THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOE LEE TALLMAN,
Grievant,

v. **DOCKET NO. 2012-0275-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed by Grievant, Joe Lee Tallman, on September 13, 2011, contesting a written reprimand. The statement of grievance reads:

> I feel I have been discriminated and retaliated against concerning my job duties and overtime. Written up without proper warning for things other employees are allowed to get by with. Favoritism with regard to overtime, job assignments.[1]

The relief sought by Grievant is:

> Written reprimand re[s]cinded, removed from record. Discrimination, retaliation and favoritism to stop. Overtime loss to be corrected. Otherwise to be made whole.

A conference was held at level one on September 22, 2011, and a level one decision denying the grievance was issued on October 14, 2011. Grievant appealed to

---

[1] Grievant asserted for the first time in his post-hearing written argument that he was being subjected to a hostile work environment, and that he should have been upgraded into Randy Courtney's Supervisor 2 position when Mr. Courtney was off work. As neither of these issues was part of the statement of grievance, nor were they ever raised as issues during the hearing, Respondent was not on notice that these were issues that needed to be addressed, and had no opportunity to address these issues. The Grievance Board does not allow parties to raise entirely new issues in their written arguments, and these issues will not be addressed by the undersigned.

level two on October 31, 2011, and a mediation session was held on February 9, 2012. Grievant appealed to level three on February 22, 2012.

A level three hearing was held before the undersigned Administrative Law Judge, on June 11, 2012, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se,* and Respondent was represented by Robert Miller, Esquire, Division of Highways, Legal Division. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on July 13, 2012.

Synopsis

Grievant received a written reprimand for continually questioning his work assignments, and writing personal complaints on the back of form DOT-12. Respondent demonstrated that Grievant's behavior was insubordinate. Grievant claimed discrimination, favoritism, and retaliation had occurred on several occasions. Many of Grievant's claims were completely without merit. Grievant did not meet his burden of proving his claims.

The following Findings of Fact are made based upon the record developed at level three.[2]

Findings of Fact

1. Grievant has been employed by the Division of Highways ("DOH") for 25 years, and is currently serving as a Transportation Crew Supervisor I. He works out of the District 7 Maintenance Department in Buckhannon, Upshur County, West Virginia.

---

[2] Grievant's written argument contains factual information which was not placed into the record at the level three hearing, even though the undersigned explained to Grievant at the conclusion of the hearing that he could not put factual information in his written argument which was not presented at the hearing. This factual information cannot be considered by the undersigned.

2. Grievant received a written reprimand on August 26, 2011, for "continuing to question and/or challenge the directives given to you by your supervisor(s)." The written reprimand states that Grievant's behavior fails "to meet the expected standard of personal conduct and courtesy in dealing with your supervisors, as set forth by the DOH Standards of Work Performance and Conduct," "shows poor performance of assigned duties," and causes "turmoil within the workforce, wastes time, shows an inability to work harmoniously with others and show signs of insubordination." The written reprimand also states that Grievant has "continued to document inappropriate matters on the back of your DO[T]-12, (continued to baby sit graders) after you have been told not to do so. This does not show a careful and diligent use of state records for their designated approved uses. The DO[T]-12 is a legal document used by the Division of Highways for record keeping of employees worked, materials and labor. It is also used to document any relevant circumstances that arise during the day that need to be addressed or evaluated by upper level management. This is not to be used as your personal notebook for cataloging complaints."

3. At the time this grievance arose, Grievant was one of two supervisors assigned to the Upshur County Maintenance Department Headquarters in Buckhannon. The other supervisor was Randy Courtney, who was a Transportation Crew Supervisor 2.

4. Charles "J.R." Crouse was the County Superintendent in Upshur County from July 19, 2010, through November 2011.

5. At the beginning of August 2011, the Upshur County Maintenance Department was in line to receive a new paver to be used for six or seven days to do "skip-paving," and a limited budget had been allocated for this work. Mr. Crouse and Tom Freeman, Maintenance Engineer in Upshur County, marked the areas of the routes which

were to be paved. Mr. Courtney had been chosen to supervise the skip-paving, and had been made aware of the marked areas to be paved, and the time constraints.

6. On or about August 2, 2011, Upshur County received a complaint about rocks being left on a road by a DOH grader. Mr. Crouse had had issues with the Upshur County grader operators' work for quite some time, and described them as "a nemesis." Mr. Crouse inspected the road, and concluded that there were rocks on the road that should not have been left there by the grader operator. On August 4, 2011,[3] Mr. Crouse told Mr. Courtney to send Grievant out with the grader operator to supervise the work being done on the road which had generated the complaint. Mr. Courtney gave Grievant this assignment at 7:00 a.m. The skip-paving job also started on August 4, 2011.

7. Grievant asked Mr. Courtney why he was not assigned to the skip-paving crew. Mr. Courtney told him it was Mr. Crouse's call. Grievant then asked Mr. Freeman why he was not assigned to the skip-paving crew. Mr. Freeman told Grievant Mr. Crouse was the boss. Grievant then asked Mr. Crouse why he was not assigned to the skip-paving crew. Mr. Crouse told Grievant they had received complaints about the grader work, and he needed him to supervise the grader operator. Mr. Crouse also told Grievant that he needed Mr. Courtney to supervise the skip-paving crew because of the time and budgetary constraints associated with that particular job. Approximately 20 to 30 minutes later, Mr. Freeman told Mr. Crouse that Grievant was still in the office, and he was on the telephone. The grader operator also had not left the office, because he was waiting on Grievant.

---

[3] While the written reprimand and Mr. Crouse's testimony reflect that this occurred on August 5, 2011, the DOT-12's completed by Grievant indicate that this occurred on August 4, 2011.

Grievant was on the telephone talking to Ron Smith, Maintenance Engineer for District 7, inquiring as to why he was not working on the skip-paving crew. Grievant was assigned to supervise the grader operator for five days, and he questioned his supervisors about this assignment almost everyday.

8. This was not the first time Grievant had questioned his work assignment. Mr. Freeman told Mr. Crouse that they needed to put a stop to Grievant's continual questioning of his assignments and wasting time.

9. Form DOT-12 is the form completed by supervisors to record the work performed and equipment used on each job. Supervisors are to record information relevant to the particular job on the back of this document. Grievant had been told many times by his supervisors that he was not to record personal complaints on these forms.

10. On August 4, 2011, Grievant's notes on the back of the DOT-12 included the following: "[a]lready done deal - everyone but 3 to paver job. I am to supervise grader - 1st time. What about before and after? Asked for reason - county got complaint. I have to try to find cause. Freeman - Crouse is boss. Courtney - J.R. wants it this way. Crouse - Courtney is boss."

11. On August 5, 2011, Grievant's notes on the back of the DOT-12 included the following: "[s]till baby sitting . . .ask[ed] Courtney and Freeman about OT last night. Freeman not my overtime to get?"

12. On August 8, 2011, Grievant's notes on the back of the DOT-12 begin with the following: "[n]o discussion, no reason."

13. On August 11, 2011, Grievant's notes on the back of the DOT-12 include the following: "[a]sk[ed] for reason for not getting overtime on paving crew - summer help is getting it. I am needed elsewhere. Appears to be retaliation for previous problem."

14. In August of 2011, Grievant's father was experiencing some health issues. Mr. Crouse had told Grievant that anytime he needed to leave to take care of his father, all he needed to do was call him and he could leave immediately, even if he was on a job site. Grievant's notations on the DOT-12 for August 5, 2011, indicate that he received a telephone call from his home that his father was having problems, and that he asked for leave at 12:20 p.m. and it was authorized by Mr. Crouse. Grievant was not available to work overtime on August 5, 2011.

15. Overtime work is often required on paving jobs, because the work cannot stop until all the blacktop which has been delivered for the day is spread on the road. Mr. Crouse did not know that there would be overtime associated with the August 2011 skip-paving job until the end of day one. The blacktop plant Respondent was planning to use shut down, and the plant that was used increased the amount of time for delivery of the loads of blacktop. In addition, Mr. Freeman added more paving to the original project, which made it difficult to complete the work without overtime. After August 4, it appeared that the employees would probably need to stay some period of time after their scheduled work hours each day, but whether the employees would need to work 15 minutes or 5 hours overtime for the week was unknown. On August 8, 2011, each of the regular employees working the skip-paving job worked 10 hours. The record does not reflect the number of hours worked by the regular employees during this job, or the total hours worked for the two weeks over which this job was spread, but they did work some overtime.

16. During the August skip-paving job, DOH was employing temporary summer laborers. Four temporary summer laborers worked the skip-paving job as rakers and flaggers on this project, and each worked 10 hours on August 8, 2011. On August 11, 2011, two of the temporary summer laborers worked 12 hours on the skip-paving job, one worked 12.5 hours, and one worked eight hours. The record does not reflect what their total hours worked was for the two weeks, but they did work some overtime in order to complete the assigned work.

17. Respondent's Summer Employment Guidelines state that, "[o]vertime should be incurred only in cases of need and not to the detriment of permanent employees."

18. During the August skip-paving job, Glenn Hollen was assigned to take the tickets as the blacktop was delivered. Although some of the employees on the job perceived that Mr. Hollen was in charge of the project, Mr. Courtney was the crew supervisor on the project, and Mr. Hollen was not upgraded to supervisor, nor was he a supervisor on this project.

19. One morning in January of 2011, Mr. Crouse asked Grievant why the roads in Upshur County were icy, while the snow and ice on the roads in Barbour County he had driven over on his way to work had melted. Grievant explained to Mr. Crouse that Mr. Freeman had told him he could only use a limited amount of material on the roads, and make a limited number of trips with the snow plow. In the course of this issue being resolved, Mr. Freeman believed that Grievant had told him that the snow removal trucks had already been sent out on the road, when they had not yet left. Mr. Crouse thought that Grievant should be given a verbal warning for this fabrication. When Grievant was asked for an explanation he said that the truck drivers were delayed in departing because he was

telling them what Mr. Crouse's expectations were for clearing the roads. This explanation was verified with the drivers, and Mr. Crouse then concluded that Grievant was doing what he had asked him to do, and the verbal warning was revoked.

20. In February of 2011, a co-worker of Grievant requested a change in shifts while his wife was ill, and this request was granted.

21. In February of 2011, Grievant's wife was ill. Grievant was not given a different shift in order to care for his wife. Grievant did not request a different shift.

22. In April of 2011, Mr. Freeman asked for five volunteers to go to Logan County, West Virginia, to help with flood clean-up. He asked first for employees who were certified to operate a tanker truck, and then laborers. Mr. Freeman needed his two supervisors to remain in Upshur County to run the crews. Grievant did not volunteer because he was a supervisor, not a laborer. Glenn Hollen, who was an Equipment Operator at this time, was one of the volunteers. After the employees arrived in Logan County, someone in charge of the operations in Logan County made the determination that one of the Upshur County employees needed to be in charge of keeping the time records, and Mr. Hollen was upgraded to a supervisor position because he maintained the time records. No employee in Upshur County made the decision that a supervisor was needed on this job, or that Mr. Hollen would be upgraded to supervisor.[4]

23. The employees who volunteered for the Logan County flood clean-up worked approximately 30 hours of overtime performing flood clean-up. The managers in Upshur County did not believe that it was fair for this overtime to be reflected on the seniority-

---

[4] Grievant testified that Mr. Hollen upgraded himself. Grievant did not indicate how Mr. Hollen acquired any such authority.

based overtime rotation list, so the decision was made to add eight hours[5] to the overtime hours of every Upshur County employee who did not make the trip to Logan County, except supervisors, for purposes of the overtime rotation list. Because Grievant was a supervisor, this decision did not affect his hours on the rotation list.

24. The seniority-based overtime list is used to assign scheduled overtime. When DOH knows that the work assignment is going to require a specific amount of overtime, this is considered scheduled overtime, and must be pre-approved by the District Director.

25. In addition to the overtime hours earned by Mr. Hollen during the Logan County flood clean-up, Mr. Hollen was called out to work overtime removing snow during snow storms, because he was an Equipment Operator. Grievant was not called out to drive snow plows because he was not an Equipment Operator. As of October 2011, Grievant had 205 hours of overtime, and Mr. Hollen had 256.50 hours of overtime. The fewest overtime hours earned by any employee on the Upshur County overtime list was 150 hours, and the highest was 256.50. One other employee had 256 hours, one had 255.50 hours, one had 252 hours, and one had 245.50 hours. Mr. Courtney had 222 hours of overtime. There are 13 employees on the list with more overtime hours than Grievant, and 15 employees on the list with fewer overtime hours than Grievant.

26. On May 19, 20, and 21, 2011, Mr. Courtney was assigned to be the crew supervisor on a “seal-and-chip” job. Grievant was assigned to run the endloader to load

---

[5] The record does not reflect why 8 hours was added when, according to Grievant’s testimony, the employees who went to Logan County worked 29 to 30 hours of overtime on that project.

stones on the truck. Grievant was not demoted during the time he ran the endloader. Lincoln Marple was temporarily reassigned from the interstate organization to the Maintenance Department to work on this job. Mr. Marple was assigned to check off on paper when rock was dumped. Mr. Marple was not the crew supervisor on this job.

27. All employees of DOH are expected to perform all types of work as required.

28. When Grievant would ask Mr. Crouse to assign a particular employee to run a particular piece of equipment on a job, Mr. Crouse would accommodate these requests when he could do so. Mr. Crouse depended on Grievant, because, in Mr. Crouse's view, no other employee in Upshur County was more knowledgable regarding the work to be done than Grievant, and no one was a better worker.

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. *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*.

Grievant was charged with failure to follow directives of his supervisor, which is insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an

administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, 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)). Further, "[a]s

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 and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988).

On August 4, 2011, Grievant was given a reasonable assignment, and, as was his pattern, rather than carrying out the assignment, he questioned why he was given this assignment. Grievant argued that he was allowed to question why he was being given a particular assignment up the chain of command, because he could not get an answer. In this case, it is clear that Grievant received an answer from Mr. Crouse regarding his August 4, 2011 assignment, but it was not the answer he wanted to hear, so he called Mr. Smith, rather than beginning his work. Grievant's supervisors had spent hours meeting with Grievant over his disagreement with management decisions, and were tired of him continually questioning their decisions. In this case, the grader operator could not begin working while Grievant was talking to Mr. Smith. Even after talking to Mr. Smith, Grievant continued to question the assignment everyday. Grievant was not setting a good example as a supervisor, and he was clearly disrespectful of his supervisors. Grievant's response to the directive is the definition of defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.[6]

---

[6] Grievant asserted that it was a threat to his health and safety to follow this order, because the assignment upset him and when he is upset his blood pressure goes up. This is not the type of threat to health and safety that is contemplated by the exception stated above.

Further, the notes Grievant placed on the DOT-12's which are set forth in the Findings of Fact above, are clearly personal complaints, and have absolutely nothing to do with the particular job. Grievant acknowledged that he probably should not have written some of these thoughts on the DOT-12's. Grievant had been told repeatedly not to put his personal notes on these forms, and chose to ignore this lawful directive. Respondent has proven the charge of insubordination.

Grievant argued that he was retaliated against by Respondent by not being assigned overtime and by being given the written reprimand. Grievant did not explain why Respondent would retaliate against him. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general

rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant placed no evidence in the record regarding his participation in other grievances. The Grievance Board's Decision database shows that Grievant filed a grievance in the early 1990's, and a second grievance in October 2009, prior to Mr. Crouse's placement in the County Superintendent position. The older grievance is too remote in time to be of any relevance, and the most recent grievance was filed almost two years prior to this one. Grievant did not place any evidence into the record that Mr. Crouse or any other supervisor was aware of this later grievance, nor was there evidence that the filing of the prior grievance was a factor in the decision to reprimand Grievant. To the

contrary, it is clear that the written reprimand was a result of Grievant's insubordinate behavior, not retaliation.

Finally, Grievant alleged that he was being discriminated against in his assignments, and was the victim of favoritism, resulting, primarily, in Mr. Hollen getting overtime and preferred work assignments that he should have gotten. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant voiced many complaints about various work assignments. Most of Grievant's complaints of discrimination or favoritism are illogical and completely without merit. Even when the undersigned pointed out to Grievant that his logic was not sound

during the hearing, he continued to pursue his complaints, sometimes coming up with new justifications for his position. It is apparent that Grievant believes he should be given all the assignments he considers to be preferred, and anytime Mr. Hollen receives an assignment Grievant wants, he believes he has been treated unfairly.

Grievant complained about Mr. Crouse calling him out in January over the treatment of the snow covered roads in Upshur County. Mr. Crouse explained that after Grievant explained to him that he was doing as Mr. Freeman had instructed, and that the truck drivers were delayed in departing while he was relating Mr. Crouse's expectations, any misunderstanding had been resolved, and the verbal warning he had intended for Grievant was revoked and forgotten. It is unclear to the undersigned why Grievant did not put this behind him as well.

Grievant complained that a co-worker was allowed to change shifts in February 2011, when his wife was ill, while Grievant was not allowed to change shifts. However, Grievant admitted that he had not requested a shift change when his wife was ill, stating that he "knew not to ask." If Grievant did not ask for a shift change, he cannot claim discrimination or favoritism when Respondent did not read his mind and change his shift. Further, it is clear that Mr. Crouse has made allowances for Grievant during Grievant's father's illness, so Grievant's testimony that he knew not to ask, while irrelevant to this issue, also lacks credibility.

Grievant complained because he did not receive the overtime Mr. Hollen received when he worked the Logan County flood clean-up. Grievant, of course, did not volunteer for this assignment. Grievant, however, claimed that a supervisor should have been sent to Logan County, since "they" upgraded Mr. Hollen. Mr. Crouse testified that no one in

Upshur County had anything to do with Mr. Hollen being upgraded to supervisor during this work, and he had no idea this was going to be done. Upshur County personnel sent five volunteers to Logan County, sending those with tanker certifications and laborers as they were asked to do, and someone on the job site decided that Mr. Hollen should be upgraded. Grievant did not have tanker certification, nor was he a laborer, and he did not volunteer. Grievant was not similarly situated to Mr. Hollen, who was an Equipment Operator at this time, not a Supervisor, and he clearly was not discriminated against in this situation nor was he the victim of favoritism.

Grievant complained that he should have been the supervisor on the May seal-and-chip job, so that he could gain more knowledge on this type of work, and that he was being punished by being assigned to operate the endloader when Mr. Crouse knew he had an injury which would make it difficult for him to operate the endloader. Grievant asserted that Mr. Marple was the supervisor on this job, and that Grievant should have been allowed to do what Mr. Marple was assigned to do. It is clear from the testimony that Grievant's perception that Mr. Marple was the supervisor on the job was inaccurate. Grievant was given an assignment on this job that he did not like, and which caused him discomfort, but there is no evidence in the record that Mr. Marple or any other employee could have been operating the endloader rather than Grievant. If Grievant is unable to perform certain work, he would need to provide a written statement from a doctor stating that he cannot perform that work so that Respondent is aware. Grievant did not demonstrate that the work assignments on this job represented anything other than the normal assignment of tasks to the workers available in order to get the job done.

Grievant disagreed with Mr. Crouse's decision to assign him to supervise the grader operator in August, stating that he had never seen a supervisor assigned to watch a grader operator for eight hours, and that the overtime on the skip-paving job was stolen from him. Grievant asserted that the overtime on the skip-paving job was scheduled overtime after the first day, and that it was a violation of policy to let the temporary summer workers work overtime rather than him. Grievant complained that not only was he assigned to supervise the grader operator while other employees were working overtime on the skip-paving job, but he was also assigned to pick up rocks on the road and pick up tree limbs, while Mr. Hollen was getting experience on the skip-paving job.

Mr. Crouse testified that he was not pleased with the work of the grader operators, and he needed Grievant to supervise this work after he had received a complaint when the operator left rocks on the road. He also testified that he was having trouble getting the operators to do what they were supposed to do, and he wanted a supervisor to check on the grader operator work twice a day. Mr. Crouse testified that Grievant was not told he had to pick up rocks. As to the tree removal, Mr. Crouse explained that all employees must at times undertake tasks such as removing trees from the road when this work needs to be done.

It should first be pointed out that although Grievant has continually compared himself to Mr. Hollen, asserting that Mr. Hollen received more opportunities for overtime and better assignments than Grievant, at the time of the incidents related in this decision occurred, Mr. Hollen was not a supervisor. He was an Equipment Operator. Grievant and Mr. Hollen were therefore not similarly situated.

As to Grievant's assignment on August 4, Grievant was one of two supervisors. Mr. Crouse offered a rational explanation for assigning a supervisor to monitor the grader operator. Mr. Courtney was the supervisor assigned to the skip-paving job, and Mr. Crouse needed the other supervisor, Grievant, to make sure the grader operator completed the job he was doing properly, as he obviously had not done a good job earlier in the week. It would also appear that more than one person was needed on the grader job.

As to Grievant's apparent assertion that the overtime on the August skip-paving job was scheduled overtime, subject to being assigned from the seniority-based rotation list, it is obvious that it was not scheduled overtime. No one knew when the job would end each day. The ending time was dependent on how long it took to spread the last of the blacktop for the day, and then the job changed when the blacktop plant that Respondent intended to use closed, and a different, apparently more distant, supplier had to be used, and when Mr. Freeman added additional areas to be paved. Grievant has been employed at DOH long enough to be aware of the distinction between scheduled and unscheduled overtime. It is also apparent that it would be ridiculous to pull the temporary summer employees off the job at the end of their regular work hours each day in this situation, and bring Grievant in. Of course, had this been done, Grievant would have no doubt complained because he was called in to do the flagging and raking jobs these employees were doing. As to Grievant's claim that this overtime was stolen from him, Grievant did not demonstrate that he would have earned ANY overtime had he been assigned to this project. Grievant's own notes reflect that he had to leave early on August 5, 2011, because of his father's illness. Grievant did not place into evidence how much overtime any employee worked over the two- week period on this skip-paving job. It is entirely

possible that Grievant's work hours for the two weeks would not have resulted in him working any overtime had he been assigned to this job instead of supervising the grader operator.

Finally, Grievant argued he was discriminated against and that favoritism was shown toward Mr. Hollen over him because Mr. Hollen had more overtime than he did on the seniority-based rotation list. First, it will again be pointed out that Grievant and Mr. Hollen are not similarly-situated. Because Mr. Hollen is an Equipment Operator, he is called out for emergency overtime to drive the snow plow, while Grievant is not. Second, by Grievant's own testimony, 29 to 30 hours of this difference was a result of the Logan County flood clean-up. Grievant did not demonstrate any discrimination or favoritism in the assignment of overtime.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*,

Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.*

3. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*.

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, 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)).

5. "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 and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988).

6. Respondent demonstrated that Grievant's behavior was insubordinate.

7. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

8. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

9. Grievant did not demonstrate that Mr. Crouse or any other supervisor was aware of his previous grievance, nor was there evidence that the filing of the prior grievance was a factor in the decision to reprimand Grievant.

10. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

11. Grievant and Mr. Hollen are not similarly situated.

12. Grievant did not meet his burden of proving his claims of discrimination or favoritism.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: August 24, 2012