officer, clerk or agent of this State . . . make, alter, or omit to make any entries . . . or in any account kept by such State, . . . with the intent in so doing to conceal . . . or to defraud the State . . . or with intent to enable or assist any person to obtain money to which he was not entitled, such officer, clerk or agent shall be guilty of a felony, . . . (See footnote 2)

The State of West Virginia and the West Virginia Bureau for Public Health expect State employees to exhibit a high level of trust and integrity. The willful and intentional misrepresentation you have demonstrated cannot be tolerated or condoned. The State and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit upon the abilities and integrity of their employees, or create suspicion with reference to their employee's capability and honesty in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct as an employee of the Division of Surveillance and Disease Control, thus warranting your dismissal.

With respect to the above issues, I feel that you cannot be trusted to perform your duties in the absence of close supervision.

The letter offered Grievant the opportunity to respond by July 31, 1998, if she felt the facts in the letter were in error. Grievant responded to Dr. Taylor's letter on July 20, 1998, indicating she felt she had done the best job she could. She told Dr. Taylor that, as her supervisor, Robert Johnson, was well aware, her mother had surgery in September1996 for breast cancer, and had received radiation therapy and chemotherapy beginning in January 1997, through the end of 1997. She also stated she had an infant daughter who had suffered from various illnesses. Grievant stated she had taken her leave as accrued in order to assist her mother and her family during this difficult time. She stated this was the most traumatic and stressful period of her life, made more difficult by her supervisor's lack of support and compassion, and the humiliation she felt at work.

Grievant further explained to Dr. Taylor what had occurred with regard to her time and attendance records, and characterized the events as an honest mistake, as a result of an incomplete transaction, which would have been caught the next month when her leave balances did not match. She stated she realized she had taken annual leave when she still had sick leave available, and thought she could not do this, so she was changing this. She noted her supervisor had access to all time and attendance reports and files, and he and a co-worker kept track of when employees in the department were absent.

She finally brought to Dr. Taylor's attention information which she believed supported her contention that her supervisor had showed favoritism toward other employees in their use of leave, and in particular, toward another employee with whom he had a sexual encounter and wished to promote to her position.

Dr. Taylor responded to Grievant by letter dated July 30, 1998, that he would conduct a further investigation. On August 7, 1998, he advised Grievant that "the issue of whether you abused time and leave policies is one that has been addressed through progressive discipline." He stated he believed the charge that she intentionally altered the monthly employee time record without approval was substantiated, and was not simply an honest mistake. He stated her allegations of differential treatment of employees were notsubstantiated. He stated he believed there were instances when annual leave was approved after it had been taken, and he was asking Loretta Haddy, the Director of the Division of Surveillance and Disease Control, to "work with all employees and supervisors to insure policies are followed." He advised Grievant that his decision to dismiss her would stand, and would be effective that day.

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. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Service Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that `dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980);Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

The specific action taken by Grievant is not in dispute. Grievant admits she changed her own leave time on one time record after it had been reviewed and approved, and that she did not receive permission to alter this record. The question is whether this action was taken by Grievant with the intent to gain leave time to which she was not entitled, or whether, as she contends, she was in the process of changing annual leave taken for illness to sick leave upon discovering she had enough sick leave, was interrupted, and forgot to finish what she had started. It is clear from the dismissal letters that dishonest intent was a key element in the decision to dismiss Grievant, and rightly so, as without such intent, the act would fall within the category of a "mere technical violation" which, standing alone, would not directly affect the rights and interests of the public.

Respondent argued Grievant's history of leave abuse and low leave balance gave her a motive to delete eight hours of annual leave taken from the monthly employee time record. In support of his

conclusion that Grievant exhibited dishonest intent rather than simply making an error, Dr. Taylor noted Grievant had not marked her place to remind herself to finish her corrections when she was interrupted, she did not make the corrections in the order he would have made them, and she did not call anyone to obtain permission to make the changes. When Grievant pointed out that she did not alter any of the support documents, and those documents were in file cabinets in her office, Mr. Johnson's response was that Grievant was smart, and she did not alter the support documents so that if she were caught, she could make this very argument. In its post-hearing brief, Respondent pointed to language found at page 8 of its Exhibit Number 20, DHHR Policy 2102, which reads, "[w]illful falsification of records constitutes a criminal offense and will be presented to proper authorities for determination of appropriate action." Although it is questionable whether this language was raised as an issue in this matter in a timely manner, it really adds nothing new, as it requires that the action be willful or intentional. Obviously, falsification of an employee's time and attendance records is a serious matter directly affecting the rights and interests of the public.

Grievant also pointed out, as will be discussed shortly, that the altered record had been left on her desk with the support documents for a full day while she was absent, that she knew Mr. Johnson had seen the documents on her desk, and that in the past he had checked the records for accuracy after she had submitted them to the appropriate persons. She further argued the real reason she was fired was because Mr. Johnson wanted to promote a co-worker who had responded favorably to his sexual advances into Grievant's place. Grievant also argued Mr. Johnson had watched her leave usage closely while allowing other employees to slide.

Grievant proved Mr. Johnson made comments to her which were inappropriate, and offered unrebutted eye-witness testimony that the co-worker, Becky Pierson, had her arms around Mr. Johnson's waist and her hands "roaming rather freely" over him at a party. After this party Ms. Pierson commented to a co-worker, Debbie Tanner, that she would not have to worry about being a few minutes late, because Mr. Johnson would not say anything to her. Ms. Tanner testified that Mr. Johnson shows favoritism toward Ms. Pierson, in that he is more friendly toward her, talks to her more, brushes shoulders with her, and gives herwork to do. She stated Ms. Pierson takes five or ten minutes here and there, while Grievant's time was closely watched. She stated Ms. Pierson does not follow the office dress code.

Grievant's supervisor, Mr. Johnson, is employed by the federal government, as a public health

advisor with the Center for Disease Control. He has been assigned to West Virginia for six years at the request of the state, and serves as the Director of the Sexually Transmitted Diseases ("STD") Program, Coordinator of HIV Prevention, and Coordinator of HIV Care. He manages all components of the STD Program, including personnel, budgets, grants, and contracts, and all components of HIV Prevention and Care, and acts as a supervisor of several state employees.

Grievant was hired by HHR as an Office Assistant II in September 1995. She was promoted in July 1996 to a Secretary I for the STD Program. Her duties were typing, filing, coordinating clerical assignments for staff, and processing purchasing, payroll, time and attendance records, and travel.

Mr. Johnson described Grievant as "the best secretary who ever worked for [him], by far." He said she was efficient, and learned how to do her job much more quickly than other secretaries had. Except for her use of leave, her annual performance evaluations are glowing. Mr. Johnson's supervisor, Ms. Haddy, stated Grievant was an excellent employee, an excellent worker, had good skills, and could always be counted on to help out. Grievant was nominated by someone in her office as employee of the month for April 1998, and was selected for this honor by the employee council. The nomination noted that the department had been short by two or three people, and everyone had pitched in. It stated Grievant "exemplifies the word TEAMWORK." It stated:

> At the same time, this STD staff member has the added responsibility of coordinating all the duties. Even though many of the additional duties were unfamiliar, she has done an excellent job! She has gone out of her way to assure completion of projects on schedule, even when deadlines were very challenging. This staff member has accepted this extra responsibility with extra professionalism! Best of all, she always accepts additional work with a smile and a "CAN DO" attitude!

It is hard to imagine this is the same employee who suddenly could not be trusted.

In processing time and attendance records, Grievant collected annual and sick leave request forms and monthly employee attendance reports for each employee in the STD Program each month. Both the leave request forms and the monthly employee attendance reports are prepared by each employee, and signed by Mr. Johnson. The monthly employee attendance report shows each employee's annual and sick leave balance at the beginning of the month and the end of the month.

Grievant checked the accuracy of the leave requests against the monthly employee attendance reports, and transposed leave usage for each employee, including herself, onto the monthly employee time record. It is this last document which she altered. When she completed this task, she sent the leave requests, monthly employee attendance reports, and the monthly employee time

record to Mr. Johnson for review. After reviewing these documents, he would forward them to Ms. Haddy. She also reviewed the documents and signed them. If either Mr. Johnson or Ms. Haddy found an error, they would either return the documents to Grievant to make the correction or to talk to the employee involved, or would talk to the employee themselves.

While this is not what occurred here, on occasion, Ms. Haddy would sign the monthly employee time record, and attach a note to the form for Grievant to make a change on the form to correct an error she had found. When she did this, she wantedGrievant to correct the error, after it had been signed, and go ahead and complete the processing of the forms without showing them to her again. Importantly, Ms. Haddy stated it was part of the secretary's responsibility, and was in the job description, to make the corrections to the monthly employee time record and get the forms submitted.

When the forms were finalized, Grievant would make copies of the monthly employee time record and sick leave request forms, and send the originals of those documents to the Office of Personnel Services for processing. Grievant filed the copies of these documents with the annual leave requests and monthly attendance reports in a file cabinet in her office. These records are kept for three to five years. The Office of Personnel Services does not ever see annual leave requests as it has no jurisdiction over annual leave. (Testimony of Edith Baker.)

Due in large part to Grievant's mother's illness, and due to Grievant having a small child who also frequently had ear infections and other normal childhood bouts with illnesses which required Grievant's attention, Grievant failed to maintain much of a sick or annual leave balance. At the beginning of May 1998, Grievant had a sick leave balance of 16.75 hours, and an annual leave balance of 25.00 hours. Since an employee may only use 40 hours of sick leave each year for family member illnesses, and Grievant would have earned 144 hours of sick leave a year, she was taking close to 104 hours of sick leave (13 days) each year for her own illnesses and medical appointments, or was using some portion of her sick leave for some other purpose. Grievant did not indicate that she suffered from any recurrent or severe medical problems, but no evidence was offered that Grievant was not, in fact, ill when she took sick leave, and, except for a brief period of timewhen she was on a work performance improvement plan, her supervisor had not taken the step of requiring her to produce doctor's excuses to support her use of sick leave.

On May 15, 1998, Grievant prepared leave request forms for four hours of family sick leave on

May 11, 1998, eight hours of sick leave due to her own illness on May 13, 1998, eight hours of family sick leave on May 14, 1998, and four hours of family sick leave on May 15, 1998. After she prepared the forms, she did not think she had enough sick leave for the entire week, and thought she would have to use annual leave for one of the days that week. She did not check her leave balance for April on her monthly employee attendance report in her file cabinet, or by calling the Office of Personnel Services. Grievant stated she did not think it mattered which day she picked to use the annual leave, so she picked the first full day of sick leave requested, May 13, and used whiteout to erase where she had requested sick leave, and marked annual leave instead. (See footnote 3) She testified on cross-examination that she picked the 13th because the other days were for family sick leave, and the 13th she was sick. She left in the justification section, "sick." She then submitted these leave requests to Mr. Johnson.

Mr. Johnson approved Grievant's leave requests on May 18, 1998. He did not check her leave balance before approving them, (See footnote 4) even though she was taking annual leave for illness, and both the Division of Personnel Administrative Rules, § 15.03, and HHRpolicy provide that annual leave shall be granted for illness when all sick leave is exhausted. He stated it was difficult to check Grievant's leave balance, stating that the monthly employee attendance report filed in Grievant's office was consistently wrong, and noting leave is accrued on a day to day basis. He stated he would call Edith Baker in the Office of Personnel Services if he wanted to check someone's leave balance. He stated whether it would be difficult to do this would depend on whether Ms. Baker was available, and how long it would take her to check the records and get back to him. He also stated in an affidavit submitted to Dr. Taylor, and placed into evidence as Respondent's Exhibit Number 12:

> it is my understanding that an employee has the option of substituting sick leave with personnel/annual [sic] leave without prior approval. I believe that a supervisor may require an employee to exhaust his/her sick leave prior to using annual leave for illnesses. I did not have to strictly enforce this rule for my employees; however, I required Ms. Butcher to exhaust her sick leave prior to taking annual leave between July 31, 1997 and September 26, 1997, when she was under a Performance Improvement Work Plan. After the expiration of the improvement plan, I did not require that Ms. Butcher exhaust her sick leave prior to taking annual leave for illness.

On May 19, 1998, Grievant prepared and submitted a leave request to her supervisor for three hours of annual leave for a medical appointment that day, and he approved and signed it. On May 21, 1998, Grievant prepared and submitted a leave request to her supervisor for three and a quarter hours of annual leave for illness that day, and he approved and signed it. On May 29, 1998, Grievant

prepared and submitted a leave request for one and a half hours of annual leave because she was late, and it was signed and approved by Beverly Keener, the Director of the Cancer Registry, who was filling in for Mr. Johnson at his request while he was out of town. Grievant's monthly employee attendance report for May 1998, matches the leave requests discussed above. It also shows that Grievant took one hour annual leave on May 7, for which she apparently requested leave, and the request was approved.

Starting in March 1998, Grievant had also taken responsibility for preparing, copying and submitting the monthly time and attendance reports for the Aids Program, when the secretary for that program resigned. She prepared the monthly employee time record for that program for May 1998. She also prepared, copied and submitted the May time and attendance reports for the Epidemiology Program, because the secretary was out of the office. The monthly employee time record report for all employees in the STD Program for May 1998, was prepared by Grievant on June 5, 1998.

Grievant forwarded the monthly employee time record for the Aids Program and the STD Program to Ms. Keener for review, and the record for the Epidemiology Program to Ms. Haddy, together with the employee leave requests and monthly employee attendance reports. Ms. Keener was reviewing the STD Program records for Mr. Johnson while he was out of town. Ms. Keener checked the accuracy of the documents, and forwarded them to Ms. Haddy. Ms. Haddy reviewed the documents for accuracy and signed the monthly employee time records, and the documents were then returned to Grievant in the afternoon of June 8, 1998.

After the monthly employee time record for the STD Program was returned to Grievant, she stated she recalled that she had used annual leave for sick leave, and decided to double check her leave balances. She also checked the monthly employee time records for the three programs to see if Ms. Haddy had left a note to make anycorrections. Grievant testified she discovered she had enough sick leave in May 1998, to use sick leave for May 13. (See footnote 5)

Grievant stated that late in the afternoon on June 8, she used whiteout on the monthly employee time record for the STD Program to erase the eight she had recorded for herself on May 13, 1998, in the column for annual leave, and to erase the total annual leave recorded on that document for the month. She stated she then corrected the total annual leave column, subtracting eight hours, and erroneously recorded the eight hours as family sick leave on May 13. She stated she then realized she was the one sick on May 13, and she should have recorded the time as personal sick leave, so

she used whiteout to erase the eight she had recorded as family sick leave. All the whiteout is obvious on the form, as are the numbers and the color of the numbers, under the whiteout. She testified she was next going to record the eight hours as sick leave, and change the total column for sick leave; however, she believed she was interrupted at this point, and did not complete this task that day. She could not recall what the interruption was. She stated she left the forms on her desk and went home. She did not contact Ms. Haddy, Ms. Keener, or anyone else to tell them she was making these changes, or to obtain approval to do so.

On June 9, 1998, Grievant was absent from work due to illness. Mr. Johnson entered her office that day to look for a travel reimbursement form he had submitted the day before, to attach the hotel receipt to it. He saw the May employee time record for theSTD Program, the monthly time and attendance reports, and the leave request forms laying on her desk. He could not recall whether these documents were in a folder or in plain view on Grievant's desk. He had expected these records would have already been filed by the time he returned to the office, as he thought the monthly employee time record and sick leave requests were due in the Office of Personnel Services on June 5. He decided to review the documents as he did each month. He discovered that Grievant's leave requests did not match the monthly employee time record.

At this point Mr. Johnson called Jim Wells in the Division of Personnel and asked for his advice. He told Mr. Wells he suspected the monthly employee time record had been altered after it had been approved by Ms. Haddy. Mr. Wells advised him to make a copy of the documents, return the originals to Grievant's desk, and wait to see what was submitted to the Office of Personnel Services, and this is what Mr. Johnson did. The trap was set for this excellent employee.

Curiously, Mr. Johnson did not speak to either Ms. Haddy or Ms. Keener to ask whether they were aware of the whiteout on the record, or that Grievant's leave request did not match the monthly employee time record, until after he had spoken to Mr. Wells. For all he knew at the time he called Mr. Wells, Grievant could have spoken to Ms. Haddy about changing the time record, and received the verbal okay from her to do so. After speaking to Mr. Wells, he then "questioned" Ms. Haddy and Ms. Keener separately on several occasions to make sure they had carefully reviewed the forms.

Mr. Johnson asked if one of the clerical staff would call Grievant at home, and he thought Ms. Pierson volunteered, although he said it could have been Debbie Tanner. Mr. Johnson testified he asked her to find out what needed to be done to finish processing therecords he had found on

Grievant's desk. He stated he had been told that Grievant said to leave the records there, and she would finish them the next day, that she had received approval from Edith Baker in the Office of Personnel Services to submit them late.

Grievant testified with regard to the telephone call, that Ms. Pierson had called her and said Mr. Johnson had asked her to call Grievant at home about why the time records had not been sent to the Office of Personnel Services. She stated she told Ms. Pierson she had not finished reviewing them, that it was late afternoon on June 8 when she had gotten them back from Ms. Haddy, and she had not had time to finish processing and copying them. She stated she then called Edith Baker and told her she was at home sick, and asked if she could submit them June 10, which Ms. Baker said was fine. She stated she called Ms. Pierson and told her Ms. Baker said it was okay to submit the records on the 10th.

It is clear then that Grievant was aware that Mr. Johnson had seen the documents on her desk. If her intent was to covertly steal eight hours of leave time from the state, the knowledge that someone had seen the monthly employee time record, when the supporting documents which did not match that report were right there with it for comparison, should have given her cause to reconsider and abort her plan. Either that, or she was not able to put two and two together. In fact, it was foolish to have left all these documents out on her desk at all, where anyone could have seen them while she was gone all day, if her intent was to defraud. As noted above, Mr. Johnson, however, testified that Grievant is very smart.

Grievant also testified that on other occasions when Mr. Johnson had been out of town at the beginning of a month, he had told her to send the monthly time and attendancereports to Ms. Keener to review, and she had done so. She stated when he returned to the office, he generally asked her to pull the records Ms. Keener had reviewed for him, so he could review them himself. As Grievant pointed out, her chances of successfully defrauding the state by altering the monthly employee time record were not high.

Grievant returned to work on June 10, 1998. She stated she thought she had finished the correction she had started to make on June 8. The first thing she did when she arrived at work was copy the monthly time and attendance records, and she then asked Greg Moore to take them to Personnel because they were late. The monthly time and attendance record for the STD Program was submitted to the Office of Personnel Services in the same form it was in when Mr. Johnson

discovered it, without Ms. Haddy's approval of the changes Grievant had made to her own time. Grievant filed all the documents in her office as she always does, in the file cabinet behind her desk. Thus, the copy of the altered employee time record, the originals of the employees' monthly attendance reports which had not been changed by Grievant to match the employee time record, copies of the employees' sick leave request forms, and the originals of the employees' annual leave request forms which had not been changed by Grievant, were together in the same file folder for the month of May.

Mr. Johnson called the Office of Personnel Services on June 12, 1998, and asked Edith Baker if the monthly employee time record for May had been received. He was told she had received this record, and he went to pick up the original. He took the original to Mike McCabe, the Director of HHR's Office of Personnel Services, explained his suspicions, and sought his advice. Mr. Johnson testified Mr. McCabe did not offer anopinion as to what action should be taken, but indicated that the records should be supportive of any action that was taken.

Mr. Johnson next sought the advice of Dale Porter, Associate Director of the Office of Epidemiology and Health Promotion. Mr. Porter advised him that dismissal should be considered, as there were previous dismissals in the office for this type of action.

On June 15, 1998, Mr. Johnson asked Grievant to explain what had happened. He stated she denied altering the records. Grievant testified she did not deny altering the records, but denied that she intended to enrich her leave balance by the alterations. It is clear from Mr. Johnson's testimony that Grievant's version is more accurate. Mr. Johnson characterized Grievant's attitude as not being very concerned, and he felt she did not think it was a very serious problem. He stated Grievant told him the records were her responsibility. Grievant testified she was not concerned because she had just been trying to change her annual leave to sick leave. Mr. Johnson stated Grievant told him she may have made a mistake. In his rebuttal testimony he also stated Grievant knew immediately, without him telling her, that the day in question was May 13, 1998, and he thought it was odd that she remembered this. He advised Grievant that he would submit the records through channels, and there would probably be a further investigation, and some action might take place as a result, such as an administrative transfer, suspension, or dismissal.

It is clear from the testimony presented that Mr. Johnson had already decided by this time that Grievant should be dismissed. He made a point of reiterating that he had to go through channels,

however, he admitted that although Dr. Taylor made the final decision, Dr. Taylor would defer to his recommendation. Mr. Johnson then consulted with Ms. Haddy and Mr. Wells, and he submitted a draft dismissal letter, and copies of the documentation he had, to Mr. Wells for review. Mr. Wells had the letter revised and returned it to Mr. Johnson. He then finalized the letter and submitted it on June 16, 1998, with the supporting documentation, for Dr. Taylor's approval.

Mr. Johnson met with Dr. Taylor. He showed him the monthly time and attendance records and the monthly employee time record for May, and explained the process for reviewing these forms. He explained that two managers had reviewed the records and approved them as correct. He stated he "gave him Ms. Butcher's history of leave abuse."

Dr. Taylor stated he considered and rejected Grievant's explanation, because that's not the way he would have done it had he been making the changes. He did not understand why she would have whited out the two entries for May 13, and the total column on annual leave, and not whited out the total leave taken for family sick leave at the same time. He stated he would have done all the white out first, then waited for it to dry, and then written in the changes.

He also thought that if she were interrupted, she should have made herself a reminder to finish the project, and there was no reminder made. He questioned her ability to perform the job, and indicated there was an expectation that a Secretary I be able to follow through on tasks without close supervision.

Dr. Taylor also considered whether progressive discipline had been followed, and felt Grievant had been given notice about time and attendance problems. He felt, however, that falsification of documents justified dismissal, regardless of the progressive discipline policy, so long as he was sure Grievant was aware of time and attendance policies. Dr. Taylor further noted that Grievant had failed to maintain a significant leave balance, but this was not the primary factor he considered. Dr. Taylor stated Grievant's supervisor had expected Grievant to maintain a significant leave balance and had relayed this to Grievant, but he knew of no requirement for an employee to do so. He referred to the performance improvement plan Grievant had been placed on in 1997; however, Mr. Johnson testified Grievant had successfully completed that plan in September 1997, and he had taken her off the plan at that time.

Finally, Dr. Taylor stated it concerned him that prior approval had not been obtained for the annual leave taken May 13, 1998, that annual leave had been taken for illness, and that personal

sick leave had at first been marked on the May 13 leave request form and then whited out. He did not indicate whether he had taken these matters up with Mr. Johnson, who had authorized this leave. He stated Grievant had the ability to communicate with Ms. Haddy and Ms. Baker, and did not do so, even though she knew the proper procedure.

The history of Grievant's leave usage, as presented by the parties, begins with her first performance evaluation. Mr. Johnson described Grievant's job performance and skills as excellent, and her performance evaluations reflect this as well. He stated Grievant's performance evaluation scores were affected by her recurrent problems with time and attendance. However, Grievant never received a rating of unsatisfactory on her performance evaluations for her use of leave time, and her total performance evaluation score improved each year. Mr. Johnson stated Grievant did not follow HHR policy on use of time, she failed to maintain a significant leave balance, and violated policy by takingmore time for lunch than the allotted thirty minutes. Mr. Johnson agreed that no policy required an employee to maintain a significant leave balance.

Grievant's first performance evaluation was for a four and one-half month period. During that time, she would have earned only 54 hours of sick leave, and 44 hours of annual leave. Mr. Johnson commented on her performance evaluation for the period September 15, 1995, through January 31, 1996, that Grievant had "followed all policies relative to use of time," but "has been unable to accumulate a significant leave balance during her tenure which nearly resulted in her going off payroll on one occasion. Would like for Ms. Butcher to work with supervisor in an effort to bank her leave time so that her benefits do not become jeopardized."

Grievant's 1996 performance evaluation states under the category "Use of Time:"

> Ms. Butcher has not always followed policies relative to use of time. Supervisor has had to take several constructive measures relative to time and attendance policy. In addition, Ms. Butcher omitted leave taken off her time sheet several times from July through October. While performing minimally statisfactorily [sic] during much of 1996, Ms. Butcher responded very well to the constructive measures instituted by her supervisor and was able to finish the year on a satisfactory level. Furthermore, Ms. Butcher has been unable to accumulate a significant leave balance during her tenure. Would like for Ms. Butcher to work with supervisor in an effort to bank her leave time so that her benefits do not become jeopardized in the event of an emergency requiring an extended absence.

Grievant explained she had forgotten to submit leave slips on two occasions in 1996 when she was off work. She stated Mr. Johnson recorded when she was absent in his pocket calendar, and told her he needed leave slips for particular days. She testified if she did not complete a leave slip as

soon as she returned to work, she would forget to complete one. She stated on two or three occasions she asked Mr. Johnson what days she had been off work, because she knew he would have it recorded. He would check hisbook, tell her which days she was gone, and she would prepare her leave slips. Grievant further testified that Nisha Parks recorded on her desk calendar when other employees were out of the office, and how many hours, and everyone, including Mr. Johnson, knew this. In fact, Mr. Johnson had been seen reviewing Nisha's calendar with her and writing information from her calendar into his attendance book. Mr. Johnson stated it did not concern him at the time that Grievant had not completed leave slips, as he assumed she was not paying attention to detail, he would bring to her attention that she had not turned in a leave slip, and she would complete one.

While Grievant did not keep on top of her leave, apparently other employees likewise were less than conscientious. Mr. Johnson stated in the previously mentioned affidavit (Respondent's Exhibit Number 12), "[e]very month, I find errors in approximately 50% of the attendance records of the STD staff that I supervise. Upon finding an error(s), I make a notation on the OPS-2a form [monthly employee attendance report] or verbally address the issue with the specific employee. For staff located in field offices, I usually asked Ms. Butcher to address the issue with them on my behalf. Said error(s) are corrected on the MEAL record [monthly employee time record] by myself or Ms. Butcher."

Mr. Johnson issued a written warning to Grievant on May 23, 1997, for taking one hour and twenty minutes for lunch. Grievant was allowed one-half hour for lunch each day. The letter stated Grievant had been warned before about taking more than one-half hour for lunch. It noted this warning was not punitive, and she was charged with annual leave for forty-five minutes. It also noted that Grievant's explanation for being late was she was test driving a car and it took longer than expected. Interestingly, DHHR Policy Memorandum 2102 states in regard to meal periods that it is HHR's practice to allow a 30 minute paid meal period, and:

> With the supervisor's approval, employees may have an additional 30 minutes non-worktime meal period. By extending their day by 30 minutes to allow for the non-worktime of 30 minutes, the number of hours worked remains 8 actual work hours.

Mr. Johnson stated in his affidavit, however, that if an employee wants to make up for "unanticipated leave," such as being "held up" beyond lunch, his approval is required, and he "almost always reject[s] requests for make up of `unanticipated leave.'"

Mr. Johnson issued a written reprimand to Grievant on July 29, 1997, for violation of time and attendance policies, abuse of leave, and excessive use of leave. The written reprimand stated this

action was punitive. The letter stated Grievant had taken two hours and twenty-five minutes for lunch, and charged her with leave without pay for two hours. The letter further notes that from April 1 to July 25, 1997, Grievant had called in sick or late 18 days, and that 5 of the sick days were adjoining week-ends. The letter further notes that on May 27, Grievant had indicated to him that it was her understanding she could use her leave in the manner she chose. While Grievant denied she had been at lunch more than one-half hour on the day in question, and that she had told Mr. Johnson she was in the office, he did not believe her, and she did not grieve the reprimand.

Mr. Johnson explained that he went over HHR policies on leave abuse, work hours, breaks, charging leave, and progressive discipline with Grievant. He then placed Grievant on a performance improvement work plan from July 31 to September 26, 1997, to correct her behavior and encourage her compliance with department policies, which she successfully completed. The performance improvement work plan required Grievant toobtain pre-approval for use of annual leave, to speak to Mr. Johnson when calling in sick, to have a doctor's excuse when she was sick, to inform her co-workers when she left her work station as to where she was going, and to meet with Mr. Johnson every two to three weeks, and discuss DHHR Policies 2102, 2104, and 2107 with him three times. The letter stated "[a]nnual leave for sick leave can only be used when sick leave has expired. A physician's excuse will be required when using leave in this manner."

Grievant's 1997 performance evaluation states under the category "Use of Time:"

> Ms. Butcher has not always followed policies relative to use of time. Supervisor had to take punitive measures relative to time and attendance policy. While some improvement has been noted, she has not accrued a significant leave balance (Goal 4 from 1996 evaluation). Would like for Ms. Butcher to work with supervisor in an effort to bank her leave time so that her benefits do not become jeopardized in the event of an emergency requiring an extended absence. She has also been observed by supervisor violating Time and Attendance policy relative to meal periods. She has demonstrated more care in documenting her leave times and submitting a leave request form on a more timely basis (Goal 1 from 1996 evaluation).

She received a rating of fair in this category.

Respondent further attempted to demonstrate Grievant's history of leave abuse, or to rebut Grievant's claims of disparate treatment, by Mr. Johnson's testimony that Grievant rarely requested leave in advance, although he apparently approved it anyway, and there is no indication he ever required her to obtain approval in advance, except when she was on the performance improvement work plan.

Respondent also placed into evidence a memorandum to show Grievant did not come to work on

time. The memorandum from Greg Moore asked field staff to report their whereabouts for the day after 8:30 a.m., "so that more than one secretary will then be available." Mr. Moore was not called as a witness to explain the reason behind hismemorandum. While Respondent apparently thought this memorandum was self- explanatory, it does not say it is referring to Grievant being late. She and Debbie Tanner were both to be at work by 8:00 a.m. The memorandum could just as easily be referring to Ms. Tanner. In fact, apparently Ms. Tanner also did not come to work a lot as she had commented that she did not understand how Grievant had more accumulated leave than she had. Grievant obviously was not at work on many occasions, as she used almost all her leave. Her annual leave for May indicates she had in fact come to work late, and had used annual leave when she did so. Also, Ms. Tanner testified that she and Grievant often had to handle the two additional telephone lines for other programs, as the secretaries for those programs were not always at work on time, and that was part of the reason for the memorandum. Only Mr. Johnson and Ms. Pierson testified the memorandum was sent simply because Grievant frequently was not there by 8:00. Four of the field staff testified they had never had a problem calling in their agenda for the day. The memorandum does not demonstrate Grievant was abusing time, or that she was allowed to get by with reporting to work late.

DHHR Policy Memorandum 2107, dated February 28, 1992, deals with leave abuse. It defines leave abuse as, "[i]mproper use of annual or sick leave." It provides that when suspicions of leave abuse arise, the circumstances surrounding the employee's absences should be reviewed by "[t]he Commissioner, Office Director, Administrator, or their designee." It notes suspicious behavior might include a practice of being absent and absence an inordinate amount of time. It states, "[w]hen abuse is substantiated, the employer must take corrective action through progressive discipline, unless there areextenuating circumstances which might necessitate more harsh action and justify exception to progressive discipline." The policy further provides:

> Normally employees who abuse any form of leave should be given a verbal warning on the first occasion, a written warning on the second occasion, a suspension on the third occasion and be dismissed on the fourth occasion.

The Division of Personnel's Administrative Rules provide with regard to suspected leave abuse, at § 15.05:

> When an employee appears to have a pattern of leave abuse, including such frequent use of sick leave as to render the employee's services undependable, the appointing

> authority may request substantiation of the employee's claim for leave, for example, verification of an illness of less than three days. The appointing authority must give the employee prior written notice of the requirement for appropriate substantiation.

These Rules provide further at § 15.06, that when an employee fails to obtain appropriate approval for leave, according to agency policy, the appointing authority "shall dock the employee's pay in the next pay period for an equal amount of time paid during which now work was performed," after giving notice in writing to the employee that this action is being taken. Notwithstanding the allegations of leave abuse, Respondent did not ever take action on the allegations by requiring Grievant to bring in a doctor's excuse, or docking her pay, except when Grievant received the written reprimand. Once Grievant successfully completed the work performance improvement plan, Mr. Johnson did not feel the need to require Grievant to obtain pre-approval of annual leave or to bring a doctor's excuse for illnesses of less than three days. While Mr. Johnson opined that Grievant's absences placed a burden on other employees, Grievant was never charged with being absent so frequently she was undependable. Thus, there is no evidence that Grievant wassuspected of leave abuse or was accused of leave abuse once she completed the work performance improvement plan.

Respondent's history of leave abuse motive theory is weak. Grievant's supervisor knew what leave Grievant had taken in May, 1998, regardless of what was reported to the Office of Personnel Services, because he signed the leave requests. If the use of leave were suspicious to him, this would not have changed by Grievant's alteration of one of the leave documents. While the Office of Personnel Services monitors sick leave to make sure employees have not used more than 40 hours of family sick leave, there is no evidence that this Office would have a role in enforcing the leave abuse policy. The only thing Grievant gained by changing the document was eight more hours of annual leave. It does not appear that Grievant had been concerned in the past with having a low leave balance, so why would it be of concern to her now?

DHHR Policy Memorandum 2107 further provides:

> Abuse of annual leave may include instances where an employee is repeatedly tardy for work and requests that the time be charged to annual leave. Another example of abuse of annual leave would be where an employee is absent from work, has not requested leave in advance, fails to call within the time frames established in the workplace, and requests that the time be charged to annual leave upon their return. It should be noted that annual leave should always be requested in advance, absent unusual circumstances. However, this policy is not intended to prohibit prior arrangements between an employee and supervisor where extenuating circumstances exist and which may require occasional schedule adjustments.

Mr. Johnson testified that 99% of the time Grievant did not request annual leave in advance.

Nonetheless, he approved her annual leave requests, and except for when she received the written reprimand, did not charge her with leave abuse. Again, Grievantobviously was not concerned that she would be charged with leave abuse, and Mr. Johnson did not enforce HHR policy on requesting leave.

Further, Respondent failed to prove Grievant had a history of leave abuse. The evidence presented shows that Grievant used her leave to take care of her mother and daughter, as well as her own needs, and that her supervisor knew of her family's medical problems.

Grievant's mother, Valerie Ahart, testified regarding her bout with cancer, and the sickness she experienced during 1996 and 1997 due to chemotherapy and radiation therapy. She stated, however, that her illness from the cancer and therapy continues, she was on hormone therapy in May 1998, and continued to have frequent medical appointments. She explained that two of her children and their spouses, and their children, live with her and her husband; and that her children had taken time off work to care for her during her illness and to care for her grandchildren. She believed Grievant had told her supervisor of her illness. She stated Grievant would come home upset after she had taken time off, and had told her she had been called into the office to discuss that she should bank her hours for an emergency. Mrs. Ahart commented that she did not understand what worse emergency was going to hit that Grievant needed to save her time for.

Mrs. Ahart testified she had advised Grievant to seek a transfer, and that Grievant told her Mr. Johnson said he would not support a lateral transfer.

Grievant testified she had spoken with Mr. Johnson about her mother's cancer, and her daughter being frequently sick with ear infections, and told him she would have to be out of the office a lot. She testified she had reminded Mr. Johnson of these matters whenshe had to be out of the office a lot. Grievant stated she did not feel she was abusing her leave. She felt like this was an emergency, and she needed to help with her family.

Mr. Johnson stated he was not aware that Grievant's mother had continuing problems throughout 1997 and 1998 with cancer, although he recalled Grievant mentioning it to him maybe once. Even after Mr. Johnson had become aware of the problem through Grievant's written response to Dr. Taylor, Mr. Johnson exhibited a lack of concern or understanding for the problem as he related his compassion for another employee. He testified that an employee had used all her sick leave for a serious illness. He stated he had not cautioned her to bank her leave, and he had asked other

employees to donate leave for her, because her case was different from Grievant's. He stated that employee "had legitimate medical reasons" for using leave, it was a "legitimate use" of leave.

It is difficult to believe that Mr. Johnson was not aware of Mrs. Ahart's cancer and what this meant to Grievant. The STD Program has few employees. Respondent's counsel elicited testimony from several employees that the office is "gossipy." Other employees, including field staff who were rarely in the office, testified they were aware of the illness. Mr. Johnson acknowledged Grievant had mentioned it to him at least once. Given that this office's purpose for existing is monitoring certain diseases, and the Cancer Registry is next door to the STD Program, it is hard to understand Mr. Johnson's lack of concern and understanding. Be that as it may, more relevant is that it is incredible that he was oblivious to the fact that Mrs. Ahart was seriously ill, would be seriously ill for a long time, and needed her daughter's help.

Grievant testified that around the time she was promoted to Secretary I, July 1996, Mr. Johnson began to make comments and gestures which made her uncomfortable. Shestated he repeatedly commented that her perfume smelled good, asked her what it was, and then would add that he wanted to buy it for his wife. She stated she would tell him time and again what the perfume was. (See footnote 6) She stated he winked at her almost every day, and stared at her. She stated once when she stared back for a while, and then turned and left, he said, "looks like the boss wins another staredown." She stated he told her she should be more appreciative of her promotion. She stated he would brush up against her back. She said she never said anything to him, but she would move away to indicate she did not appreciate it. She estimated that this behavior lasted about seven to eight months. Mr. Johnson did not deny this. (See footnote 7)

Grievant stated sometime in 1997 she had told Mr. Johnson she wanted to transfer to another position, and he told her he would not support a lateral transfer. Mr. Johnson did not deny this. It appears that Mr. Johnson had an agenda.

It is apparent that Mr. Johnson did not strictly enforce official time and attendance policies. As further evidence of the lack of attention to detail in keeping time and attendance records, Grievant presented testimony from several of the field staff that they had each been approved to work five hours of overtime, which they reported on the forms provided to them as simply five hours worked, without reporting when they worked the fivehours. Sometime later they received forms on which it had been reported the dates and times they had worked these five hours, and which had been signed

by one of the office staff in the STD Program, Ilesa. Neither Ilesa nor anyone else ever called any of them to ask the dates and times worked, and the dates and times reported were wrong. In fact, one of the field staff testified that her supervisor told her her overtime had been questioned because she had worked the same time everyday. He then showed her this form signed by Ilesa which she had never seen before, and which was erroneous. She stated no one had ever asked her what hours she worked, even though she had kept a record of this herself. Respondent did not see any problem with Ilesa's actions, so long as the number of hours was correct.

Respondent failed to prove it is more likely than not that Grievant intended to steal eight hours of leave when she altered the monthly employee attendance report without approval. It is weak, but plausible, that Grievant would not remember she had not completed the changes after being gone a day with an illness; and with all the stress she was under both at home and at work, perhaps she was not as careful as she might have otherwise been. A perfect secretary would have marked her place in some way, even if the interruption required her immediate attention, but she was not required to be perfect. Grievant's version of the order of making the changes makes sense, regardless of how Dr. Taylor would have made them.

Grievant should not have made any changes to the monthly employee time record without talking to a supervisor about what she was going to do, and this is the weakest area for Grievant. It is difficult to understand why she would not have told someone what she was doing, but this does not make her a criminal, or an employee who cannot betrusted. She thought the record was her responsibility, and Ms. Haddy's testimony supported this, although Grievant's belief as to the extent of her own authority was erroneous.

Many factors, however, weigh in Grievant's favor. The deciding factor in this balancing of one fact against the other to try to determine Grievant's intent, is that it is difficult to understand how someone could steal leave time when the back-up records show the leave was taken, and those records are all filed together and are accessible. Further, the alterations are clearly visible under the whiteout. Eventually, someone would catch it, and Grievant knew her supervisor had already caught it, or would catch it later when he checked the records himself. Neither Grievant nor many of the other employees in the office had ever been careful with reporting their time, and it was not a concern to Grievant. Perhaps this was because she never had any leave time, and had no hope of having any in the near future due to her family's circumstances, and felt defeated by her supervisor's attitude.

The following Findings of Fact are made based upon the record developed at Level IV.

Findings of Fact

1. Grievant was hired by HHR as an Office Assistant II in September 1995. She was promoted in July 1996 to a Secretary I for the Sexually Transmitted Diseases ("STD") Program. Grievant was an excellent employee.

2. Grievant's supervisor, Robert Johnson, is employed by the federal government, as a public health advisor with the Center for Disease Control. He has been assigned to West Virginia for six years at the request of the state, and serves as the Director of the Sexually Transmitted Diseases ("STD") Program, Coordinator of HIV Prevention, and Coordinator of HIV Care.

3. Grievant was dismissed on August 7, 1998, for altering her own time on the monthly employee time record without approval, after it had been approved and signed by the Director of Surveillance and Disease Control, Loretta Haddy, with the intention of stealing eight hours of leave.

4. On June 8, 1998, Grievant altered her own time on the monthly employee time record without approval, and did not tell anyone she was making the alteration. Grievant was attempting to change her annual leave taken to sick leave, as she had taken the annual leave for her illness, and discovered she had enough sick leave to use it. She used whiteout to erase the eight hours of annual leave shown on May 13, 1998, and the total annual leave taken for the month. She wrote in the corrected total annual leave taken and erroneously recorded the eight hours taken on May 13, 1998, as family sick leave. She used whiteout to erase the eight hours of family sick leave, and was interrupted. She left work without finishing the changes, and did not make a note to herself to finish the changes. Grievant left all the documents on her desk, and went home. She did not cometo work the next day, and turned the monthly employee time record in to the Office of Personnel Services on June 10, 1998, without completing the changes. The whiteout and the numbers under the whiteout are obvious.

5. Grievant did not alter any of the leave request forms which showed the leave taken on May 13, 1998, as annual leave, or her monthly employee attendance report which showed eight hours of annual leave was taken on May 13, 1998. These documents were filed in Grievant's office with copies of all sick leave request forms and a copy of the monthly employee attendance report.

6. On June 9, 1998, Mr. Johnson found the documents on Grievant's desk, reviewed them,

and discovered the monthly employee time record did not match the support documents.

7. Becky Pierson called Grievant at home on June 9, 1998, for Mr. Johnson, and told her he wanted to know what had to be done to complete them so they could be turned in to the Office of Personnel Services.

8. Grievant knew Mr. Johnson had seen the documents on her desk, and she knew in the past he had compared all the documents for accuracy after she had filed them.

9. Grievant maintained a very low leave balance due in large part to her mother's cancer and her infant daughter's various illnesses.

10. Grievant's supervisor reprimanded her in July 1997, and put her on a work performance improvement plan because she took more than one-half hour for lunch, and because he did not think her use of leave was due to legitimate illness. During the time Grievant was on the work performance improvement plan she was required to provide doctor's excuses for use of sick leave and to obtain approval for use of annual leave inadvance. She successfully completed the improvement plan and was removed from it. Mr. Johnson did not require Grievant to obtain approval for annual leave in advance or provide a doctor's excuse for use of sick leave at any other time.

11. Ms. Pierson had her arms around Mr. Johnson and her hands all over him at a party attended by field staff. Mr. Johnson exhibited favoritism toward Ms. Pierson after that.

12. Mr. Johnson made inappropriate remarks to Grievant and to other female employees regarding their perfume, winked at Grievant, stared at her, brushed up against her, and refused to support her lateral transfer.

The following Conclusions of Law support the Decision reached.

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 the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent failed to prove the charges against Grievant.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a Secretary I in the STD Program, and to transfer her out of the STD Program to another

Secretary I position acceptable to Grievant and Respondent, when one is available, and to pay her all backpay to which she is entitled, and benefits, as though she had not been dismissed, plus interest.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 26, 1999

Footnote: 1

Grievant was represented by Michael Oring, Esquire, and Respondent was represented by Meredith Harron, Esquire.

Footnote: 2

This Code Section appears to the undersigned to apply to financial accounts, not to leave records. The title of the statute is "Falsifying accounts; penalty." One of the few cases from the Supreme Court of Appeals of West Virginia citing this Code Section, State v. Rouzer, 127 W. Va. 392, 32 S.E.2d 865 (1945), notes:

> *This statute is a very old one. It can be traced back beyond thefoundation of this state to the Virginia Code of 1849. Yet we are not able to find the report of any case brought to this Court or to the Supreme Court of Virginia involving this statute. Evidently it has been found to be of little practical utility. A probable explanation of this phenomenon may be found in the extremely narrow scope of the statute itself.*

The Court went on to discuss the meaning of the word "account," with all of the cited definitions referring to the recording of a monetary transaction. The Court stated,

> *This statute, in its original form, clearly deals with the written records or accounts of the corporations mentioned, and nothing else, and was inherited in that form by this State. . . . It is to be observed, however, that notwithstanding the broadening of the statute by this [1881] amendment in many aspects, no change was made in the character of the account protected, other than to make the law applicable also to "any book of account."*

The parties, however, presented no argument as to the statute's applicability, or lack thereof, to this situation.

Footnote: 3

Respondent seemed to insinuate that Grievant could have made this change after the forms were signed by Mr. Johnson; however, none of the witnesses who had reviewed these forms could remember whether the whiteout had been on the form when they initially reviewed it, including Mr. Johnson. Only Grievant recalled the order of events.

Footnote: 4

Mr. Johnson first testified he did not check Grievant's leave balance, and later stated he was not sure whether he checked Grievant's leave balance with Edith Baker before approving the leave requests.

Footnote: 5

Although Grievant did have enough sick leave to use eight hours of sick leave on May 13, and may have accrued enough sick leave through May 14 to take eight hours on that day, it appears she would not have accrued enough sick leave by May 15 to also take four hours on that date if she changed her eight hours on May 13 from sick leave to annual leave. Respondent did not dispute, however, that Grievant could take eight hours of sick leave on May 13, and also take sick leave the rest of that week.

Footnote: 6

One witness testified that Mr. Johnson had repeatedly said the same to her, even after she had told him she did not wear perfume as she was allergic to it. Finally, he started telling her her hair smelled good and asked her what hairspray or shampoo she used.

Footnote: 7

Two former secretaries testified as to remarkably similar experiences with Mr. Johnson. Mr. Johnson responded that these two had stated they wanted his head on a chopping block. He also testified that one of these secretaries had failed to timely submit his expense reports, intentionally causing him much embarrassment. He testified she had retaliated against him - although he did not state why she would feel the need to do so.