CHARLES ADKINS,

Grievant,

v. **Docket No. 04-DOL-071**

DIVISION OF LABOR,

Respondent.

D E C I S I O N

Grievant, Charles Adkins, was employed as a Labor Inspector I at the Division of Labor ("DOL"). On February 19, 2004, he filed this grievance asserting he was unjustly terminated and treated in a discriminatory manner. He seeks as relief to be reinstated with back pay, and accommodation for any disability DOL "believes me to have in compliance with title I of the ADA. . . ."

As this grievance concerned a dismissal, Grievant filed directly to Level IV. W. Va. Code § 29-6A-4(2)(e). A Mediation Session was conducted on April 9, 2004, without success, and Level IV hearing was held on September 24, 2004. This case became mature for decision on December 8, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as a Labor Inspector I by DOL on April 16, 2002. (See footnote 2) He was assigned to work in Wayne County because that is where he was from and where he lived. During most of the first year, Grievant worked closely with his supervisor Stephen Davis.

2. A Labor Inspector inspects places of employment and monitors records to ensure compliance with state and federal labor law, as well as enforcing compliance with the Contractors Licensing Act and wage bonding requirements. The Labor Inspector is also

expected to conduct audits of payrolls, prepare reports, and appear and testify at court proceedings.

3. On March 27, 2003, Grievant received his first performance evaluation. This evaluation rated Grievant overall as "Meets Expectations." This evaluation noted three areas where Grievant needed to improve; "Shares information with others when appropriate," "Performs work according to current guidelines," and "Work product is free of flaws and errors." Grt. No. 1.

4. While Grievant worked for DOL, the agency received a number of complaints about his rude and contentious behavior.

5. On July 23, 2002, Grievant went to the Wayne County Commission Office and spoke to Lori Justice. At the time, Grievant knew Sherri Elliot, who handled the majority of the documents he was seeking about water projects, was off at a training session with his estranged wife, also an employee of Wayne County. Ms. Justice was one of the individuals who was assisting Ms. Adkins to hide from her husband as she was "infear of Charles." Grievant asked where Ms. Elliot was, and Ms. Justice refused to tell him. Grievant was upset by Ms. Justice's refusal and attempted to intimidate her with his DOL position, indicating there could be a fine for withholding the information about the water projects. (See footnote 3) Test. Justice.

6. On September 4, 2002, Grievant went with a senior Labor Inspector, Danny Mitchell, to serve subpoenas at the Wayne County Courthouse. Grievant had been taken off the case because of complaints, and Mr. Mitchell was to serve the subpoenas while Grievant waited in the car. When Mr. Mitchell gave the subpoenas to an employee, she stated, "we knew they were coming." When asked how she knew, she informed Mr. Mitchell that Grievant's wife worked in the courthouse, and Grievant had told her about them. When asked about this by Mr. Mitchell, Grievant admitted he had told his wife that subpoenas would be served.

7. It is against DOL policy for a Labor Inspector, or any employee to inform employers that any actions are to be taken, especially subpoenas, as the employer could destroy needed paperwork in advance. Resp. Exh. 10.

8. Sometime in the Fall of 2002, Grievant filed a criminal complaint against the Mayor of Wayne. By letter dated October 24, 2002, Mr. Walker informed Mayor James Ramey the

complaint was being withdrawn after discussions with Grievant. The letter also stated, "further infraction of DOL statutes would result in appropriate action by the agency." Grt. No. 5. 9. On October 16, 2002, DOL received a complaint about Grievant's behavior from Kenneth Sturgill, Vice President of the Spade Corporation. He indicated Grievant refused to listen when told the corporation had the required contractor license, and it was posted on another portion of the site. Grievant was rude and rather insulting.

10. On Saturday, November 23, 2002, Grievant got in a fight with David Ramey, the brother of the Mayor of Wayne. Grievant filed a Workers' Compensation claim for this injury, but it has never been ruled compensable as Grievant was not working at the time of the occurrence.

11. On November 25, 2002, DOL received a complaint from Rose Meredith, Executive Director of the Wayne County Community Services Organization, about the treatment of one of her employees, Albert Jordan, a social worker. At the time of this call, Mr. Jordan was working with housing and building projects for the organization, and Ms. Meredith was not in the office. Grievant indicated the organization had not filed some papers, and he informed Mr. Jordan he was going to close down the job and fine the organization. During this conversation Grievant was very confrontational and rude, and did not listen when Mr. Jordan told Grievant he needed to talk to Ms. Meredith. Test. Jordan.

12. While it was not unusual for DOL to receive some complaints, the number and type of these complaints about Grievant's behavior were troublesome to DOL, and the agency started an investigation into this matter. Test. Walker.

13. As DOL usually does in difficult personnel matters, the agency contacted Jim Wells, the Assistant Director of Employee Relations with Division of Personnel, and sought his advice and guidance. Test. Wells. 14. The investigation revealed Grievant's difficulties might be related to his closeness to Wayne County, and on April 1, 2003, Grievant was transferred from Wayne County to Mingo and Cabell Counties. His supervisor new was Clarence "Buddy" Compton. Test. Walker & Compton.

15. Shortly thereafter, a Cabell County contractor, Ray Blankenship, called Mr. Walker, Grievant's second level supervisor, to complain about Grievant's behavior. Mr. Blankenship reported Grievant wanted him to leave the work site in the middle of a concrete pour and get

his contractor's license, when Grievant had already checked on his laptop and knew Mr. Blankenship had a license. (See footnote 4) Mr. Blankenship described Grievant as rude and demanding and reported Grievant had called him an "SOB" in front of his employees. Test. Walker.

16. DOL employees are aware they may need to interact with angry people, and they are trained and instructed to not be confrontational or rude to these individuals, but to be clear on what is needed.

17. At a Wayne County diner on Saturday, May 3, 2003, Grievant interrupted a conversation between T. Scarlet Mong and Arthur Browning. They were discussing an acquaintance who had stolen money, and Grievant interrupted stating, "You must be talking about Rose Meredith." Ms. Mong told Grievant Ms. Meredith was her boss, and she did not want to talk about this. Grievant continued stating he did not care if Ms. Mong liked him, and on Monday, Ms. Meredith would not like him because he was going to slap a suit on her for $20,000 and shut down the Westmoreland center for wage violations. Grievantalso told Ms. Mong that she was either "dumb" or "as crooked as Rose Meredith." Test. Mong; Resp. Ex. 9.

18. Later that day, Ms. Mong called Grievant's brother, and he stated Grievant was upset about his ex-wife, and the doctor was not able to help him. Test. Mong; Resp. Ex. 9.

19. On May 8, 2003, DOL received a written complaint from Ms. Meredith about Grievant's behavior on May 3, 2003.

20. On May 14, 2003, Grievant was called to Mr. Compton's office to discuss this incident and other past problems. Grievant denied all accusations, but said Ms. Mong was a drug user and called Ms. Meredith a "whore." He indicated what he did on his day off was his business. After Grievant's response, Mr. Compton, Mr. Walker, Commissioner Lewis and DOL personnel people, Denise Brown and Mick Sample met to discuss Grievant's response and DOL's subsequent action. Test. Walker & Compton. Resp. Ex. 13.

21. Mr. Compton informed Grievant on May 14, 2003, that he was to cease field work immediately, and he would work at home on audits and other paperwork until further notice. Grievant refused, and Mr. Compton asked Grievant if he would like to meet with Mr. Walker. Grievant told Mr. Walker he did not want to stay at home because "everything would come back" and the City of Wayne would start calling him at home and threatening to kill him. Mr.

Walker asked Grievant for proof of these assertions and Grievant had none, but stated, "[I]f these people came on my property - I have guns - I would blow them away." Test. Walker & Compton; Resp. Exs. 12 & 13. 22. During the May 14, 2003 conversation, Grievant stated he had a conversion disorder, his doctor had left the state, and he was out of medication. (See footnote 5) Grievant became tearful and complained about the way the City of Wayne was treating him. Grievant finally agreed to work at home.

23. After the meeting on May 14, 2003, Grievant had lunch with a co-worker, Frank Jordan. Grievant told Mr. Jordan about a physical altercation he had with a Wayne County resident, and then said Mr. Walker had put him on "'home confinement" because "he knows I own a 9mm and he knows I ain't afraid to use it." Test. Jordan; Resp. Ex. 11.

24. Grievant contacted Mr. Compton at home the evening of May 14, 2003. He discussed the meeting, his conversion disorder, and how all the problems with the City of Wayne started with his ex-wife. He talked about the felony warrant he had taken out against the Mayor, that DOL made him drop it, and how the mayor's brother beat him up, and DOL did nothing about it. After the conversation went on for a while about the evils in Wayne County, Mr. Compton told Grievant to just focus on his job. Grievant indicated that would be hard to do as "everyone was after him." Test. Compton. Resp. Ex. 12.

25. On May 27, 2003, DOL received a letter from Dr. William Webb, Grievant's psychologist, informing DOL that restricting Grievant to working at home was having a detrimental effect on Grievant's psychological well-being.

26. DOL again consulted Mr. Wells, and he recommended DOL have Grievant examined by a mental health professional. He told DOL they would need to abide by thefindings of the doctor. He also opined Grievant should be suspended without pay pending this investigation. DOL took the advice about having Grievant assessed, but continued to allow Grievant to work at home and receive a salary.

27. DOL directed Grievant to see Dr. Daniel Thistlethwaite, a board-certified psychiatrist, for a psychiatric assessment on June 6, 2003.

28. On June 5, 2003, Commissioner Lewis sent Dr. Thistlethwaite a letter outlining the essential duties of the position, noting that the duties often involved dealing with an upset contractor. This letter also detailed the complaints received, indicated Grievant appeared to

have difficulty focusing on his work at home, and frequently called his supervisor to discuss the situation in Wayne County. Commissioner Lewis noted the letter from Dr. Webb. Commissioner Lewis asked Dr. Thistlethwaite if Grievant was capable of performing the normal duties of a Labor Inspector. Resp. Ex. 2.

29. Dr. Thistlethwaite reviewed all information sent to him by DOL or given to him by Grievant.

30. On June 6, 2003, Dr. Thistlethwaite performed a fitness for duty exam on Grievant. This exam included psychological testing, an interview, and a mental status exam.

31. Grievant indicated he did not know why he was referred to a psychiatrist, and Dr. Thistlethwaite told him it was a fitness for duty exam requested by DOL. Resp. Ex. 3.

32. During the mental status examination, Grievant admitted he was paranoid, but also believed this paranoia was substantiated by actual events. Grievant also demonstrated poor insight. The psychological testing revealed "significant paranoid ideation characterized by prosecutory ideas." This testing also revealed significant feelingsof anger, hostility, and resentment which Grievant tried to control, but may be expressed in a passive aggressive manner or in impulsive acting out. The previously discussed Conversion Disorder was noted, and indicated Grievant was likely to focus on physical complaints because of external stressors. Resp. Ex. 3.

33. During his psychiatric interview, Grievant reported that during his marriage he had a bad anger problem, and he was verbally abusive to his wife and children. Grievant also struck his wife "in retaliation," and this was "an automatic response." Grievant reported his 24-year marriage had recently ended in divorce. Resp. Ex. 3.

34. The diagnostic impression was that Grievant's depression was in partial remission, his Conversion Disorder was in remission, and he had a personality disorder with narcissistic and paranoid traits. A personality disorder is a chronic maladapted pattern of behavior which is hallmarked by pathological defense mechanisms and frequently, patterns of behavior that cause some distress in a person's life. An example is . . . antisocial personality disorder." Test. Thistlethwaite; Resp. Ex. 3.

35. Dr. Thistlethwaite found Grievant was unlikely to be able to perform the normal duties of a Labor Inspector. Specifically, Grievant's degree of paranoia would interfere with

his ability to interact with businesses in an appropriate manner, and given the confrontational nature of the position, Grievant's inappropriate behavior could escalate. Also, given Grievant's limited insight, it was unlikely any form of treatment would be effective at reducing Grievant's symptoms. (See footnote 6) Dr. Thistlethwaite also stated, "I would be concerned, given the intensity of Mr. Adkins['] resentment and anger that the potential forviolence exists if he were to continue to be in a position where he will interact with individuals with whom he has had confrontational episodes in the past." Resp. Ex. 3; Test. Thistlethwaite.

36. Dr. Thistlethwaite did not find Grievant to be disabled, and clearly stated Grievant was able to work, but could not perform the essential duties of the Labor Inspector position.

37. On June 12, 2003, Grievant wrote Commissioner Lewis requesting him to file multiple criminal complaints against fourteen people who had filed complaints against him. Included in this list were the supervisor of his ex-wife, Robert Pasley, Ms. Justice, Ms. Meredith, the Mayor of Wayne and his brother, and Ms. Mong. Grievant noted his prior shoulder injury on December 5, 1995, with a previous employer, and believed this injury was somehow related to his current situation.

38. Grievant noted in his letter of June 12, 2003, that he had not asked DOL for any "reasonable accommodation," but if "these disabilities [were] now being considered as a factor of the cause of the fitness of duty evaluation I must hereby request that a reasonable accommodation be considered. . . ."

39. DOL made no complaint about Grievant's physical ability to perform the duties of the position.

40. On July 23, 2003, DOL was advised Grievant planned to attend a union meeting concerning his former employer and planned to pass out DOL materials. Mr. Compton called Grievant to inform him that he was not to represent DOL in any way at this meeting and followed this with a letter stating the same thing. Grievant was informed if heviolated this directive he would be considered insubordinate and subject to "severe disciplinary action." Resp. Ex. 15.

41. Because Dr. Webb had stated Grievant should no longer work at home, but should return to work, DOL asked him to respond to Dr. Thistlethwaite's report, and to state whether Grievant was capable of performing his normal duties.

42. Dr. Webb stated he "was not able to render an opinion regarding Mr. Adkins['] employment capabilities." He noted he was the treating clinician, had not conducted a fitness for duty exam, and did not feel qualified to render a professional opinion about Grievant's ability to effectively "execute the requirements of his employment." Dr. Webb also stated Grievant was sufficiently stable, psychologically, to return to work, and he had signed a statement releasing him on August 19, 2003. Resp. Ex. 4, Attachment.

43. On September 9, 2003, Commissioner Lewis sent this report to Dr. Thistlethwaite for response. Dr. Thistlethwaite replied on September 16, 2003, stating he still believed Grievant was unable to return to the duties of a Labor Inspector, Dr. Webb did not indicate Grievant's psychological symptoms had changed, and, thus, there was still "a potential for continued hostility, if not frank violence." Dr. Thistlethwaite agreed Grievant would be able to work in another environment that was less stressful and confrontational. Resp. Ex. 5.

44. Dr. Thistlethwaite also confirmed his opinion in a letter addressed to Commissioner Lewis dated October 21, 2003, and reiterated Grievant's return to work as a Labor Inspector could result in a potentially dangerous situation. Resp. Ex. 8.

45. Grievant was informed on February 5, 2004, that he was terminated immediately because he was unable to perform the essential duties of his position. Theevents leading up to this decision were listed, and Grievant was given three options: 1) resigning, 2) taking Family Medical Leave and seeking treatment to see if his condition improved, or 3) being dismissed. Grievant elected to be terminated.

46. No Labor Inspectors have reported threats from Wayne County since Grievant's dismissal. Test. Compton, Level IV Hearing.

Issues and Arguments

Respondent asserts Grievant was terminated because he was unable to perform the essential duties of his position. Respondent avers Grievant has demonstrated an inability to follow orders and to relate appropriately to the individuals he dealt with on the job.

Grievant asserts he is able to perform the essential duties of the position, and DOL has failed to accommodate any disability the agency thinks he has. Grievant believes he has been discriminated against, and the ADA has been violated.

It must be noted that Grievant did not testify, as is his right, but he also failed to present testimony and documents to support his allegations. He was reminded frequently he was attempting to testify when asking questions, and that these statements could not be considered as evidence, as he was not sworn or subject to cross-examination. Accordingly, much of the information Grievant placed in his proposals and other statements is unsupported and cannot be considered. In general, it appeared Grievant failed to understand he was terminated because of his psychological make-up, that this make-up prevented him from dealing nonaggressively with conflict and prevented him from being able to perform the duties of a Labor Inspector.

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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Division of Personnel Rule 3.40 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified." Rule 3.31 notes an employee can be dismissed "from employment for good cause . . . ." See Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

I. Credibility

The first issue to address is credibility, as Grievant raised the issue in his proposals that the testimony of others was incorrect. Since Grievant did not testify, and only questioned Mr. Walker in the presentation of his side of the case, the evidence presented by DOL was largely unrebutted.

In situations where the existence or nonexistence of certain material facts hinges on

witness credibility, detailed findings of fact and explicit credibility determinations arerequired. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993). "The fact that this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 7) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Respondent presented the testimony of many witnesses and placed multiple statements into the record to support its assertions that Grievant was unable to perform the essential duties of the position. The testimony of Respondent's witnesses was credible. Their statements were unrebutted, believable and clear, consistent with eachothers', internally consistent, and consistent with contemporaneously written documents. Additionally, there was no demonstration of bias.

Grievant asserted Respondent should have called other witnesses. Grievant cannot tell Respondent how to present its case, and it was made clear to Grievant prior to the hearing that he could subpoena witnesses. He chose not to exercise this right. (See footnote 8) Further, Grievant stated Mr. Browning had given a different version of the events to Mr. Walker than Ms. Mong did, and Mr. Walker agreed this "may" have occurred. Grievant did not present the testimony of Mr. Browning, did not testify about this himself, and did not produce this document. Given the dearth of conflicting evidence, and the fact that Mr. Walker had previously been "threatened" by Mr. Browning, the undersigned Administrative Law Judge,

finds the testimony of Ms. Mong to be credible.

II. Merits

The issues in this grievance are whether Grievant is able to perform the essential duties of the position, and whether DOL was correct to dismiss Grievant.

A. Ability to perform duties of the position

The evidence presented by Respondent was clear; Grievant had difficulty interacting with the individuals he was supposed to monitor and to inform of the need for certificates and documents. At times a Labor Inspector is called upon to issue citations and engage in other acts that would anger contractors and other businesses. The position of Labor Inspector, by its very nature, requires the employee to be able to deal with disgruntled people in a non-confrontational way. As stated by Mr. Walker, frequently the LaborInspector needs to "just walk away." Grievant was unable to do this. The way Grievant did interact with people during his employment created unnecessary problems and complaints and caused DOL to worry about potential escalation of these interactions. Further, DOL was clearly worried about Grievant's preoccupation with events in Wayne County, and his inability to focus on his work. It is clear Grievant was unable to perform the essential duties of the position, and therefore did not meet the definition of fitness as stated by the Division of Personnel.

It is also clear Grievant had poor insight into the cause of his troubles while an employee at DOL. Grievant's belief that everything was the fault of everyone else, and he was blameless, demonstrates this fact. He was unable to see the part he played in the problems he got into while working. In fact, he saw himself as treated unfairly by all. As found by Dr. Thistlethwaite, Grievant, with his poor insight, was incapable of change as he did not see himself as part of the problem, and, thus, could not see the need to correct his behavior.

B. Did DOL violate the ADA when it dismissed Grievant

Grievant also argues his position is protected by the Americans with Disabilities Act ("ADA"). Even if Respondent could do something more to accommodate Grievant's behavior and were required to do so under that Act, "[i]t has previously been held that this Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995). See Prince v. Bd. of Trustees/W.

Va. Univ., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995)." Teel v. Bureau ofEmployment Programs/Workers' Compensation Div., Docket No. 01-BEP-466 (June 10, 2002).

Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination" as that term is defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the ADA. 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 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." Administrative notice is taken that the West Virginia Supreme Court of Appeals recently revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 9)

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not met his burden of proof and demonstrated he was treated differently from similarly-situated employees, or that the different treatment was not related to his actual job responsibilities. Grievant produced no evidence of other similarly situated employees who retained their positions. Further, it is clear Grievant was unable to carry out his actual job responsibilities in an appropriate manner.

The above-discussion will be supplemented by the following Conclusions of Law.

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). "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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence,which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

3. State employees who are in the classified service can only be dismissed for "good cause." See Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

4. "Fitness" for a classified position is defined as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified." Division of Personnel Rule 3.40

5. Respondent has met its burden of proof and demonstrated Grievant was unable to perform the essential duties of the position. Accordingly, Grievant was not "fit" to continue in the position.

6. The Grievance Board has determined it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (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.). See Bowman v. W. Va. Educ. 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).

7. The Grievance Board does have authority to provide relief to employees for "discrimination", as that term is defined in W. Va. Code § 29-6A-2, including jurisdiction to remedy discrimination that would also violate the ADA. 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).

8. W. Va. Code § 29-6A-2(d) defines discrimination 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."

9. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

9. Grievant has failed to establish a claim of discrimination.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 25, 2005

Footnote: 1

Grievant represented himself, and Respondent was represented by J. Christopher Krivonyak, Assistant Attorney General.

Footnote: 2

Labor Inspectors are now call Compliance Officers.

Footnote: 3

A complaint was filed about this incident, but when DOL tried to investigate the individual did not want to discuss it. The complaint was closed as unsupported.

Footnote: 4

Stopping in the middle of a concrete pour can create sufficient problems that could cause the job to have to be redone.

Footnote: 5

In a conversion disorder the individual has a symbolic manifestation of a psychic conflict, and stress results in an increase of physical symptoms that have no physical cause.

Footnote: 6

Dr. Thistlethwaite noted that two prior psychological evaluations agreed that Grievant was unlikely to respond to treatment.

Footnote: 7

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 8

Additionally, Grievant was given many documents pursuant to his discovery request, and he chose not to present these documents into evidence.

Footnote: 9

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).