MARK LEMLEY,

Grievant,

v. **Docket No. 99-DMV-063**

DIVISION OF MOTOR VEHICLES,

Respondent.

D E C I S I O N

This grievance was submitted by Grievant Mark Lemley directly to Level IV, pursuant to W. Va. Code § 29-6A-4(e), on February 8, 1999, when he was dismissed from his employment by Respondent Division of Motor Vehicles on January 26, 1999, effective February 10, 1999. Grievant sought as relief to be reinstated to his former position. (See footnote 1)

The dismissal letter states Grievant is being dismissed for falsification of accounts, attempting to receive monies to which he had no lawful entitlement, insubordination in ignoring the directive of his supervisors concerning his eligibility for travel reimbursement, and encouraging other employees to submit inflated mealexpenses. The dismissal letter states Grievant's actions with regard to his Travel Expense Account Settlement forms are prohibited by W. Va. Code § 61-3-22, and quotes the following language:

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

The following Findings of Fact are made based upon the record developed at Level IV. (See footnote 3)

Findings of Fact

1. Prior to his dismissal, Grievant was employed by the Division of Motor Vehicles ("DMV") as a Customer Service Representative in the new Parkersburg regional office. He transferred to DMV from

the Division of Highways.

2. From October 19 through November, 1998, Grievant traveled fromParkersburg to Winfield for training each week, staying overnight during each week in a nearby hotel.

3. Employees were told at the beginning of their training by Glenn Pauley, Director of Vehicle Services, they would be reimbursed mileage for their travel to Winfield, but if they rode with another employee, only the employee who drove could claim mileage. He also told them the meal allowance was $30.00 per day, but DMV policy was that employees were to claim only actual expenses up to that amount.

4. The mileage reimbursement rate in October and November 1998 was $0.32 per mile. It is 103 miles one way from the Parkersburg office to the Winfield training office. Employees were not allowed to claim more than 103 miles, even if they lived further from Winfield than this. Employees claiming travel of 103 miles were reimbursed $32.96. Each round trip was reimbursed $65.92.

5. Grievant is not able to drive due to a disability. He arranged for an acquaintance to transport him to Winfield on October 19, 1998, then arranged for another employee, Gary Newbrough, to transport him thereafter, until November 16, 1998. He rode with Mr. Newbrough between Winfield and Parkersburg 12 times. Mr. Newbrough and another employee, Carol Roush, also transported Grievant for meals.

6. Grievant lives in Belpre, Ohio, and Mr. Newbrough lives in Harrisville, West Virginia, which are in opposite directions from Parkersburg. Both are more than 103 miles from Winfield. Mr. Newbrough took Grievant to his home in Belpre, or picked him up at his home, eight times, an approximately 13 mile round trip from Parkersburg to Belpre and back. At $0.32 per mile, this amounts to $4.16 per trip,or $33.28 total.

7. On one occasion, an acquaintance was to transport Grievant from Winfield to Parkersburg. Mr. Newbrough waited with Grievant, and the acquaintance did not come to get him. Mr. Newbrough took Grievant home that evening.

8. Grievant paid Mr. Newbrough $50 once, paid for his gasoline once, and bought him a soda. Mr. Newbrough considered this to be payment for his inconvenience and mileage to transport Grievant to and from Belpre, and his inconvenience when he waited to make sure Grievant had a ride home the one evening. He and Grievant had no agreement regarding payment for the transportation.

9. Grievant turned forms in to DMV requesting mileage reimbursement for travel to and from

Winfield eight times (See footnote 4) when he was riding with Mr. Newbrough, requesting total reimbursement in the amount of $263.68. Mr. Newbrough was also turning in forms for mileage reimbursement. Grievant was reimbursed for some of the mileage when he was riding with Mr. Newbrough. Some of his mileage request forms were not processed.

10. Grievant was told by his supervisor, Mary McFadden, on October 23 and 30, 1998, when she received his travel expense forms, and on other occasions, that it was her understanding he could not claim mileage reimbursement if he was ridingwith another employee. Grievant told Ms. McFadden he had called someone at the Division of Highways about this, and had been told he could claim mileage.

11. Grievant was told by Ms. McFadden's supervisor, Steve Pauley, that he could not claim mileage if he was riding with another employee. Grievant told him he had been told by Bill Feazelle in the Department of Transportation that he could claim mileage, even if he was riding with another employee. Mr. Pauley told Grievant he could not claim mileage, regardless of what he had been told by Mr. Feazelle. Grievant continued to claim mileage even though he was riding with Mr. Newbrough.

12. Alberta Kincaid, who is responsible for processing DMV travel expense forms, told Grievant he could not claim mileage if he was riding with another employee.

13. Bill Feazelle, the Department of Transportation's Finance Director, told Grievant he could not claim mileage if he was riding with another employee. Grievant had not indicated to him when he first asked him about this issue that he was riding with a co-worker.

14. Grievant called Clarence Hughart, an employee of the Department of Transportation, who was later assigned to investigate this matter, and Albert Adams, in the Auditing Section of the Department of Transportation, regarding whether he could claim mileage. Grievant did not tell them he was riding with a co-worker. Both told Grievant he could claim mileage. Mr. Hughart suggested to Grievant that he try to catch a ride with a co-worker so he would not have to have someone take him all the way to Winfield, yet Grievant never mentioned he was riding with a co-worker. 15. Grievant completed and signed forms listing the vehicle in which he was being transported to and from Winfield, during the time he was riding with Mr. Newbrough, as a 1998 Mitsubishi, a 1992 Ford, and a 1991 Dodge, and their license plate numbers, and submitted these forms as part of the process necessary to reimbursement of travel expenses. Mr. Newbrough drives a 1990 Nissan. None of the license plate numbers listed by Grievant was Mr. Newbrough's. One of the

license plate numbers listed was registered to an acquaintance of Grievant's, who testified he had never transported him to Winfield, nor had anyone else transported Grievant to Winfield in this acquaintance's vehicle. (See footnote 5)

16. Mr. Newbrough was not disciplined.

17. Other employees who rode from Parkersburg to Winfield with co-workers were not allowed to claim mileage.

18. Grievant told Mr. Newbrough and Ms. Roush they could claim the full $30.00 meal allowance each day, regardless of whether they spent that amount.

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 apreponderance 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).

Grievant was charged with insubordination, among other things. 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 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 basedupon 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).

Respondent proved the charges against Grievant. Grievant was specifically told by his supervisor

and several other DMV employees that he could not claim mileage. Rather than following his supervisor's directive, he went to someone else and asked whether he could claim mileage, without revealing the key detail that he was riding with a fellow employee, and then submitted false travel expense reimbursement forms. Grievant cannot rely on this ruse that he was relying upon the advice of someone else to justify his unethical actions. Worse yet, he had no qualms about submitting a false document listing wholly inaccurate vehicle identification information in an effort to hide the crucial fact that he was riding with a fellow employee. Finally, he encouragedother employees to claim the maximum meal allowance, regardless of actual expenses incurred, when they had been told the opposite by Mr. Pauley, a higher level supervisor, which is insubordination.

Grievant argued he was discriminated against because of his handicap, citing § 102 of Public Law 101-336. He argued it was discriminatory to not allow him to claim mileage, and the discipline imposed was discriminatory as Mr. Newbrough was not punished, yet he had paid Mr. Newbrough to take him to Winfield.

As to Grievant's first argument, Grievant is confused as to the purpose of mileage reimbursement. Its purpose is to reimburse an employee for wear and tear on his vehicle when it is used for business purposes. In fact the Department of Transportation's Travel Regulations which govern DMV travel, specifically state this. They further state quite clearly, "The mileage reimbursement rate for a courtesy vehicle [a vehicle not owned by the employee but used by him] is only applicable when the employee incurs personal expense to operate the courtesy vehicle." Employer's Exhibit 21. Grievant was not driving a vehicle, nor was he paying someone else to drive him when he rode with Mr. Newbrough; therefore, he had no mileage expense for which he could be reimbursed, and it was not discriminatory not to reimburse him for an expense he did not incur.

It is true Grievant gave Mr. Newbrough around $70.00. The amount of money he chose to give Mr. Newbrough is not close to what it cost Mr. Newbrough to drive from Parkersburg to Winfield and back with Grievant twelve times, and Grievant knew that, as he knew he had turned in requests for reimbursement for mileage seeking$263.68 for eight of these trips. The amount of money Grievant gave Mr. Newbrough covers the extra mileage to go to Belpre to pick up Grievant and return him to his home, and not much else. Grievant had no agreement with Mr. Newbrough that he would receive mileage reimbursement rather than Mr. Newbrough, and had been told both of them could not be paid for the same mileage.

This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act ("WVHRA", W. Va. Code §§ 5-11-1, et seq.), including a claim of handicap discrimination, or the federal Americans with Disabilities Act ("ADA", 42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educational Broadcasting Auth., Docket No. 96- EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96- T&R-536 (June 23, 1997).

> Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination", "favoritism", and "harassment", as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra.

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. A grievant alleging discrimination must establish a prima facie case by demonstrating:
>
> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

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

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant was not treated differently from Mr. Newbrough, or from any other employee who rode with a co-worker. Other employees who rode with co-workers likewise were not allowed to claim mileage. Mr. Newbrough did not intentionally submit falsified travel expense reports, as Grievant did. Mr. Newbrough was under no obligation to report to DMV that Grievant had paid him $50.00 and filled

his tank one time, when Mr. Newbrough was traveling far out of his way to Grievant's home in Belpre, waiting to make sure Grievant had a ride, and making sure he had transportation to meals. It is hard to believe Grievant would even suggest Mr. Newbrough had done something wrong after he had shown such concern forGrievant's welfare.

On the one occasion when a non-employee took Grievant to Winfield, the mileage reimbursement was allowed by DMV, and was considered appropriate by DMV. Grievant was not discriminated against in any way.

In regard to the ADA, it provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

> A person making a claim of discrimination under the ADA bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence. In a typical ADA case, the claimant must prove that:
>
> (1) he was in the protected class;
>
> (2) he was discharged;
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> (3) at the time of the discharge, he was performing his job at a level that met his employer's reasonable expectations; and
>
> (3)(sic) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.
>
> Ennis v. Nat'l Ass'n of Business & Educ. Radio, Inc., 53 F.3d 55 (4th Cir 1995). See also Doe v. Univ. of Md. Medical System Corp., 50 F.3d 1261 (4th Cir. 1995). The proof analysis for a claim of handicapped discrimination under the WVHRA is essentially identical. See McCauley v. Merrimac, Inc., 194 W. Va. 349, 460 S.E.2d 484 (1995).

Rodak, supra.

Assuming Grievant's disability placed him, by definition, within the protected class, Grievant's discharge did not occur under circumstances that raise a reasonableinference of unlawful discrimination. Grievant's inability to drive did not cause him to be insubordinate or falsify travel expense forms.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; 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 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.).

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 thanupon 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. Respondent proved the charges against Grievant, and that Grievant's intentional efforts to defraud the state were sufficiently egregious to justify his dismissal.

5. Grievant was not the victim of discrimination.

Accordingly, this grievance is **DENIED**.

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 circuitcourt.

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BRENDA L. GOULD

Administrative Law Judge

Date: June 16, 1999

Footnote: 1

A Level IV hearing was held on April 29, 1999. Grievant appeared pro se, and Respondent was represented by Jacquelyn I. Custer, Esquire. This matter became mature for decision upon receipt of Respondent's written argument on May 25, 1999. Grievant declined to submit written argument.

Footnote: 2

The parties presented no argument as to the statute's applicability, or lack thereof, to this situation. The title of the statute is "Falsifying accounts; penalty." One of the few cases from the Supreme Court of Appeals of West Virginia citing this Code Section, State v. Rouzer, 127 W. Va. 392, 32 S.E.2d 865 (1945), notes:

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

Footnote: 3

Grievant chose not to testify.

Footnote: 4

Grievant rode with Mr. Newbrough 12 times. However, one week, during which there was a holiday which resulted in Grievant and Mr. Newbrough making two round trips, Steve Pauley presented Grievant with a corrected expense reimbursement form which omitted the mileage for the two round trips, and Grievant signed that form. Apparently, the original form was not processed.

Footnote: 5

Grievant signed an affidavit as part of an investigation of this matter, in which he stated four different people had transported him for pay to meet Mr. Newbrough, in a Cadillac, a Hyundai, a Dodge, and a Mustang. The individual who has a Dodge denied he had taken Grievant to meet Mr. Newbrough. Two of the named individuals confirmed they had taken him to meet Mr. Newbrough at the intersection of Route 50 and I-77 in Parkersburg, and the fourth person, who drives the Mustang, was not contacted. Grievant stated a friend had transported him home from Winfield on October 23 in a Mitsubishi, the first day he rode home with Mr. Newbrough.