BERNARD COBB,

Grievant,

v. **Docket No. 97-ADMN-405/455**

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICES DIVISION,

Respondent.

D E C I S I O N

These grievances were submitted by Grievant Bernard Cobb directly to Level IV, pursuant to W. Va. Code § 29-6A-4(e), on September 12, and October 17, 1997, respectively, after he was suspended for 22 days, and then dismissed from his employment with Respondent Department of Administration, General Services Division ("GSD"). (See footnote 1) Grievant sought as relief in his suspension grievance:

> 1. Reversal of the suspension and restoration of pay for the suspension period, with interest, together with restoration of all benefits lost by reason of the attempted suspension;
>
> 2. Cessation of the harassment underlying and involved in the groundless circumstances alleged in the letter supporting the suspension, dated August 28, 1997, copy attached.
>
> 3. Prohibition of the dismissal threatened in the letter of August 28, 1997 or any other adverse personnel action for any reason involving the groundless circumstances alleged in such letter supporting the suspension.
>
> 4. Removal of the suspension and the allegations and groundless circumstances alleged in support of the suspension from grievant's personnel file.
>
> 5. Such attorney's fees as may be recovered under the grievance statutes.

Grievant sought as relief in his dismissal grievance to be reinstated with backpay and benefits. (See

footnote 2)

Grievant had been employed by the GSD four years, and was an Administrative Services Manager II, the Assistant Director of buildings and grounds. He supervised a unit of employees. On August 28, 1997, he was suspended by his supervisor, Raymond Prozzillo, Director of the GSD, for 22 days without pay. The suspension letter stated he would be required to prepare a strategy to overcome his deficiencies within five days after his return to work from his suspension. He served his suspension from September 8 through October 7, 1997, and returned to work onOctober 8, 1997. Upon his return to work, he was dismissed from his employment for additional acts of alleged gross insubordination 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 dismissal notice must set out sufficient facts of alleged misconduct so that the details are known with some particularity, and an act of misconduct should be identified by date, specific or approximate, unless its singular characteristics leave no reasonable doubt when it occurred. Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977)." Amar-Abrams v. Dep't of Health and Human Resources, Docket No. 96-HHR-520 (July 2, 1997). Mackin v. Civil Serv. Comm'n, 155 W. Va. 139, 181 S.E.2d 684 (1971).

Many of the charges against Grievant involve alleged acts of insubordination. It is well established that "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of theviolation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995) (Citations omitted.). Where an

employee has justifiably misunderstood or misinterpreted a superior's instruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to establish insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998), citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991).

"`Generally, an employee must obey a supervisor's order and 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 Department, Docket No. 90-H- 128 (Aug. 8, 1990)], citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988) [other citations omitted]." Stover v. Mason County Bd. of Educ., Docket No. 94-26- 640 (Feb. 23, 1995). "An employee is not justified i[n] disobeying a reasonable order simply because he/she does not agree with it." Id. "An employer has the right to expect subordinate personnel `to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .'. McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984))." English v. Div. of Corrections,Docket No. (June 29, 1998). However, "intent to thwart the orders of the employer" is an essential element of insubordination, and "[w]hen an employee, though intentionally, does not comply with reasonable directions of a superior entitled to give such, upon advice of his criminal attorney, that element might be found missing; . . .." Rymer v. W. Va. Dep't of Tax and Revenue, Docket No. 90-ABCC-204 (Mar. 14, 1991).

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, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, [149 W. Va. 461,] 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).

"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." Wiley v. W. Va. Div. of Natural Resources, Parks andRecreation, Docket No. 96-DNR-515 (Mar. 26, 1988).

Grievant had served under three Directors: Bill Elswick, Doug Koenig, and Mr. Prozzillo. He was reclassified in 1996 from an Administrative Services Manager I to an Administrative Services Manager II, but his duties had always been about the same, except for the level of responsibility. He testified when he was first employed he was told what he was expected to do and how he was to do it. Tr. I, pp. 200, 497-499.

Grievant argued generally that the technical and frivolous nature of many of the charges against him demonstrate that Mr. Prozzillo had a pre-conceived notion to fire him; and that the issues raised had little to do with Grievant's ability to perform, but arose out of poor management by Mr. Prozzillo, in that he wanted things done differently but failed to tell Grievant.

It is clear from the testimony that Mr. Prozzillo did not always communicate clearly to his employees; yet when they, particularly Grievant, did not communicate clearly to him, he reacted harshly. It is equally clear that Grievant cannot answer a question without telling a story, sometimes the stories are hard to follow and not necessarily relevant, and Mr. Prozzillo had no patience for or understanding of Grievant's stories, and Grievant does tend to look for excuses. Mr. Prozzillo took this as incompetence and lying, blamed Grievant for things which were not his fault, and blew even the smallest thing way out of proportion, as is most clearly evidenced by the corn chip incident which will be discussed. Grievant, however, did not always respond appropriately to Mr. Prozzillo's requests, and took things slowly, while Mr. Prozzillo wanted him to take immediate action. The dismissal charge, and some of the other charges, are based solely upon how Mr. Prozzillo viewed events, and his view was not objective, and often not fair. Deputy Director Dan Gilchrist also was a witness to some of the events, including the key suspension charges. As will become apparent from the discussion, Mr. Gilchrist's testimony was not credible at times. Mr. Prozzillo tried to avoid answering the questions asked, and was not always clear in his answers. Likewise, the undersigned found Grievant's testimony incredible on two occasions, and difficult to understand on others. Thus, in evaluating what really happened the undersigned has been left to sift through the events, and try to determine what more likely than not occurred based upon the available credible information, keeping

in mind the burden of proving the charges was upon Respondent.

GRIEVANT'S SUSPENSION

On August 27, 1997, Mr. Prozzillo called Grievant to his office, and the suspension letter followed on August 28, 1997. The suspension letter states that on August 27, Mr. Prozzillo discussed with Grievant his insubordination, work deficiencies and misconduct. The suspension letter rambles through a number of items which Mr. Prozzillo brought to Grievant's attention during two meetings on August 12, 1997, and relates Mr. Prozzillo's recollection of Grievant's responses to him regarding these items.

The suspension letter states, "this is your final warning of impending dismissal for continued insubordination, misconduct, and poor performance." A number of incidents are listed, then the letter concludes:

> These items were among those used to justify your position being classified as an Administrative Services Manager II rather than an Administrative Services Manager I. Yet, in my tenure as Director of the General Services Division I have experienced the above cited incidents. Accordingly, your actions lead me to believe that you are either unable or unwilling to meet the required standards of your position, and that I must take this disciplinary action.
>
> You are reminded that supervisors serve as role models for employees. As a supervisor, it is your basic responsibility to create a model of how employees are to interpret and apply the Department's policies and procedures and how they are to respond to problems they confront in their daily activities. Your actions diminish the effect of your leadership and is not acceptable behavior for your employees to emulate. As a supervisor, you should understand the importance of discipline in meeting Department objectives. It is as important to discipline yourself as it is for employees to exercise self-discipline in these matters.
>
> You must realize that in your position as a[n] Administrative Service[s] Manager II, you have a responsibility to enforce the policies and procedures established by the Department of Administration. The employees under your supervision rely on you for training, leadership and direction in complying with the rules and regulations. It is then the subordinate's responsibility to apply your instructions in the work place. Obviously, if there is a lack of positive and supportive supervision, employees cannot perform their duties with confidence that their work product is in compliance with departmental policy and/or procedure. It is your primary responsibility to plan, assign, supervise, evaluate and secure the resources necessary to ensure the successful performance of the employees under your supervision. I conclude that your failure to exercise supervisory skills and to follow policy make it difficult, if not impossible, to enforce compliance with policy by your staff. The examples above clearly demonstrate your inadequate leadership, supervisory performance and judgement, as well as your repeated disregard for departmental policies and/or procedures.

Your conduct and behavior is judged to be inappropriate and unacceptable in that you have displayed unnecessarily confrontational actions, irrational behavior and the wasting of time and energy on frivolous matters. I am uncertain if you are lacking the skills to perform your assigned duties or if these deficiencies are a matter of your unwillingness to adjust to work expectations. Whatever is the case, it is unacceptable.

. . .

All of the aforementioned, when viewed both singularly and collectively, demonstrate unacceptable conduct warranting disciplinary action. The cumulative effect of your unprofessional conduct is one of inability or unwillingness to effectively perform the functions of your position as an Administrative Services Manager II in a professional manner, and to adjust to the goals of the agency.

A review of your personnel record reveals that Jam[e]s W. Teets, Secretary, Department of Administration, previously issued a written reprimand to you dated March 11, 1997. I remind you that the subject of that reprimand was your inappropriate and unprofessional conduct regarding a subordinate employee. Within that letter, Mr. Teets informed you that any future infractions, whether they be the same as that situation or different, may result in more severe disciplinary action.

After careful consideration, I am left with no other alternative than to conclude your deliberate neglect of your duties is so irresponsible and so singularly reprehensible that your actions warrant your suspension. The Department of Administration, General Services Division, has the right to expect its employees to maintain and 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 employees' capacity in discharging their duties and responsibilities. I believe your poor performance is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct. Thus, warranting your suspension. I must advise you that such negligence cannot and will not be tolerated. Any further incident will result in your dismissal.

. . .

When you return to duty from your suspension without pay you are to submit, within five (5) working days, your written strategy to overcome these deficiencies. You are to identify any necessary support that I may consider to assist you in overcoming these problems. Your written strategy is to include how you plan to accomplish overcoming these deficiencies within your current allocated resources. If I do not see a marked improvement, within sixty (60) calendar days you will be dismissed.

Respondent's Exhibit 1.

Although the suspension letter contains a paragraph about prior disciplinaryaction, Mr. Prozzillo testified he did not consider this in arriving at his decision to suspend Grievant. He was assisted by the Division of Personnel in drafting the letter and Personnel included that paragraph. Tr. I, pp. 104-105. He stated, "[t]he insubordination and the failure to follow direct lawful orders by me, his superior, his poor work performance, and his planning were enough for me to warrant the 22 day suspension." Tr. I, p. 73.

The discussion of each incident listed in the suspension letter follows. The first item in the suspension letter will be addressed later, for reasons which will become apparent.

1. Failure to Obey Directive to Obtain Smaller Garbage Can Liners

The second item in the suspension letter relates to Mr. Prozzillo's request to Grievant that he take care of a problem with the trash can liners in the Capitol Complex being too large. The letter states Mr. Prozzillo asked that this be taken care of three months before, yet it still had not been addressed, and he confirmed this in his testimony. The large liners caused the "whirlybird" lid to not go around so that the paper would stay on top, and eventually fall out, which was unsightly. Tr. I, pp. 43- 44. The letter states, "[y]ou responded that slip rings had been ordered."

Respondent argued the evidence demonstrated Grievant lied under oath regarding when he acted on Mr. Prozzillo's request, and that he, in fact, did not attempt to comply with Mr. Prozzillo's request until August 1997. It also asserted Grievant testified inconsistently when he stated he was not aware medium size liners were available and could be ordered until he saw the state contract produced byRespondent at Level IV; and then later stated he found out they could be ordered on October 8, 1997, and directed David Deusenberry to order them that day. Respondent argued Grievant was neglectful and insubordinate. Mr. Prozzillo testified this problem was one of several items which caused him to verbally reprimand Grievant on August 12, 1997. Tr. I, p. 51. As a verbal reprimand was given, "Respondent cannot rely on this incident to independently support" the suspension. Amar-Abrams, supra.

Grievant argued this incident was silly. The liners were not in stock, Grievant checked on them, set the wheels in motion, and in the meantime took steps to solve the problem by installing bands in the cans.

Grievant testified when Mr. Prozzillo first asked him about the trash can liners he told him Mr. Koenig had also told him to get the correct size liners, and that Inventory Control had told him they

were not on contract. He stated as soon as Mr. Prozzillo asked him to take care of the trash can liners he went to Inventory Control and requested medium size liners. He stated he was told by Sara Whitney, in Inventory Control, that only large and small liners were available. Other employees suggested he talk to Mr. Deusenberry, also in Inventory Control, and he did so. He testified Mr. Deusenberry told him they had never ordered medium liners, and he was not sure if he could get them, but he would find out. He stated he checked at least three times to see whether the medium liners were in, and was told they were not. He had tried to solve the problem by adding a band inside the trash cans to hold the large bags in place, and this project was nearly completed. Tr. I, pp. 515-519, 734.

Mr. Deusenberry testified Grievant had made a request to him for a medium sizeliner around July or August 1997. He stated because they did not stock the liners, at Mr. Koenig's request, they were not listed on the computer inventory. He had not received a copy of the new state contract with prices, so he had to contact the distributor and get the information he needed, and it took him about three days to get the information in the computer and place the order. He thought it took 10 to 14 days for the order to come in. He was not sure whether the receiving clerk contacted anyone to let them know the liners were in, but he had not called Grievant, even though Grievant had come by a couple of times to see if the liners were in. He thought it was likely the receiving clerk would have called the Lead Custodian. Tr. I, pp. 393-400.

Mr. Prozzillo provided a copy of the statewide purchase order which allows any agency to order the trash can liners listed. Tr. I, p. 265. The document states on its face that it is effective June 1, 1997. Respondent's Exhibit 7. While Mr. Gilchrist testified the contract had been the same the previous year, and for as long as he could remember, he also testified the GSD normally kept all three sizes of trash can liners in stock, which testimony was contradicted by Mr. Deusenberry. Tr. I, pp. 266, 394.

While Grievant's testimony regarding when he became aware of the state contract is hard to follow, Mr. Deusenberry's testimony is entirely consistent with Grievant's. It appears Grievant's testimony regarding the state contract was that he had never seen the contract until it was produced at the Level IV hearing, and was not certain the medium size liners were on the contract until the hearing. As to Ms. Whitney, neither party called her to testify, and Respondent ignored Grievant'stestimony that he had first talked to her. It is entirely possible that Ms. Whitney told Grievant

they did not stock the bags and they were not available because they were not listed in the computer, and she went no further than this. It is also possible that Grievant misunderstood Ms. Whitney. Likewise, as Grievant points out, no evidence was produced of when the liners were ordered, although that information should have been readily available to Respondent.

Respondent failed to prove Grievant was anything other than gullible, non- aggressive, and a poor communicator. Even if he did not try to get the liners until August 12, 1997, however, the fact that he did so immediately is an indication that his failure to do so before was not as a result of his intent to disobey an order. Further, he did order additional bands to correct the problem, and the bands were being installed. He was neither neglectful nor insubordinate.

Even if it were accepted that Grievant did not perform this duty when he should have, this is a performance problem. However, Grievant's last performance evaluation, signed by Mr. Koenig and Grievant on February 20, 1996, for the rating period from October 1, 1994, through September 30, 1995, rated his performance as "far exceeds expectations," even though the medium liners were not being used. He was not rated for the year 1995-1996. Such a minor incident in light of Grievant's outstanding past performance cannot support any disciplinary action.

2. The Noisy Corn Chip Bag

The next item listed was:

> I informed you that I did not appreciate your arrogance during the earliermeeting that day, as you had a bag of corn chips and proceeded to eat the chips during the meeting. Further, you and/or others rattled the bag which was disruptive. You stated that you passed the chips around.

This item was not addressed in Respondent's post-hearing written argument, but the charge apparently is insubordination. Grievant pointed out the incident was so ridiculous as not to merit consideration. While ridiculous indeed, it is instructive.

Employees had a practice of bringing food and drinks to staff meetings, and offering their food to others, and had not been told to do otherwise. In attendance at the meeting in question were Pam Dukate, (See footnote 3) Mr. Gilchrist, Jim Bumpus, James Casto, Mr. Anthony, Tammy Goad, Paul Prendergast, someone from accounting, and Grievant. Ms. Dukate was eating Necca wafers. Grievant offered his corn chips to others at the meeting, and several people accepted. No one told Grievant at the time that he was being disruptive. Tr. I, pp. 519-522, 528.

Mr. Gilchrist was sitting to Grievant's right, one or two chairs over, and Mr. Prozzillo was to his

immediate left. He found the chip bag noise disruptive, and as Mr. Prozzillo does not normally speak very loudly, Mr. Gilchrist was having trouble understanding what he was saying. Tr. I, pp. 263-264. Ms. Dukate believed Grievant was being disruptive intentionally. She did not recall that the corn chips were passed to other employees, and stated they were not passed around the table, and did not notice others bringing food into staff meetings except coffee. She stated she would not have noticed Grievant's corn chips except it was so obvious. Tr. I, p. 292, 300-301.

Mr. Bumpus, an Administrative Services Manager II with the GSD, did not recall Grievant being disruptive, and he was able to concentrate during the meeting. The chips were in a cellophane bag, which was normal, and these bags are noisy. Tr. I, pp. 373-384, 389, 415-417. Mr. Casto, an Administrative Services Manager II for the GSD, was sitting across from Grievant, and although his hearing is somewhat impaired, he had no trouble hearing Mr. Prozzillo that day. Tr. I, pp. 925, 928-929, 933-935.

The testimony of Ms. Dukate and Mr. Gilchrist, who are Mr. Prozzillo's advisors, is so opposite that of the other employees who testified as to be unbelievable. If Mr. Casto, with his hearing impairment, and who was sitting directly across from Grievant, could hear Mr. Prozzillo, how could Mr. Gilchrist have a problem hearing? If people commonly brought food to staff meetings, how could Ms. Dukate not be aware of it? If there were only ten people in the room, someone would not need to be "obvious" about eating corn chips from a cellophane bag for her to notice it. This incident also demonstrates Mr. Prozzillo's inability to fairly judge Grievant. The charge was not proven.

3.

Failure to Prepare an Equipment Maintenance Plan Resulting in Equipment Breakdowns

The suspension letter next states:

> I then discussed the yard crew and asked you about the maintenance of the equipment they used. You informed me that you had been unable to locate a public schedule of when the maintenance occurred. You told me your crew only changes the oil, sharpens blades, and greases. That ifanything needed repair you took it somewhere else. You said you left it up to Donald Hill to do maintenance.
>
> You were specifically asked about the two (2) blowers that had been inoperable for six (6) weeks. You offered some excuse that you didn't take things to Crede's to be repaired, as you tried to take them somewhere else.

The letter goes back to this at a much later point, noting that had one of the blowers been repaired when it was first broken, two would not have been down at the same time, and Grievant should have established a system to ensure that all equipment was repaired in a timely fashion. It continues:

> I have concluded that preventive maintenance on machinery has been lacking. Regardless of whether this is neglect or coincidence, it is your duty and responsibility to develop such maintenance schedule and see to its compliance. As you have been unable to provide me such a written schedule, I can only conclude that there is no such schedule. As the Assistant Director, responsible for the upkeep of the capitol grounds, the maintenance of machinery should be of utmost importance to you and your failure to ensure preventive maintenance is inexcusable.

Respondent argued Grievant's failure to take action to get the blowers repaired "until the matter was critical and the threat of disruption of work loomed," and his failure to maintain a maintenance schedule demonstrated poor job performance and neglect of job duties.

Grievant argued that the suspension letter states Grievant did not give Mr. Prozzillo the equipment maintenance schedule, and that as the testimony indicates Grievant did provide the schedule he had used, the real complaint was that the schedule was inadequate. Grievant argues Mr. Prozzillo did not tell him he wanted something different, which he was required to do. He further argued nothing adverseresulted from two blowers being down at the same time, and noted that Mr. Prozzillo had replaced both of them after Grievant left.

Mr. Prozzillo believed the two blowers should have been repaired as soon as they became inoperable, or he should have been notified they needed to be replaced, and there should have been a plan in place for maintenance. He had asked Grievant for the maintenance schedule and he had told him Mr. Hill had it. Mr. Hill had a schedule for changing the oil on one piece of equipment. He told Grievant there was no maintenance schedule, and Grievant responded that Mr. Hill took care of maintenance. Tr. I, pp. 79-81.

Grievant was not aware there had ever been a formal maintenance schedule. He stated he had never been instructed by Mr. Prozzillo to have a written maintenance schedule prior to August 12, 1997. Tr. I, p. 529. He explained the grounds crew performed minor preventive maintenance such as greasing the units and wheel bearings, sharpening blades, replacing wheels, and changing oil and spark plugs, on an as needed basis, but when equipment broke down, they called someone to fix it. He believed the employees knew to sharpen the lawnmower blades in the spring, and get the snow blowers ready in the fall, and this was common sense. Tr. I, pp. 522- 525, 714-715, 831.

Grievant stated Mr. Hill was responsible for getting equipment repaired, up to his spending

authority limit of $500. He inspected the equipment approximately once every quarter, and had looked at the equipment sometime after Mr. Prozzillo became Director, and had sent him a memo listing all the equipment and its condition. Tr. I, pp.679-680, 710-713. Grievant stated he was not aware one blower had been inoperable for six weeks. Tr. I, pp. 526, 530. He was not aware of the blower problem affecting his staff's ability to get any work done, and thought the blowers were repaired within two days to a week of the time he learned they were broken. Tr. I, pp. 830, 832.

Mr. Hill's testimony regarding this problem was not useful, as he was utterly confused as to the time period when the blowers broke down, and could not recall what he had told Grievant and what Grievant had told him. Tr. III, pp. 18-19, 20, 22, 25, 29. Mr. Hill explained the broken blowers were 8 to 10 horsepower, and were mounted on wheels so they could be pushed, and they only had two of these at the time. They still had blowers with backpacks and small hand blowers for use. Tr. III, pp. 29, 39-40. He testified one of the blowers could not be fixed, and now they have two new push blowers, plus the one old one which was fixed which they do not use. Tr. III, pp. 34-36.

Mr. Prozzillo did not tell Grievant to develop a formal preventive maintenance schedule, nor did Respondent demonstrate one was needed. No testimony was introduced to explain the problem with either blower, or how a preventive maintenance schedule would have detected and prevented the problems. For example, both problems could have been caused by accidents. What Grievant needed to do was tell Mr. Hill to get the blowers fixed immediately when they broke down, if it really was a problem. Apparently, neither Mr. Hill nor Grievant saw this as a major problem, as they had smaller blowers available to adequately get the summer work done, and itonly took a few days to get the repairable blower fixed. The evidence presented did not establish a critical situation. The charge of poor job performance with regard to this incident was not proven, and certainly is not the type of charge for which a suspension is contemplated, particularly in light of the fact he was operating in this same fashion when he received an excellent rating on his last performance evaluation. While the undersigned can see how Grievant's response to Mr. Prozzillo could be annoying, this issue was not developed by the parties so that any conclusion can be drawn with regard to what occurred; however, this would likewise appear to fall under the category of improper attitude in a performance evaluation, rather than insubordination, or a matter otherwise for disciplinary action.

4. Failure to Maintain Fertilization Schedule for Capitol Grounds

The next incident in the suspension letter reads:

> I then informed you that you had failed to give me the total fertilization schedule of the grounds. One week later, I had to tell you that you had not given me the total fertilization of the grounds schedule and you agreed to go to your office and get the schedule and bring it back to the [sic] me immediately. One hour went by and I then proceeded to your office, stood in front of your desk, and ask[ed] you for the total fertilization schedule and you reached into your desk and handed me the Scott's fertilization schedule for grass only. Later, during the verbal reprimand conference your rebuttal to the fertilization issue was that you had other fertilization schedules for trees and shrubs and referred me to their location. The only schedule I could find was dated 1985 [sic] and was a small lawn care bulletin that was found inside Mr. Hill's key box and the box was closed.

Respondent argued Grievant's job performance was deficient in that he had taken no action to develop a lawn fertilization plan or a plan to maintain trees and shrubs, did not meet the standards set forth in his job description, and that the Scott'slawn fertilization plan was insufficient because it treated all areas of the Capitol lawn the same.

Grievant argued that the suspension letter states Grievant did not give Mr. Prozzillo the fertilization schedule, however, Grievant did provide the schedule he had used. Grievant argues that Mr. Prozzillo did not tell Grievant he wanted something different, which he was required to do.

Mr. Prozzillo testified Grievant handed him a Scott's plan for grass fertilization, which was in his desk, he told him this was not his plan, and Grievant responded it was the one he used. He stated he then said, "[n]o, Bernard, you misunderstood me. I asked you for your plan. I don't want Scott's plan; I want your plan." He then asked for the fertilization plan for trees and shrubs, and Grievant directed him to Building 2. Mr. Prozzillo could not locate it there, and asked Mr. Hill about it. They located a 1984 Scott's Four Step Annual Program. Tr. pp. 60-62, 64.

Mr. Prozzillo explained the plans were unacceptable because products have changed since 1984, soil samples should have been taken to determine exactly what was needed in what areas, and they were storing fertilizers in building 2 that were the wrong materials. Tr. I, p. 64.

Grievant testified he had contacted Scotts several years ago, and that company had taken soil samples of the Capitol grounds and provided a lawn maintenance program. He stated the recommended program was put out for bid, and Scotts won the bid. He explained this was the lawn fertilization schedule which had been in place since he had been there, and the other Directors had not expressed that this schedulewas inadequate. He admitted he handed a copy to Mr. Prozzillo, and stated he thought Mr. Prozzillo already had a copy of this as he had given a copy to Mr. Koenig. Tr. I, pp. 531-534. Respondent's Exhibit 8 indicates it is a lawn fertilization application program for 1996.

Grievant further stated Mr. Prozzillo had never instructed him to develop a different fertilization

schedule, or told him the existing schedule was inadequate, until right before he was suspended, although he was confused as to whether it was right before he was suspended, when he was suspended, or when he was discharged. Tr. I, pp. 532, 585-586; Tr. II, pp. 68-69, 73. Once he was made aware of this, he contacted Ed Lake at Davey Trees and TruGreen-Chemlawn about getting new soil samples taken. Soil samples were taken, proposals to treat the Capitol lawn were submitted, and he gave them to Mr. Prozzillo. Tr. II, pp. 65, 67-68, 71-72, 824.

Grievant thought the tree and shrub plan was in Building 2, and when he discovered it was not, he called Davey Trees to get a copy, they brought it to him, and he then took it to Mr. Prozzillo. Tr. I, pp. 533-534, 544-545.

Grievant testified when Mr. Koenig was Director he had told him he did not want to spend money on the trees, even though Grievant had gotten Davey Trees to look at the trees and prepare a plan to take care of them, at the request of Chuck Polan, then Secretary of the Department of Administration. Tr. I, pp. 825-827, 857. Respondent's Exhibit 28 indicates the Davey Trees proposal was submitted May 10, 1996, and gave the location, size, and species of 288 trees, and a recommendation for each. Mr. Prozzillo hired Beth Laughlin, a landscape architect. Grievant testified she worked for Mr. Prozzillo and Mr. Gilchrist, and seemed to always be busy with them. He stated he had people who planned flower beds for him, for free. Tr. I, pp. 851- 853. Curiously, Respondent's counsel asked Grievant if he ever "ask[ed] to use her services." Tr. I, p. 853. It is strange that Mr. Prozzillo would not involve Grievant in the hiring of a landscape architect to improve the appearance of the Capitol grounds, and explain to him what his vision was, and how he believed her services should be used.

In early August, before Grievant was suspended, Mr. Prozzillo contacted the Superintendent of the Pete Dye Golf Club (where Mr. Prozzillo had worked prior to assuming the Director position), Gary Grandstaff, regarding maintenance of the Capitol grounds. Tr. III, pp. 115, 125. Mr. Grandstaff acquired a bachelor's degree from Penn State in 1968 in agronomy, which is the study of soils, ornamental grasses, insects, funguses, weeds, irrigation, drainage, and some horticulture. Tr. II, pp. 130-132. There is no dispute that Grievant does not possess this type of education.

Mr. Prozzillo entered into a contract for Mr. Grandstaff's services on August 25, 1997, in the amount of $60 per hour, not to exceed $5,000. Grievant's Exhibit 11. At no time did Mr. Prozzillo disclose this to Grievant. Tr. III, pp. 131, 161.

Mr. Grandstaff first visited the Capitol grounds in September 1997, and found the grounds infested with clover, nut grass, and crab grass, some areas were lacking in lime and basic nutrients needed for plant growth, but broadleaf weeds were well taken care of. Tr. II, pp. 120-122. He could not tell how long it had taken for thegrounds to reach this condition as he had not been given any information on what was being applied to the grounds, but he estimated one to three years, depending on rainfall, and the particularly heavy rainfall in 1997 would have been a somewhat unique deteriorating factor. He stated it would take longer to break down lime, phosphates, and certain other chemicals. Tr. II, pp. 145-146, 158-159, 165. He explained his plan for the lawn would place it in the same condition as a golf course or a quality home lawn. Tr. II, p. 157.

The suspension letter says nothing about the lawn fertilization and tree and shrub maintenance schedules being inadequate, and gives no notice that this was part of the basis for the suspension. The parties did not address Grievant's slow response to Mr. Prozzillo, and the undersigned will likewise consider this not an issue. Assuming the letter should have said Grievant had failed to prepare an adequate fertilization and maintenance schedules, Grievant was never told Mr. Prozzillo expected him to do anything different in this regard from what he had done the preceding four years. How was Grievant to know that the new Director had different priorities than Mr. Koenig unless he told him? Further, the undersigned is not convinced that Grievant's programs were, in fact, inadequate. The charge of inadequate job performance with regard to the fertilization and maintenance schedules was not proven.

5. Failure to Attend a Level II Grievance Hearing

The suspension letter states in regard to this problem:

> You were then asked why you did not attend the Level II grievancehearing for Linda Snell on August 7, 1997, in my office. Your response was that you were not invited, even though I put a highlighted copy of the conference notice of when Ms. Snell's hearing would be held in your box.

At a later point in the letter it refers to this item as a failure to follow a lawful directive to attend Ms. Snell's Level II grievance conference.

Respondent argued Grievant presented no valid excuse for his failure to attend the grievance hearing as he was directed to do. Grievant denied that Mr. Prozzillo's memorandum was clear, and argued it demonstrated Mr. Prozzillo's failure to communicate clearly. Indeed it does. This incident also demonstrates Grievant's unwillingness to talk to Mr. Prozzillo to clarify matters.

The memorandum regarding Ms. Snell's grievance hearing is from Mr. Prozzillo to "b. Cobb, Kenneth J. Morris, Linda Snell," is dated August 5, 1997, and states simply: "LEVEL 2 GRIEVANCE OF LINDA SNELL WILL BE CONDUCTED IN MB 60 ON 8/7/97 AT 4:00 P.M. BY THE DIRECTOR." Respondent's Exhibit 10.

Mr. Prozzillo highlighted Grievant's name on his copy of the memorandum, and placed it in his mailbox. He gave the memorandum to Grievant because, "[h]e's the one that was supposed to have handled the grievance. . . . Mr. Cobb should have been the Level II." Tr. I, pp. 95-97. He later explained the purpose was, "I felt that Mr. Cobb was the cause of the grievance. Mr. Cobb had given Linda Snell a temporary upgrade to Lead Custodian." Tr. I, p. 232. Mr. Prozzillo admitted on cross-examination that his memorandum does not instruct Grievant to attend Ms. Snell's grievance hearing. Tr. I, p. 216. However, Grievant's testimony regarding this event is not credible. He stated, first, that nothing in the memorandum led him to believe he was supposed to either attend or conduct the conference, and Mr. Prozzillo had never directed him to be there. Tr. I, pp. 535. He later stated he thought it was possible that he was supposed to conduct the Level II conference, but he really did not know what Mr. Prozzillo meant by sending him the memorandum, and did not believe he would be a witness. Tr. I, pp. 666-667. He stated Mr. Gilchrist saw him in the hall at about 3:15 on the day the conference was scheduled, and asked him what he was doing there. He told Mr. Gilchrist he got a memo from Mr. Prozzillo, and guessed he was supposed to go to the grievance hearing. He said Mr. Gilchrist responded, "that's not your job; that's Mr. Prozzillo's job." Grievant thought Mr. Gilchrist was talking about holding the Level II conference. He stated the memorandum did not say he was to attend, and he went home. Tr. I, pp. 653-654.

Mr. Gilchrist thought he told Grievant Mr. Prozzillo would hold the Level II grievance conference. He did not recall telling Grievant he did not need to be at the Level II conference. Tr. II, pp. 208-209.

Although the memorandum was not a clear directive, the undersigned must conclude Grievant knew he was supposed to go to the hearing, and was intentionally obtuse. He should have asked the person who sent the memorandum, Mr. Prozzillo, if he really did not understand what was expected from him with regard to this matter, rather than relying upon the convenient excuse that Mr. Gilchrist told him he was not supposed to be there. Grievant's failure to attend the Level II conference wassufficiently knowing and intentional to constitute insubordination.

6. Service to the Governor's Mansion

The next item in the suspension letter is:

> On August 11, 1997, you submitted a memorandum to me informing me that as of August 18, 1997, the Day Shift Custodians and Moving Crews would only have three (3) people assigned. You also informed me that the mansion was complaining because someone different is sent every time they want something done. I informed you that this was poor planning on your part and requested that when you give me this type of information to put a name with it so I will know who is making the complaint or inquiry.

This item was not addressed in Respondent's written argument.

Mr. Prozzillo testified he was not going to do Grievant's planning for him or be responsible for his poor planning; and he had gotten incomplete information in the past and wanted to correct this. Tr. I, pp. 87-88.

Grievant explained he was down to three custodians on day shift, if he sent them to the Governor's Mansion, he would have no one to cover the rest of the Capitol Complex, and many of the jobs at the Governor's Mansion required more than three people, and required immediate action. Tr. I, pp. 535-538. Grievant testified he had frequently talked to Mr. Prozzillo about his need for more people to do the assigned work. Tr. I, pp. 513-514. He stated after he received the suspension letter, he would tell Mr. Prozzillo who had complained, and denied having been given this directive before. Tr. I, p. 538.

Whatever the charge was here, Respondent failed to prove Grievant did anything for which he should have been punished.7. Insubordination during August 12, 1997 Meeting with Supervisor

After reciting the incident regarding service to the Governor's Mansion, the suspension letter then states:

> At this point, I told you the meeting was over and while exiting my office, on your way out, you stated, "I'll file a grievance." As the door was closing you were overheard asking Laura Bentl[e]y for a grievance form.

The letter at this point relates Mr. Prozzillo's recollection of Grievant's responses to these items. It then states:

> After approximately five (5) minutes, I telephoned you on the intercom and asked you to return to my office. On arrival, I advised you that I had other items to bring to your attention. . . . It was at this point that you told me in an angry tone, "You write it up and give this writing to me as soon as possible," and then exited my office abruptly.

This is also the first incident related in the suspension letter, and provides as follows initially:

> On the afternoon of August 12, 1997, you exited my office stating, "I'll file a grievance" and demanded a grievance form from Laura Bentley. Within three (3) to five (5)

> minutes I directed you to return to my office, at which time I informed you that I considered your prior actions to be insubordinate. When exiting the second meeting you stated something to the effect, ". . .you write it up, you get me a copy as soon as possible." Your making demands of me demonstrates your disrespect for me and my position and constitutes another act of insubordination. As an Administrative Services Manager II, serving as an Assistant Director, you are expected to conduct yourself in a professional manner even when you are in disagreement with an issue. While you are entitled to personal emotion, including anger, it is uncalled for and inappropriate for a person in your position to display such in the presence of subordinates.

> RESPONSE: You denied that you said I'll file a grievance. In the second part of the insubordination when demands were made of the director, "you write it up - you get me a copy as soon as possible," your response was, "I recall you telling me and I asked you to write it up." Yourresponse regarding your conducting yourself in a[n] unprofessional manner was, "I would be acting in a rebellious manner. I would be showing disrespect for you if I did that."

Respondent argued Grievant's actions of threatening to file a grievance, demanding a grievance form from an employee outside Mr. Prozzillo's office, leaving, and then demanding that Mr. Prozzillo "write it up," when he was called back to Mr. Prozzillo's office, was disrespectful and insubordinate.

Grievant argued it did not matter whether he asked for or demanded a grievance form from Laura Bentley, outside Mr. Prozzillo's office, as she was not his superior. He also pointed out he had the right to file a grievance. While he denied demanding that Mr. Prozzillo "write it up," Grievant argued it likewise did not matter whether he demanded this or requested it, as neither amounts to insubordination.

Mr. Prozzillo's purpose in calling the first August 12 meeting was to administer an oral warning to Grievant. Mr. Prozzillo testified Grievant stated, "`I'll file a grievance.' And as the door was closing, we - Dan Gilchrist and I both - could hear Mr. Cobb asking Laura Bentley, who was behind the secretary's desk, for a grievance form." Tr. I, p. 56. Mr. Prozzillo continued:

> Three to five minutes later, I summons Mr. Cobb back to my office and informed him that I thought his actions was insubordinate, and that insubordination I would not condone. He then made a demand on me, an Assistant Director making a demand on the Director, "You write it up. You write it up."

Mr. Prozzillo testified he viewed Grievant's demand on him to "write it up," and his action of "stomping" out of his office "in a very arrogant fashion" as insubordination. Tr. I, p. 75. Mr. Gilchrist testified the August 12 meeting began cordially, but Grievant became upset at some point during the first meeting, and near the end of the meeting he became arrogant. Tr. I, pp. 264-265, Tr. II, p. 225. Mr. Gilchrist related that Mr. Prozzillo asked Grievant something, and Grievant said, "something to

the effect that if you want to say anything more to me or if you want to do something with me, put it in writing. As he said this, he stood up and walked out of the room." Tr. II, pp. 225-226. He stated Mr. Prozzillo made a comment that he did not know what to think, then said "yes, I do or something to that effect," and called Grievant on the telephone and asked him to return, which he did. He stated Mr. Prozzillo continued the discussion, and after a while the meeting ended with Grievant walking out and demanding a grievance form. Tr. II, p. 226. Mr. Gilchrist's testimony about the order of events is different from Mr. Prozzillo's, and from the suspension letter. As the suspension letter was prepared closer in time to the events, the order related therein is accepted as more accurate.

Grievant did not recall that he had "demanded" a grievance form. Tr. I, p. 501. Ms. Bentley was not called to testify as to her perception of Grievant's request.

Grievant's response at the conclusion of the meeting that he would file a grievance is not insubordination. While he more than likely exhibited behavior which indicated he disagreed with Mr. Prozzillo, the appropriate course for an employee is to file a grievance, rather than getting into a fight with his supervisor. The undersigned also cannot conclude from the testimony that Grievant's manner toward Ms. Bentley in requesting a grievance form was disrespectful toward his supervisor. However, it appears clear from the suspension letter, that the reason Grievant was called back into Mr. Prozzillo's office was that he had asserted his right to file a grievance. This is inappropriate conduct on the part of Mr. Prozzillo. Had Grievant alleged retaliation, the undersigned would be inclined to make a finding in his favor.

Grievant admitted he had made a statement to Mr. Prozzillo regarding "writing it up," but denied that he had demanded this. Tr. I, p. 504. He testified when Mr. Prozzillo advised him of the purpose of the meeting, he was surprised, upset, and confused. He did not recall that he had acted in a disrespectful manner, lost his temper, said anything rude, or displayed anger. He testified he had politely asked Mr. Prozzillo to "write it up." Tr. I, pp. 501-502, 504-505, 785.

It is likely Grievant lost his temper when he exited the second meeting without being excused, and told Mr. Prozzillo in a less than cordial tone to "write it up." This is disrespectful and insubordinate behavior. The act of leaving a meeting he was required to attend is insubordination in itself. Amar-Abrams, supra., citing Dooley v. Bureau of Employment Programs, Docket No. 93-BEP-128 (Aug. 30, 1993).

8. Failure to Submit Weekly Reports

The next item discussed in the suspension letter is Grievant's failure to submit weekly reports to Mr. Prozzillo. It states that out of the 12 weeks Mr. Prozzillo had been Director, Grievant had failed to submit a weekly work schedule 5 times. It continues:

> Subsequently, for the work week of August 18, 1997, through August 22, 1997, you submitted or caused to be submitted a hand written weekly work schedule on a page of yellow legal pad paper. Thecomplete notation was "no scheduled meetings." This document was signed by you and was found in my mail box. Such is inadequate, as it is expected that you would indicate the overall planned work of your section.

Mr. Prozzillo orally told his staff he wanted weekly reports, and he told employees in three weekly staff meetings that those who were not giving him weekly reports were to do so. He testified he wanted a weekly report of what they were doing, and had asked his staff to write what they intended to do each week. Grievant was not the only one not turning in reports. Tr. I, pp. 40-42.

Mr. Prozzillo stated Grievant had given him some reports. He explained he did not have any discussions with him about the reports because he, "[d]idn't want to embarrass anybody." Tr. I, p. 42. He denied that Grievant had ever come and asked for guidance on what he wanted in these reports. Tr. I, p. 43.

Mr. Prozzillo initially described the reports he received from all staff as, "I got all kinds of weird answers." Tr. I, p. 40. He then stated, however, "[i]t was pretty well known exactly what I wanted. Everybody else knew what I wanted." Tr. I, p. 43. He explained on cross-examination that by "weird" answers, he meant answers that were irrelevant to "what their work week should consist of." Tr. I, p. 212. When asked whether he had problems with other employees turning in the weekly reports he said he probably did in the beginning. Tr. I, p. 218.

In its rebuttal, Respondent submitted into evidence as its Exhibit 38, a typed report for the week of June 9, 1997, which states on its face it is from Grievant, in an effort to show Grievant had turned in a report at one point which showed hisemployees' activities for the week, and knew what he was supposed to do. Mr. Prozzillo testified Grievant had given this to him in a staff meeting on June 9. Tr. III, p. 56. Grievant did not recall preparing this document, noted he did not have access to a typewriter, those who would type things for him did not usually use letterhead, as was used for this document, he normally would sign the typed document, and this one was not signed, and it was unlikely he would have chosen to use the word "eradicate," which is in the report. Tr. I, pp. 611-613.

Grievant admitted he had not always turned in weekly reports. His explanation for this was he was confused as to what Mr. Prozzillo wanted. He stated he understood that Mr. Prozzillo wanted a record

of his appointments for the week, so he would know where he was if he was not in his office; and if he had no meetings scheduled, he sometimes did not turn in a report, and sometimes turned in a sheet of paper that said, "no meetings." He testified he never received his "report" back with any comments. He asked Dennis Stewart, Ms. Goad, Mr. Bumpus, and Mr. Gilchrist what type of report it was Mr. Prozzillo wanted, and he had asked Mr. Prozzillo what he wanted in the reports, and he had responded, "Just make me a report." Tr. I, pp. 509-513, 616-617.

Ms. Dukate and Mr. Gilchrist both testified they had no trouble understanding what Mr. Prozzillo expected in the weekly reports. Mr. Gilchrist puts his scheduled and potential meetings and what they concern in the reports. Tr. I, pp. 262-263, 286. He testified Mr. Prozzillo asked others to submit similar reports at the first staff meeting. Tr. I, pp. 272-273. By a "similar report," he stated he meant a report ofscheduled meetings, "[a]nd what people would be working with. I don't know. The one I probably first gave him was a schedule of my appointments for the week and perhaps some of those things, work I had in progress. I'm not certain." Tr. I, p. 273. He confirmed Grievant had asked him what should be in the reports, and he told him to put in the reports, "the things you have scheduled for the coming week or the week in question. Just, you know, any appointments you have, any meetings, you know, you might have scheduled, things that the Director would need to know in making his schedule for the week or of anything that he needed to be made advised of." Tr. II, p. 227.

Mr. Bumpus had turned in weekly reports giving an overview of the jobs they were trying to accomplish. He recalled Mr. Prozzillo announcing at a staff meeting he wanted weekly reports of the status of projects they were working on. He recalled there was confusion regarding what should be in the reports, and he had gone to Mr. Prozzillo a couple of times to see exactly what he wanted. Tr. I, pp. 384-388.

Mr. Casto understood they were to submit a report of what they had done the previous week, and their schedules for the upcoming week, and he submitted what jobs he would be working on that week, and how long they would take. He did not recall exactly what instructions Mr. Prozzillo had given, but he believed he had just told them he wanted their "schedule," and that meant to him the jobs he would be working. He testified he failed to turn in his report a couple of times, as he had forgotten. Tr. I, pp. 925-927, 942-944.

Paul Prendergast, the GSD's Occupational Health and Safety Coordinator, saidMr. Prozzillo had

asked for "what you had planned for the week such as meetings," "where you're going to be, what you're going to be doing." He also lists his work activities for the week, but he had decided on his own to do this. Tr. I, pp. 401-407.

Mr. Stewart thought a lot of people were confused about what Mr. Prozzillo wanted in the weekly reports. He provides meetings he will be attending. His testimony regarding what Mr. Prozzillo had initially asked for was inconsistent. Tr. I, pp. 439-441, 447-449. Mr. Stewart believed Mr. Prozzillo was not clear on how things were to be done, in general, and what the goals were. Tr. I, p. 424.

Respondent failed to prove that Grievant was insubordinate in his failure to turn in weekly reports of what his staff was scheduled to do. Mr. Prozzillo did not make clear what he wanted, and it was his obligation to do so prior to charging an employee with insubordination. Grievant's failure to turn in reports which simply said, "no scheduled meetings," likewise does not amount to insubordination under these circumstances. If Grievant did in fact prepare Respondent's Exhibit 38, which seems unlikely, it is possible his discussions with the other employees as noted above caused him to believe this is not what was to be in the reports. It does not appear Mr. Prozzillo indicated to Grievant on August 12, 1997, that the reports he was turning in were not what he wanted, and in fact, never told Grievant these reports were not acceptable until the suspension letter. Even the suspension letter is internally inconsistent about this issue, stating Grievant had turned in reports seven times, while at least six of those must have dealt only with his scheduled meetings, which would not be "reports" in Mr. Prozzillo's view. 9. Failure to Follow Overtime Policies

This charge relates to three separate incidents. The first one involved Roger Paxton not following the chain of command. Mr. Paxton went to Mr. Gilchrist to obtain approval to work overtime when Grievant was not available. Grievant was looking at a Christmas tree at Mr. Prozzillo's request; he told Mr. Prozzillo where he was going; and he told Mr. Prozzillo why Mr. Paxton had gone to Mr. Gilchrist rather than Grievant. Mr. Prozzillo testified if Grievant was out looking at a Christmas tree at his direction, Mr. Paxton going to Mr. Gilchrist, "would have been excusable." Tr. I, p. 65. (See footnote 4) Both Mr. Paxton and Grievant did what they were supposed to do in this instance. This incident was not addressed in Respondent's written argument.

The second incident involved Kenneth Morris signing his own overtime form as approved. The suspension letter relates that Mr. Prozzillo had directed Grievant and his other managers that employees were not to sign as approved their own overtime slips, but Grievant had not relayed this to

Mr. Morris. Although the letter continues with other discussion regarding documentation of various matters in this same paragraph, no evidence regarding these matters was introduced.

Respondent argued by failing to communicate a directive that employees could not sign their own overtime to Mr. Morris, and approving overtime after it was worked(the third incident) Grievant did not follow an order, which was neglectful and insubordination.

Grievant argued Respondent failed to establish that he was given a particular period of time within which to accomplish this task.

Mr. Prozzillo testified he had cautioned Grievant that supervisors were not to sign their own overtime, and he thought Grievant had received training and should know this without being told. Tr. I, p. 78.

Grievant testified he became aware around the end of July 1997, that supervisors were not to sign their own overtime slips, as they had done under prior Directors. The only person he was aware of who had signed his own overtime slip was Mr. Morris, on one occasion. He testified he had verbally approved the overtime, although the overtime slip did not come to him to be signed, which was not unusual. He explained there was no one available in Inventory Control to issue supplies to Mr. Morris' crew, so they had a standing order between them that Mr. Morris could come in one-half hour early, and charge this to overtime. He had met with his other supervisors and informed them not to sign their own overtime slips, but he did not inform Mr. Morris of this directive because he had not seen him, as Grievant left work at 3:00 p.m., and Mr. Morris started work at 4:00 p.m.; and he thought there had to be some other reason, such as one of them being on vacation. Tr. I, p. 747. He stated when he found out Mr. Morris had signed his own overtime slip, he immediately called him at home and told him not to do this again. Tr. I, pp. 506-509.

While Grievant failed to follow the order to direct Mr. Morris not to sign his ownovertime, there is no evidence of intent to disobey an order. Grievant told his other supervisors not to do this, he just forgot to tell Mr. Morris, and as soon as he was reminded of this order, he immediately took care of informing Mr. Morris. There is likewise no evidence that Mr. Morris fabricated the overtime, or should not have worked it, or that there was any harm suffered. Yes, Grievant should have done something to remind himself to tell Mr. Morris, or taken some action to inform him immediately. This is a minor incident, and a matter for Grievant's performance evaluation, which should be weighed at that time against his total performance in the appropriate rating area.

The third incident involved employees Ronald Bill and Mr. Morris working overtime without prior approval by Grievant to do so on June 23 and 24, 1997. Although Grievant was on annual leave those two days, he signed the overtime reports, which indicated to Mr. Prozzillo that Grievant had approved the overtime after it was worked, violating his directive that overtime be approved in advance. Grievant admits Mr. Prozzillo told him this was not to be done.

Grievant was sure he had approved the overtime worked June 23 and 24 in advance, as he recalled explaining this to Mr. Prozzillo at the time, although he could not recall why overtime work was needed. Tr. I, pp. 563-566. On cross-examination, however, he testified it appeared from Mr. Bill's overtime slip that he was working overtime because Mr. Paxton was off work; he did not know whether Mr. Paxton's absence was scheduled in advance; and he knew it was pre-approved because he had told his supervisors if an emergency came up, they were authorized to take care of it. Tr. I, pp. 643-644.

Respondent's evidence is wholly circumstantial. Apparently, neither Mr. Bill nor Mr. Morris was asked about this at the time, and Grievant did not know what had occurred with this particular incident so many months after the fact. The undersigned cannot draw the conclusion that the overtime was approved after it was worked based upon the scant evidence presented. Even if Grievant approved the overtime after it was worked, and it was worked because someone was off sick, that would seem to be reasonable; however, it is not what Mr. Prozzillo wanted. While this would be "intentional" failure to follow a direct order, it would be harmless, and would not indicate a blatant disrespect for the supervisor's orders. This is again, a minor matter.

10. Failure to Report Sick Leave to Supervisor

The suspension letter states Grievant was directed on July 1, 1997, to report his absences directly to Mr. Prozzillo, but had instead reported he would be absent on July 2, 1997, on Mr. Gilchrist's voice mail. It then states Grievant called and told Mr. Stewart on June 26, 1997, that he was sick and having chest pains, and that Mr. Gilchrist's voice mail was not working. It notes Mr. Prozzillo had checked his and Mr. Gilchrist's voice mail, and both were working. Both incidents are characterized as a failure to follow a direct order of reporting his absence to Mr. Prozzillo. The letter continues, noting that Grievant reported to work at noon on June 26, and when Mr. Prozzillo inquired about his illness Grievant told him he had been sick that morning, but was feeling okay then. The letter mentions a birthday party for Mr. Stewart was being held in Grievant's office. Respondent argued

Grievant lied about Mr. Prozzillo's voice mail not working, Grievant should have left a message for Mr. Prozzillo on his voice mail that he was sick, and Grievant's failure to report sick leave as directed was insubordination.

Grievant argued the Employee Handbook for the Department of Administration governs the reporting of sick leave, and pointed out that an authenticated copy was not introduced by Respondent. From this Grievant argued his duties were never clearly delineated. He argued that the Handbook used states its provisions are not binding on the employee, and noted that Mr. Prozzillo approved his sick leave. Finally, Grievant pointed out that Personnel's Rules provide the sanctions for abuse of sick leave, and suspension is not appropriate for a first offense.

Grievant admits Mr. Prozzillo told him to report his leave directly to him. (See footnote 5) However, Mr. Prozzillo did not tell Grievant what to do if he was not available.

Grievant testified on the day he left a message with Mr. Stewart that he was ill, he tried to call Mr. Prozzillo around 6:00 a.m., and did not get an answer or voice mail. He then dialed his own number as he thought Mr. Stewart would be there, and Mr. Stewart answered. He did not recall whether he had tried to reach Mr. Gilchrist. He did not specifically recall whether he had tried to reach Mr. Prozzillo to report his absence on July 2, but that would have been his normal procedure. He stated if he could not reach him, he would try to reach Mr. Gilchrist. Tr. I, pp. 554-558. Grievant has had four heart attacks, heart bypass surgery, and a defibrillator monitors his heart at all times. He continues to experience connected problems from time to time, including temporary bouts with chest pain and just not feeling well, so that he may not be able to get out of bed in the morning, yet recovers and is well enough to report to work within a few hours. Tr. I, pp. 550-554.

First, Respondent offered no evidence that Grievant had been directed to report his absences to Mr. Prozzillo prior to July 1, 1997, and has therefore failed to prove the first incident on June 26, 1997, was insubordination. Second, Grievant was to report to work by 7:00 a.m., and Mr. Prozzillo was not generally at work by that time. Grievant had not been told to leave a message on the voice mail. Assuming the voice mail was working, was it a better choice for Grievant to leave a message on the voice mail, or try to find a human being to report his absence? Opinions will vary. Some would argue Grievant should have called back later as well to report his absence to Mr. Prozzillo. The undersigned cannot find the defiance of authority necessary to support a charge of insubordination in this minor incident. If a supervisor thinks it is a good use of his time to monitor an employee's time so

directly as this, he needs to be explicit with him about when he is to report his absence, and what to do if the supervisor is not available. Further, if Mr. Prozzillo did not believe Grievant was really sick, he should have told him he suspected leave abuse, and asked for a doctor's excuse.

11. Failure to Submit Verbal Bids

The suspension letter states:

> On June 23, 1997, I informed you by memorandum that the three (3) tree bids that you obtained on June 14 and 15, 1997, were all rejected. I understand that over a year ago it was called to your attention that there was a problem with deadwood in certain trees on the capitol grounds. There is a high mortality rate for the trees for the following reasons: stress when they are planted, lack of fertilizer, improper banking of the soil, and fungus. After I became Director you submitted only one (1) bid while being aware of the verbal bid process. I returned that bid to you and requested three (3) verbal bids. Instead, you submitted three (3) written bids. You are not following the proper procedure when obtaining bids, nor are you timely in obtaining such bids.

Grievant argued Mr. Prozzillo was complaining about a directive he knew to be unlawful, in that the bids were over $500, and had to be in writing. The testimony on this point was not conclusive, as Mr. Prozzillo testified he was aware of this, but Mr. Gilchrist testified oral bids were sufficient for the $500 to $5,000 range. Tr. I, pp. 204, 268. Respondent cited in its reply brief purchasing guidelines which comport with Mr. Gilchrist's testimony.

Mr. Prozzillo testified Grievant had not done what he told him to do when he gave him written bids. He wanted oral bids because he thought it would be quicker. Tr. I, pp. 101-103.

Grievant explained he tried to get three verbal bids, but two of the three vendors he contacted refused to give verbal bids, and he did not ask the third one for a verbal bid. Tr. I, pp. 542-544, 639. Grievant told Mr. Prozzillo he had been unable to get verbal bids from the vendors when Mr. Prozzillo telephoned him shortly after he had placed the written bids in his in-basket. Tr. I, pp. 635-636. None of the vendors was called to rebut Grievant's story.

This charge of insubordination is not supported by the evidence. Grievant didwhat he could to comply, but the vendors were not willing to comply with Mr. Prozzillo's directive, and Grievant told Mr. Prozzillo this.

12. Failure to Number and Stripe Capitol Complex Parking Lot

The suspension letter states:

> On June 18, 1997, at my direction, a memorandum was prepared for you by Mr. Stewart, requesting that all parking lots on the Capitol Complex be numbered and striped. With the number of summer students employed by General Services, this should not have been difficult, however, as of this date, this has not been completed.

It appears from the suspension letter and from Respondent's summary in its written argument that this is a charge of ineffective job performance, rather than insubordination.

Mr. Stewart asked that the parking lots be striped and numbered. Mr. Prozzillo told Mr. Stewart to send Grievant a memorandum and get it done while the summer students were there. The work was not done, but Mr. Prozzillo did not recall discussing this with Grievant. Tr. I, pp. 100-101. He later testified, "I directed him to take that request to Mr. Cobb. It was a directive of mine to him to take it to Mr. Cobb." Tr. I, p. 230. Mr. Stewart is not Grievant's supervisor, nor is he above him on the organizational chart. Respondent's Exhibit 6.

The memorandum sent by Mr. Stewart to Grievant is dated June 18, 1997, and states, "Raymond requested that all parking lots on the Capitol Complex be numbered and striped would you please advise when it can be started. Thank You!" Respondent's Exhibit 11.

Grievant's explanation for his failure to get the parking lots striped was thiswork could only be done on Saturday, Sunday, or late in the evening, as the lots are full five days a week. This would require overtime work, which he stated he explained to Mr. Prozzillo, and he did not believe Mr. Prozzillo wanted him to work anyone overtime on this project. Grievant testified the summer workers hired for the summer of 1997 only worked as many hours as they wanted, and worked only when they wanted to, making it difficult to schedule projects for them to complete. He stated he had roughly 12 summer workers, but some days only 3 would show up for work, and then they would not necessarily work all day. Grievant testified he had always had his employees stripe the parking lot in the summer in the past, and the summer workers had been told when hired in the past they would be required to work evenings, Saturdays and Sundays. He testified he told Mr. Prozzillo he was having trouble getting the summer workers to come to work. Tr. I, pp. 566-573, 631-632.

The time sheets submitted by Respondent for the summer workers do not support Grievant's claim that these employees did not show up for work. Some employees worked only a month or so. Some worked from May to July, and some started in July. However, most of them worked 32 to 40 hours almost every week. It is true that only two of them worked on a Saturday, and none worked on Sunday, and they seldom worked more than eight hours in one day. Respondent's Exhibit 37. With this contradiction of Grievant's testimony, the undersigned cannot conclude that these employees refused to work evenings and weekends; and if they did, Grievant should have sent a memorandum to Mr. Prozzillo telling him he needed them to work at these times to complete this project, they

refused to do so, and asking what heshould do, or suggesting a course of action to correct the problem. Respondent has proven ineffective job performance in Grievant's unresponsive action on this matter. As a performance issue, it is appropriate to bring this to Grievant's attention for correction.

GRIEVANT'S DISMISSAL

Mr. Prozzillo testified the very first time he saw Grievant on October 8, 1997, was when he opened his office door and Grievant was sitting in the chair outside his door at 8:00 a.m., as he had been instructed. Tr. I, pp. 105-106. He later testified on rebuttal that he had seen Grievant before 8:00 a.m. and given him "some" keys to "try to decipher what they were." Tr. III, p. 130. He stated he met with Grievant at that time, and read the last page of the suspension letter to him. He explained there were deficiencies and he "had the courtesy to read him what those deficiencies were and what the remedies were to correct" them. Tr. I, pp. 106-107. He stated Grievant responded "that he wasn't going to write me anything and it was on advice of his attorney that he hadn't been proven guilty of anything and he was told not to respond. And I told Mr. Cobb that I wasn't dealing with his attorney; I was dealing with him." Tr. I, pp. 120-121. He stated later Grievant had told him he did not have any deficiencies. Tr. III, p. 134.

Mr. Prozzillo further testified as follows:

> [Pam Dukate] indicated [to me] that Bernard had indicated that she would probably want to hold on to that [events] book because I have a meeting with him, him meaning the Director. And so when that meeting took place, Ms. Dukate was a part of that meeting. So this prompted a letter written to Bernard Cobb from me and delivered to him at 2:14 p.m. thatafternoon.

Tr. I, p. 120.

This letter stated:

> This letter shall serve (1) to reaffirm my directive to you this morning, as well as the directive previously communicated in your letter of suspension dated August 28, 1997, (2) to confirm your intention to disobey my directive and (3) to warn you of my intention to dismiss you immediately if in fact you are refusing to obey my directive. I also wish to share with you that I do not believe that I am mistaken in my perception of your willful intent to be insubordinate.
>
> Firstly, you stated early this date to Ms. Pam Dukate when she attempted to deliver to you the events book, words to the effect that "you may want to wait on giving me the book - I have an appointment with him [Mr. Prozzillo] at 8:00 a.m. and I am going to do what my attorney told me to. So you may want to wait." Later in this morning, when we were discussing my expectation that you provide me with the requested strategy referenced within your suspension letter within five working days of your return to duty, you advised me that you will not provide me with the requested

> strategy. In response to my request for the strategy you stated "on the advice of my attorney, I have not been proven guilty of anything, and I was told not to respond."

The letter goes on to state that the directive issued on August 28, 1997, was lawful, and reiterates that directive. It concludes:

> Therefore, I am directing you to confirm in writing, within the next hour, that you will obey my directive. . . . If in fact you are refusing to obey my directive then it is my intention to dismiss you immediately for blatant insubordination as gross misconduct.

Respondent's Exhibit 14; Tr. I, p. 121.

Mr. Prozzillo stated the reason he gave Grievant this letter was he "wanted to make sure there was no mistake in communication of that letter, that it had been clearly issued and a lawful directive, that he return to duty from his suspensionwithout pay to submit within five working days your written strategy to overcome those deficiencies." Tr. I, p. 121. He stated Grievant came to his office and said, "he didn't need a hour and handed the letter back to me." He stated Grievant left his office and he walked after him. He testified he said, "`Bernard, stop.' I said, `Think of what you're doing; think of what you're doing.' He says, `I know what I'm doing; you do what you have to do.'" Mr. Prozzillo stated he told Grievant he would give him a dismissal letter within an hour. Tr. I, pp. 121-123.

The dismissal letter was issued approximately 3:15 p.m. on October 8, 1997. It states Grievant is being dismissed for gross misconduct, and that the 15 day notice is being withheld because "the nature of your misconduct demonstrates a willful disregard of the employer's interests, a wanton disregard of standards of behavior which the employer has the right to expect of its employees and blatant insubordination." The letter goes on to list the events of October 8, 1997. It states Grievant told Ms. Dukate, "`you may want to wait on giving me the [events] book - I have an appointment with him [Mr. Prozzillo] at 8:00 a.m. and I am going to do what my attorney told me to. So you may want to wait.'" It then notes that Grievant advised Mr. Prozzillo he was not going to provide him with the strategy to overcome his deficiencies. It continues, "[i]n response to my request for the strategy you stated `on advice of my attorney, I have not been proven guilty of anything, and I was told not to respond.'" It then references a letter issued earlier in the day, and states:

> At approximately 2:20 p.m. on October 8, 1997, you returned to my office and stated words to the effect "you do what you have to do." Further, you asked me if I was "firing" you. I advised you that I was andthat I would issue such a letter to you.

> I find that your willful and intentional refusal to obey my directive is an act of insubordination. Your statements demonstrate a blatant disregard for the authority of the management of the Department of Administration, General Services Division. . . .
>
> Obviously your failure to perform assigned duties affects the efficient operation of General Services Division affecting the rights and interests of those we serve. In fact, your disobedience to directives makes it difficult for me to maintain discipline and exert leadership during your presence, all of which are sufficient to warrant your immediate dismissal.
>
> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Department of Administration, General Services Division.

Respondent's Exhibit 2.

Mr. Prozzillo stated that Grievant refused a lawful direct order from him, which he saw as blatant insubordination. Tr. I, pp. 122, 124. He stated, "the gross misconduct and insubordination that took place, you'd have to really have been there to see the body language that was demonstrated to me via the fact that Mr. Cobb was not receptive at all." Tr. I, p. 194. Although the dismissal letter references the suspension, Mr. Prozzillo stated the problems referenced in the suspension letter had nothing to do with his decision to dismiss Grievant, and Personnel included this language. Tr. I, pp. 125-126.

Mr. Prozzillo further testified with regard to the question of whether Grievant'stime to prepare the improvement strategy had been shortened from five days to one, "[i]t was when Mr. Cobb blatantly said he wouldn't do what I ordered him to do. I don't need to give him five days; if he's not going to do it now, he's not going to do it five days from now." Tr. I, p. 125. However, on cross-examination he testified:

> Question [by Mr. Albright]: You actually changed your direction to Mr. Cobb and ordered him to provide it to you that morning, didn't you?
>
> Answer: No, I did not. To the best of my knowledge, I did not do that.

> Question: Oh, alright. You directed him--you changed your direction to him and ordered him to do it by that afternoon. Is that correct?
>
> Answer: That only came after Mr. Cobb refused to write me anything. My directive was to Mr. Cobb write me something regardless of what the time frame was. Mr. Cobb did not write me something, and I think it gets down to that and that alone.

Tr. I, p. 191. He later stated Grievant "was to start working on that plan that day," meaning October 8. Tr. I, p. 229.

Grievant testified he came to work on October 8, 1997, at 6:40 a.m., and no one was at the GSD offices to let him in. He stated he sat down in the hallway and waited. Mr. Prozzillo appeared at 7:15 a.m., and said, "come with me." He did so. He stated Mr. Prozzillo opened his office door, entered, and handed him the key ring of about 220 keys he had turned in when he was suspended, and told him to go to his office and label every key as to its use and return at 8:00 a.m. Grievant testified he labeled all the keys he could before returning to Mr. Prozzillo's office at 8:00. Tr. I, pp. 579-582.

Grievant stated Mr. Prozzillo's door was closed, so he sat outside and waited. When Ms. Dukate appeared and indicated she had the events book, he told her she should keep it until he finished meeting with Mr. Prozzillo, "because I'm not sure that I'm going to be doing that job or what I'm going to be doing until he tells me what he wants me to do." Tr. I, p. 582. Given that Grievant had already filed a grievance over his suspension, and that his first task that morning was to label his key ring, apparently so it would be useful to someone else, it was reasonable for Grievant to draw the conclusion that he might be assigned different duties until the grievance was resolved. If he appeared to Ms. Dukate to have a chip on his shoulder (Tr. I, p. 920), that is understandable given he was unable to enter his office at 7:00 to begin his work day, had to sit on the ledge in the hallway and wait until someone let him in while his co-workers walked by him, and had just been assigned the task of labeling 220 keys in 40 minutes upon his return to work from his suspension. Ms. Dukate stated Grievant did not tell her at this time that his attorney had advised him of anything, although the dismissal letter says otherwise. Tr. I, p. 920. She stated he told her when Mr. Prozzillo had stepped out of the room during a meeting that he would not be submitting anything on the advice of his attorney. Tr. I, p. 296.

Grievant stated Mr. Prozzillo came to the office door at 8:25 a.m., and told him to come in. Ms. Dukate, Mr. Stewart, and Mr. Prendergast were present for the meeting to update him on what had

occurred while he was gone so he could return to his duties. He stated Mr. Prozzillo said he "would like to start all things anew today," and then read from the suspension letter the section regarding how long Grievant had to prepare an improvement strategy. Tr. I, pp. 582-584. As previously noted, Mr.Prozzillo did not tell Grievant he had hired Mr. Grandstaff.

Grievant stated he told Mr. Prozzillo, "`I don't feel that I have deficiencies.' I said, `So far, you've never explained to me to where that I can see that I have deficiencies. So how do you expect me to write something that I don't know about?'" Grievant said, "I really--I didn't feel that I had any problems. I didn't see any." Tr. I, pp. 584-585.

Grievant stated Mr. Prozzillo called him in later that afternoon and directed him "to write the deficiencies and have them back to him" in one hour. He responded to Mr. Prozzillo that he did not have any deficiencies that he knew of, and he was asking him "`to write something that I can't do.'" He testified he started down the hall and Mr. Prozzillo followed him and said, "`Bernard, don't you understand what you're doing.'" Grievant testified he responded:

> "Mr. Prozzillo, I don't see anything that I'm doing." I said, "You're doing all of this." I said, "You're calling all the shots here." I said, "I haven't said anything or done anything, to my knowledge."

Tr. I, pp. 582-586. Grievant then testified this conversation occurred in the morning. Tr. I, p. 589.

Grievant called his attorney, Mr. Albright, Sr., but he did not have time to react from 2:00 to 3:00. He also stated, however, that he received the first October 8 letter around 2:00 p.m., but that he did not discuss that letter with his attorney until the next day. Tr. I, pp. 589-591, 696.

Grievant believed the first October 8 letter was directing him to prepare the strategy within an hour. He did not understand the letter to mean that he was torespond within an hour as to whether he would prepare such a plan. Tr. I, pp. 698- 700. Grievant testified he made a decision he could not submit an improvement plan to Mr. Prozzillo. He stated the advice of his counsel played into that decision somewhat. Tr. I, p. 591. He testified he had told Mr. Prozzillo, "`On advice of counsel I'm not going to give you anything,'" but he thought this occurred late in the day, not in the morning. Tr. I, pp. 692-694, 698. Grievant stated he had already made the determination that he was not going to prepare a written plan of deficiencies, and did not need the advice of counsel on this matter. Tr. I, p. 696.

Respondent argued Grievant was given a clear directive, and when he stated he would not

prepare an improvement strategy, this was insubordination.

Grievant argued he had the right to file a grievance over his suspension, and the right to counsel. He argued, had he prepared a strategy to correct his deficiencies, it could have been used against him as evidence, and construed as an admission, and that an employee should not be required to address grievance issues while at work during its prosecution. He argued a grievant should not be forced to weaken his case at the risk of being labeled insubordinate. Grievant further argued Mr. Prozzillo placed him under duress by requiring him to act immediately. He argued this shows a disrespect for his right to file and prosecute his grievance, and looks like retaliation, and has the effect of deterring others from filing grievances. Grievant argued Mr. Prozzillo's directive to him was not lawful, in that it denied or tended to deny him his right to grieve or to chill that right, and violated public policy. He asserted Mr. Prozzillo's action amounted to a decision by him that the grievance had no merit. Grievant argued Mr. Prozzillo was aware he was represented by counsel, and ignored this. Grievant argued Mr. Prozzillo's response to this news was to change the rules, requiring Grievant to prepare his strategy within one day, not five.

Grievant argued he was not capable of preparing an improvement strategy which would correct his alleged deficiencies, as he was to develop the improvement strategy "within [his] current allocated resources," and that was not possible. He pointed out that the parking lots could not be striped with the employees on staff at that time, with the summer employees gone, and noted that this task had not been completed as of the time of the Level IV hearings. He also pointed to the fact that he did not have the spending authority to hire someone of Mr. Grandstaff's training (See footnote 6) to prepare a lawn care plan, and that, although Mr. Grandstaff would have been a "current allocated resource," Mr. Prozzillo did not tell him of this development. Curiously, as Grievant pointed out, Mr. Prozzillo had the other employees who had been performing Grievant's job bring him up to date on developments, but he did not tell him Mr. Grandstaff was on board. One would think if he and Grievant were to start "anew," that this development would be significant to that effort and to Grievant's improvement strategy. It would appear Grievant was set-up for failure.

Respondent argued Grievant was not excused from complying with Mr. Prozzillo's directive even if he thought it was not legal. He was required to comply,and grieve later. Respondent argued that Grievant served the 22 day suspension while the grievance was pending, and it could be argued this was an admission that the punishment was warranted, and compared this to the directive to prepare

the improvement strategy. Respondent also compared what occurred here to cases where an employee was terminated for refusing to take a random drug test because his attorney had told him it was unconstitutional, and where an employee was terminated for refusing to cooperate in an internal investigation based upon his privilege against self-incrimination. Respondent argued that, as in these cases, if the requirement to prepare an improvement strategy were improper, a remedy could be fashioned, such as precluding the Respondent from using the strategy as evidence.

In regard to the advice of counsel defense, Respondent argued Grievant had not proven the elements. Respondent argued Mr. Prozzillo had not been notified as of October 8 that Grievant had obtained counsel. (See footnote 7)

Respondent argued in regard to the requirement that Grievant respond immediately whether he was going to comply, that an employer is not required to wait, in this case five days, to see if the employee is going to change his mind and comply with the directive.

Grievant's testimony makes it clear he was not relying on the advice of his attorney when he told Mr. Prozzillo he would not be preparing an improvement strategy. The next question is whether his refusal amounts to insubordination. It is clear the basis for the dismissal was not Grievant's responses to Mr. Prozzillo during the morning of October 8 that he was not going to prepare an improvement plan, for whatever reason, but rather was Grievant's response upon receipt of the first October 8 letter. Grievant told Mr. Prozzillo in the morning he would not be preparing an improvement strategy, and Mr. Prozzillo gave him one last chance. Thus, it is what occurred after this letter was presented to Grievant which is critical.

Although upon first reading it appears that letter was not requiring Grievant to prepare his strategy on the day he returned to work, but rather was requiring Grievant to state whether he was going to prepare the strategy at all, Mr. Prozzillo's testimony indicates Grievant was to work on it that day, and he may have communicated to Grievant orally that he was requiring that it be prepared that day. The letter can be read as Grievant read it, and Grievant thought he was being asked to prepare a written improvement strategy within one hour, which he could not do.

The undersigned finds Grievant did not possess the intent necessary to support a finding of insubordination in failing to comply with the directive in the first October 8 letter. He did not understand what was being asked of him, and felt incapable of preparing a plan within an hour.

GRIEVANT'S ARGUMENTS THAT THE TERMINATION SHOULD BE OVERTURNED DUE TO

PROCEDURAL VIOLATIONS.

Grievant argued Mr. Prozzillo did not have the authority to terminate his employment, as he was not the appointing authority, and the authority to terminateemployees had not been delegated to him, citing Rule 12.02 of Personnel's Rules, which provides that the appointing authority may terminate an employee. Grievant argued that only the Secretary of the Department of Administration fit within the definition of "appointing authority," and only he could terminate Grievant. Grievant acknowledged this authority could be delegated by the Secretary, but argued this did not occur here.

Grievant further argued Mr. Prozzillo was required by Personnel's Rules to consider his last performance evaluation before dismissing him, and that his failure to do so should result in his dismissal being overturned. Grievant also pointed to the fact that he was not evaluated for the period October 1, 1995, through September 30, 1996.

Respondent argued first, that Grievant must demonstrate he was prejudiced in some way by the failure to follow the required procedure, and he was not so prejudiced because both Secretary James Teets, and his successor, Secretary Joseph Markus, were informed by Mr. Prozzillo of the proposed discipline and approved of it. Second, it argued the Secretary may delegate his authority to Division heads, citing W. Va. Code §§ 5A-1-7 and 5F-2-2(a)(13), and this need not be placed in writing, and that the lack of objection to the actions proposed by Mr. Prozzillo resulted in a de facto delegation of their authority. Respondent argued Grievant also was not prejudiced by the failure to consider past performance evaluations, because Mr. Prozzillo also did not consider Grievant's prior disciplinary record, which was to Grievant's benefit.

Section 3, #8 of the Division of Personnel's Rules defines "appointing authority"as "the executive or administrative head of an agency who is authorized by statute to appoint employees. . .." The undersigned finds no evidence in the record that Mr. Prozzillo had the authority to do anything other than recommend disciplinary action to Secretary Markus. The argument that the Secretary delegated his authority to Mr. Prozzillo by his failure to disapprove the proposed action is rejected.

Section 16 of Personnel's Administrative Rules provides, in pertinent part:

> The appointing authority shall prepare and record evaluations for all permanent employees at regular intervals not to exceed twelve months. The appointing authority shall consider performance evaluations in determining salary advancements and in making promotions, demotions, and dismissals. The appointing authority shall notify an employee of his/her performance evaluation in writing.

A body is required to abide by its own lawfully established policies, however, its actions will not

always be reversed where it has failed to follow its policies. "The grievant must prove that the error was harmful, in that `a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error.' McFadden v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10." Kloc v. Bd. of Trustees, Docket No. 96- BOT-507 (Aug. 20, 1997). See Dadisman v. W. Va. Div. of Rehabilitation Services, Docket No. 98-RS-023/040 (Mar. 25, 1999); Walker v. Dep't of Public Safety, Docket No. 98-DPS-056 (Sept. 11, 1998); McFadden v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995).

Inasmuch as Grievant was suspended for 22 days, and then fired, it is difficultto see how Grievant benefitted in any way by the failure to consider his prior disciplinary record. Further, it is pure speculation that the prior disciplinary record would outweigh the excellent evaluation if objectively reviewed by the appointing authority. Further, his prior disciplinary record consists of a memorandum to the file made by Mr. Koenig regarding a meeting with Grievant, with a reference to his insubordination during the meeting, and a written reprimand issued by Mr. Teets on March 11, 1997, "for inappropriate and unprofessional conduct, resulting from a personal relationship with a subordinate employee". (See footnote 8) Grievant established the failure of the appointing authority to consider his last performance evaluation was harmful error. See Finver v. Bd. of Trustees, Docket No. 97-BOT-271 (Oct. 15, 1997); McFadden, supra.

In summary, Respondent proved Grievant was insubordinate when he failed to attend a Level II grievance conference which he knew he was supposed to attend, when he exited a meeting without being excused, and by the manner in which he told his supervisor to write up his performance problems. Grievant also failed to take appropriate action to get the parking lots striped, and did not promptly inform asubordinate of his supervisor's order not to sign his own overtime, a minor issue. Eleven of the charges or incidents which formed the basis for Grievant's suspension were not proven. Accordingly, inasmuch as the suspension of 22 days was based upon the combination of charges, it should be reduced. The incidents of insubordination are not minor, and this must also be considered. A suspension of 15 days duration does not seem unduly harsh.

Respondent also failed to prove Grievant was insubordinate when he failed to respond to Mr. Prozzillo's first October 8, 1997 letter, in that Grievant did not understand what was being asked of

him, and did not believe he could do what he thought was being asked of him. This is not to say that Grievant acted in an appropriate manner at all times, but neither did his supervisor, and this should also be considered in determining whether there was "good cause" for dismissal. See Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Grievant's conduct was not of a substantial nature directly affecting the rights and interest of the public, particularly in light of the circumstances. Grievant simply was not treated fairly, and his grievance rights were not respected, and this, at the least, is what a classified employee is protected from. The dismissal cannot be upheld under the facts of this case.

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

Findings of Fact

1. Prior to his dismissal, Grievant was employed by the GSD as anAdministrative Services Manager II, and was considered to be the Assistant Director of building and grounds. He had been employed by Respondent for four years and four months. Tr. I, pp. 24, 26, 497.

2. Grievant's supervisor was Raymond Prozzillo, Director of the GSD. Mr. Prozzillo was appointed to this position effective May 5, 1997. Tr. I, pp. 17, 37. Prior to his appointment he had been the Administrative Assistant to James D. Larosa and James J. Larosa, the owners of the Pete Dye Golf Club and the Burning Ambers Corp., had a role in the development of the East Point Shopping Center in Bridgeport as an employee of Mr. Larosa's, had served as a county commissioner in Marion County for 12 years, and was Chairman of the Region Six Planning Development Council. Tr. I, pp. 18-19.

3. The Directors preceding Mr. Prozzillo were Doug Koenig and Bill Elswick. Tr. I, p. 498.

4. Grievant's last performance evaluation was completed by then Director of General Services, Doug Koenig, on February 6, 1996, for the period October 1, 1994, through September 30, 1995. His rating was "far exceeds expectations." Grievant was not evaluated for the period from October 1, 1995, through September 30, 1996, by Mr. Koenig.

5. Grievant tried to comply with Mr. Prozzillo's directive to get medium size trash can liners, but was given incorrect information. He made a second attempt and was told Inventory Control would try to get them. He was not informed when the liners were received, although he checked on this several times. 6. Grievant was not told he could not bring food to staff meetings, and employees had

always brought food to staff meetings. Grievant brought corn chips to a staff meeting, and he and other employees were noisy when they took the chips from a cellophane bag. Grievant was not intentionally disruptive.

7. Grievant was not told to develop a formal preventive maintenance plan, and preventive maintenance was not lacking. The employees knew when to sharpen blades and change the oil on equipment. A preventive maintenance plan would not have prevented the two large blowers from breaking down, and the fact that two were not available during two to five days during the summer was not a critical situation, as there were other blowers available.

8. Grievant was not told to develop a lawn, tree and shrub maintenance program to put the Capitol grounds in a particular condition, or that the program he used was not what Mr. Prozzillo wanted, nor was he qualified to prepare such a program without the assistance of professionally trained, expensive personnel.

9. Grievant was given a memorandum by Mr. Prozzillo regarding Linda Snell's Level II grievance conference, and knew he was to attend, but did not do so.

10. On August 12, 1997, Mr. Prozzillo, Grievant, and Dan Gilchrist, the GSD's Deputy Director, met. Mr. Prozzillo's purpose in calling this meeting was to administer an oral warning to Grievant. After Mr. Prozzillo went through a list of problems he was having with Grievant's performance, Grievant stated he would file a grievance, and asked the secretary sitting outside Mr. Prozzillo's office for a grievance form as he left. Grievant was called back to Mr. Prozzillo's office fiveminutes later, in response to the assertion of his grievance rights, and Mr. Prozzillo began listing additional performance problems. Grievant interrupted Mr. Prozzillo, told him to write it up, and left without being excused.

11. Mr. Prozzillo did not give a clear directive to his employees regarding what he wanted them to put in weekly reports, and Grievant did not disobey him by turning in reports of his appointments, and by not turning in a weekly report when he had no appointments scheduled.

12. Kenny Morris followed the chain of command when he went to Mr. Gilchrist in Grievant's absence.

13. Grievant was told his supervisors were no longer to sign their own overtime. He informed all his supervisors of this except Kenny Morris. He forgot to inform Mr. Morris immediately, but did so as soon as Mr. Morris signed his own overtime form.

14. Grievant did not approve overtime after it was worked after Mr. Prozzillo told him not to do so.

15. Grievant was not told to report his illness directly to Mr. Prozzillo until July 1, 1997, and was not told at that time what to do if Mr. Prozzillo was not in.

16. Grievant tried to get three verbal bids for tree maintenance, but two of the three vendors he contacted refused to give verbal bids, and he did not ask the third one for a verbal bid. Tr. I, pp. 542-544, 639. Grievant told Mr. Prozzillo he had been unable to get verbal bids from the vendors. Tr. I, pp. 635-636.

17. Grievant knew Mr. Prozzillo wanted the parking lots striped during thesummer of 1997, but failed to undertake the action necessary to assure summer employees would work after hours to accomplish this task.

18. On October 8, 1997, Grievant returned to work. Mr. Prozzillo gave him a letter at 2:15 p.m. Grievant believed this letter directed him to prepare a plan to correct his alleged deficiencies within a hour. Grievant did not believe he could do this, and told Mr. Prozzillo he could not do what he was asking him to do.

19. Mr. Prozzillo signed the dismissal letter. He was not the appointing authority, and had not been delegated the authority to dismiss an employee. The appointing authority did not disagree with the decision to dismiss Grievant.

20. Neither Mr. Prozzillo nor the appointing authority considered Grievant's last performance evaluation when the decision was made to dismiss him.

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. It is well established that "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the

employee was in existence at the time of the violation, but that the employee's failure to comply was sufficientlyknowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995) (Citations omitted.). Where an employee has justifiably misunderstood or misinterpreted a superior's instruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998), citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991).

3. 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, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, [149 W. Va. 461,] 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).

4. Grievant was insubordinate when he failed to attend a Level II grievanceconference which he knew he was supposed to attend, when he exited a meeting without being excused, and by the manner in which he told his supervisor to write up his performance problems. Grievant also failed to take appropriate action to get the parking lots striped, and did not promptly inform a subordinate of his supervisor's order not to sign his own overtime, a minor issue. Eleven of the charges or incidents which formed the basis for Grievant's suspension were not proven.

5. Respondent failed to prove Grievant was insubordinate when he failed to respond to Mr. Prozzillo's first October 8, 1997 letter, because he did not understand what was being asked of him, and did not believe he could do what he thought was being asked of him.

6. Respondent was required to consider Grievant's last performance evaluation before dismissing him, and the failure of the appointing authority to do so was harmful error.

7. The undersigned has no authority to award attorney fees. Stollings v. Div. of Envtl.

Protection, Docket No. 97-DEP-411 (June 8, 1998); Chafin v. Boone County Health Dep't and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to reinstate Grievant to his position as an Administrative Services Manager II in the General Services Division, and to pay him all backpay towhich he is entitled, and restore all benefits, as though he had not been dismissed, and had been suspended 15 days without pay rather than 22, plus interest. Grievant is not required to prepare a strategy to correct the areas of his performance which have been found in this decision to require attention.

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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: May 26, 1999

Footnote: 1

Grievant amended his grievances on December 18, 1997, to include a claim that the suspension and dismissal were the result of and motivated by political discrimination. Grievant later withdrew his general claim of political discrimination, and argued he was discriminated against because of his association with Robert Plantz; but as this argument was omitted in Grievant's post-hearing written submission, it is deemed abandoned. Grievant proved there was no love lost between Mr. Prozzillo and Mr. Plantz, but he did not prove this resulted in his termination; although his friendship with Mr. Plantz certainly could not have helped his relationship with Mr. Prozzillo.

Footnote: 2

Grievant was represented by Joseph P. Albright, Esquire, and Joseph P. Albright, Jr., Esquire. Respondent was represented by Kelli D. Talbott, Esquire, and Joy Cavallo, Esquire. Eight days of hearing were held at Level IV on January 15 and 16, May 27 and 28, July 9 and 10 (referenced herein as Tr. I), and October 9 (referenced herein as Tr. II) and 28 (referenced herein as Tr. III), 1998. This matter became mature for decision upon receipt of the last of the parties' written arguments on April 8, 1999.

Footnote: 3

Ms. Dukate is Project Coordinator and EEO counselor for the Division, and was brought on board by Mr. Prozzillo June 1, 1997. Tr. I, p. 286.

Footnote: 4

After Grievant had made it clear he had gone immediately to look at the Christmas tree when Mr. Prozzillo told him to do so, Respondent's counsel then inquired as to whether Grievant had listed this appointment in his weekly report. Obviously, Grievant could not have listed this appointment in his weekly report if he did not know in advance he was going to be doing this.

Footnote: 5

Grievant was the only employee who had been directed to report his sick leave directly to him. Tr. I, p. 219. When asked why he wanted Grievant to report his use of sick leave directly to him he responded, "[t]hose were my general instructions to Mr. Cobb. I have the ability to ask that from anybody." Tr. I, p. 243.

Footnote: 6

Respondent suggested that Grievant should have been able to prepare a lawn care plan on his own, based upon his job description and statements made by Mr. Koenig when the position was being reclassified. A view of Mr. Grandstaff's training alone calls into question whether Grievant was treated fairly.

Footnote: 7

The grievance form filed by Grievant lists his attorney, and there was no argument that it was not filed with the appropriate persons.

Footnote: 8

The written reprimand also includes a reference to an instance of insubordination when he continued the employment of a temporary worker, contrary to a clear directive from Mr. Koenig, and points out that Grievant's reference to a Bible present in the workplace and to a passage of scripture to support one of his own opinions, when talking to a subordinate, was inappropriate, and directs him "to refrain from attempting to impose [his] personal religious beliefs on subordinate employees." Respondent's Exhibit 15. Mr. Prozzillo admitted he had brought a "book of worship" to the first staff meeting and read from it, after telling his subordinates they could step out of the room if they did not care to participate in the reading. Tr. I, pp. 214-215.