JOHN J. PAYNE, .

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Grievant, .

.

v. . DOCKET NO. 93-DOH-454

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WEST VIRGINIA DEPARTMENT .

OF TRANSPORTATION/DIVISION .

OF HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a grievance by John Payne (hereinafter "Grievant"), submitted directly to Level IV in accordance with W. Va. Code §29-6A-4(e), challenging his dismissal from employment with the Division of Highways (hereinafter "Employer" or "DOH") on October 21, 1993. An evidentiary hearing in this matter was conducted in the Board's office in Charleston, West Virginia, on January 25, 1994. (See footnote 1)

Grievant was employed by DOH in its Office Services Division as a Mail Runner. DOH notified Grievant that his dismissal was based upon "gross misconduct and insubordination" citing the following specifics:

> On October 15, 1993, in a meeting with Frank Eder, the Division Director, concerning your use of leave, you used abusive and profane language in an insubordinate manner when you said, "f_you Frank, I don't work for you." You also called Mr. Eder a "lazy a_hole," and otherwise displayed a disrespectful attitude. In addition, earlier that day, you said to Mrs. Virginia White, "f_you Ginny, I don't have to listen to you." (R Ex 11)

In order to put these charges in context, it is necessary to relate certain events involving Grievant

that transpired on the previous day. On October 14, 1993, Grievant went to his immediate supervisor, Curtis Anderson, Acting Mail Room Supervisor, and requested annual leave. Mr. Anderson told Grievant that he did not think that Grievant had any annual leave available. Mr. Anderson was aware that Grievant had just been docked for exceeding his available annual leave on the previous Friday (October 8, 1993). Nonetheless, Mr. Anderson suggested that Grievant check his leave record.

Grievant then went to the Division Office and spoke with Virginia White, who was responsible for maintaining the annual leave records for the Office Services Division. Ms. White advised Grievant that he had annual leave available. Grievant thereupon completed a leave request for the remainder of the day (3.5 hours), placed the leave request on Mr. Anderson's desk and left his work area without first obtaining Mr. Anderson's approval to take annual leave.

When Mr. Anderson returned to his desk, he noted the leave request and went to see Ms. White to clarify Grievant's leave balance. At that point, Ms. White recognized that she had provided erroneous information to Grievant in that he did not have 3.5 hoursof annual leave available. (See footnote 2) Ms. White attempted without success to contact Grievant at home to advise him of her mistake.

On the following day, October 15, 1993, Grievant came to see Ms. White regarding a message she had left at his home while attempting to contact him. Ms. White explained to Grievant that she had made a mistake in advising him that he had annual leave available. Grievant asked to see his second-level supervisor, Mr. Frank Eder, Director of the Office Services Division, and was told that he was not available. After Ms. White told Grievant that she was sorry for her mistake but that he would have to be docked for exceeding his available annual leave, Grievant said, "F_you, Ginny, I don't have to listen to you." This event was related through the testimony of Ms. White and corroborated by Phyllis A. Lucas, Telephone Operator (See footnote 3) in the Division Office, who witnessed this incident.

When Mr. Eder returned to his office, Ms. White and Ms. Lucas advised him of the previous encounter with Grievant. Mr. Eder called Grievant to his office, along with Grievant's immediate supervisor, Mr. Anderson, and attempted to discuss the situation with Grievant. Mr. Eder advised Grievant that he should have known he had no annual leave available since he had been docked the previous Friday. Moreover, Grievant was told he should have obtained verbal approval from Mr. Anderson or his signature on hisleave slip before leaving the building. Grievant indicated that if he

had been properly advised by Ms. White that he had no annual leave available, he would have taken sick leave to work on his car. Mr. Eder explained to Grievant that he could not grant sick leave for such a purpose. Mr. Eder told Grievant that since Ms. White had made a mistake, Grievant would not be reprimanded for the leave incident. However, he would still have to dock Grievant for the hours he exceeded his available leave balance since he could not be paid for hours that he did not actually work.

Grievant told Mr. Eder that he (Mr. Eder) and Mr. Anderson did not fill out leave slips each time they left the building. Grievant told Mr. Eder that there was a double standard in the division and that Mr. Eder sat on his a_all day and then worked overtime in the evening. Mr. Eder told Grievant that he had a supervisor to whom he was responsible for his conduct and that Grievant needed to be concerned about his time, not Mr. Eder's time.

Mr. Eder proceeded to question Grievant about where he had been on Friday, October 8, 1993, when he had been docked for exceeding his available leave. Grievant replied that he did not have to answer to Mr. Eder and Mr. Eder told him that as the Division Director, Grievant was responsible to him. Grievant then said to Mr. Eder, "F_you, I don't work for you. I work for the State of West Virginia since your name is not on my paycheck." Grievant further told Mr. Eder to give him two or three days off. Mr. Eder advised Grievant that he could not approve leave sinceGrievant had no leave available. Grievant then got up and left the office without being excused from the meeting. These events were described in some detail through the testimony of Mr. Eder, and substantially corroborated by the testimony of Mr. Anderson who was present throughout the incident, as well as testimony from Ms. White and Ms. Lucas, who overheard part of the conversation through the open door to Mr. Eder's office. (See footnote 4)

Later that morning, Grievant came back to Mr. Eder's office with a leave slip, seeking to take 3.5 hours' sick leave for a doctor's appointment. While Mr. Eder was waiting for Ms. White to check Grievant's current sick leave records, Grievant proceeded to question Mr. Eder's leave and called Mr. Eder a "lazy a_hole" who worked overtime and did nothing. At that point, Mr. Eder told Grievant to get out of the office as he was being suspended for the remainder of the day. (See footnote 5) This incident was also overheard by Ms. Lucas whose work area is immediately outside Mr. Eder's office.

Consistent with his right under W. Va. Code §29-6A-6, Grievant did not testify at the Level IV hearing. Prior to his dismissal, Grievant voluntarily provided a written statement to Jeff Black, the

Employer's Director of Human Resources, in which he related the following version of events:

> I came to the front office of Office Services, at approximately 11:35 a.m., to get a sick leave slip signed, for 3.5 hours sick. From 12:30 p.m. to 4:00 p.m. on October 15, 1993 as I had a doctor's appointment that afternoon.
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> I was told to see Mr. Eder, and that he would have to sign my leave slip.
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> I went to Mr. Eder's office, who called Ginny White into his office, to see if I had 3.5 hours sick leave time to take. While waiting for the time check, Mr. Eder began talking about me leaving the day before, without an approved leave slip. I asked him at that time, "what is the difference between, Curt Anderson (Acting Mailroom Supervisor) leaving a few weeks before, with a leave slip unsigned. [sic] lying on his desk (which was also seen by Jim Chapelle and Bill Boster) and my situation? Mr. Eder replied hastily, "how do you know that's even the slip he turned in? I said, even if he turned in another slip, it still wasn't signed when he left the building, therefore, he too was guilty of leaving without an approved leave slip, "making it in my opinion no different than my situation.
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> Mr Eder, obviously upset, stood up quickly pointing toward the door, saying, "you're going home, I want you out of here right now!!!", I told him, "fine i'll leave, but you're not going to dock me for the afternoon", he replied, "like hell i'm not!", I then asked him to put it in writing and excused myself from his office. I then went to the mailroom and got my tape recorder, and returned to Mr. Eder's office, at that time I was told, "you'll have to wait in the front office." By Mr. Eder, which I did.
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> In a few minutes, Sue Knighton (from Personnel) came into Mr. Eder's office, and he shut the door. After a while, Ms. Knighton left and Mr. Eder gave Phyllis Lucas a letter to type.
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> That's the letter I received.
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> Mr. Eder shoved the letter at me, and ordered me to sign it, I told him "I would like to have my Employee Representative look at it first", he then jerked it out of my hand and wrote "employee refused to sign" on it, and handed it back to me, and said", now you can have whoever you want to look at it", hatefully.
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> That's when I left the building.

At no time during this incident did I raise my voice or use profanity. (R Ex 10.)

In disciplinary matters, W. Va. Code §29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 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 interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965).

In evaluating the available evidence, the undersigned finds that the testimony of the Employer's witnesses and their prior written statements were substantially consistent. Moreover, their demeanor and responses under cross-examination revealed no particular animosity toward Grievant, despite being offended by his conduct, so as to cause them to fabricate or embellish their statements. Grievant's written statement, which was not under oath, addresses only one of the incidents at issue and largely conforms to Mr. Eder's version of events, except for the reference to Mr. Eder being lazy. Accordingly, the undersigned finds that the Employer proved the facts alleged in Grievant's notice of dismissal by a preponderance of the evidence.

It must now be determined if these facts support the particular offenses stated in the dismissal notice and, if so, whether the penalty of dismissal is appropriate. Grievant was charged with "gross misconduct and insubordination." R Ex 11. This Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This approach is consistent with the treatment accorded to insubordination by arbitrators in the

private sector. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). There, Arbitrator Holley noted:

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management. (Burton, supra, at 1234, citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974).)

Applying these legal precedents to Grievant's statements to his second-level supervisor, Mr. Eder ("F you. I don't work for you. I work for the State of West Virginia since your name is noton my paycheck."), it is apparent that Grievant uttered abusive language to a supervisor in a manner constituting contempt for or defiance of authority, the crux of any offense of insubordination. (See footnote 6) Likewise, calling Mr. Eder a "lazy a hole" within the hearing of other employees subordinate to Mr. Eder, is conduct likely to undermine the status, prestige or authority of Mr. Eder as a supervisor.

As stated by this Board in Graley v. W. Va. Parkways Economic Development and Tourism Authority, (See footnote 7) the "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Id. at 41, citing Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W. Va. 1985); Blake v. Civil Service Comm'n, 310 S.E.2d 472 (W. Va. 1983). Grievant argues that his conduct was no more serious than using profanity toward others or engaging in insulting and abusive language, offenses which are listed as "minor disciplinary infractions" warranting a penalty of an oral or written reprimand for a first offense, according to Addendum A in DOH's Personnel Operating Procedures governing "Disciplinary Action, Suspension and Dismissal." G Ex. 1 at 21. DOH contends that the offenses stated in Grievant's dismissalletter are not specifically addressed in the guidelines. Moreover, DOH notes that Section IIIA of this policy states: "The type of action taken for an offense depends on the severity of the offense measured by the standards of conduct and the circumstances surrounding the offense." G Ex 1 at 2.

The undersigned agrees with DOH that Grievant's conduct was more serious than simple profanity or abusive language. Moreover, neither the cited Operating Procedures nor the law of this state required DOH to engage in "progressive discipline" when dealing with Grievant's misconduct. Grievant's repeated repudiation of his second-level supervisor's authority so thoroughly disrupted and undermined the employer-employee relationship as to eliminate any likelihood that a lesser penalty would beneficially serve to reform Grievant's conduct toward his superiors.

In Buskirk v. Civil Service Commission, (See footnote 8) the West Virginia Supreme Court of Appeals stated that "the work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Id. at 585. Grievant here had only been employed in a permanent status for approximately one year and his work record was largely unremarkable, except for his extremely low leave balance. Prior to this incident, Mr. Anderson reprimanded Grievant for exceeding his available leave balance on October 8, 1993. Mr. Anderson testified that he would find it difficult to deal with Grievant if he returned to work with thesame attitude he had at the time he was fired, and that he would prefer not to work with Grievant again. (See footnote 9)

In addition, Ms. White testified on cross-examination by Grievant's representative that Grievant had become irate with her on a previous occasion when she tried to explain to Grievant that he could not take sick leave in order to take a friend to the doctor. Ms. Lucas testified that Ms. White was very upset on the morning of October 15, 1993, following Grievant's use of profane and abusive language. Ms. White was visibly shaking and indicated to Ms. Lucas that no one had ever talked to her like that before. Obviously, Grievant's conduct was disruptive of the ordinary work environment in this office.

The public clearly has a significant interest in the effective and efficient conduct of the state's business by state employees while on duty. It is not necessary for misconduct to take place in the presence of a member of the general public for the public's rights and interests to be directly affected. Thus, given Grievant's insubordination directed toward his second-level supervisor in the presence of his first-level supervisor and within the hearing of at least two other employees, as well as the disruption resulting from Grievant's profane and abusive language toward Ms. White, the undersigned finds that DOH has adequatelydemonstrated that Grievant's misconduct was of a substantial nature affecting the rights and interests of the public.

Graley, supra, does not provide support to Grievant's defense against these charges as there was

no evidence of any protected conduct on Grievant's part that could establish a prima facie case of retaliation. Moreover, unlike the facts in Graley, the evidence adduced at the hearing in this matter fully supported the employer's version of the facts upon which this discipline was based.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant had been employed by the Division of Highways (DOH) as a Mail Runner in its Office Services Division at Charleston, West Virginia, since October 1992.

2. On October 8, 1993, Grievant took annual leave in excess of his available leave balance and was subsequently docked pay for those excessive hours and reprimanded by his immediate supervisor, Curtis Anderson.

3. On October 14, 1994, Grievant requested that Mr. Anderson approve 3.5 hours of annual leave for that afternoon. Mr. Anderson referred Grievant to Virginia White who was responsible for maintaining leave records for the Office Services Division.

4. Ms. White advised Grievant that he had sufficient annual leave available to cover his leave request. Thereupon, Grievant completed a leave request form, placed it on Mr. Anderson's deskand left work without obtaining Mr. Anderson's verbal or written approval to take annual leave.

5. As a result of a conversation with Mr. Anderson, Ms. White recognized that she had made a mistake in advising Grievant that he had leave available when, in fact, he did not have sufficient leave to cover his absence for 3.5 hours. Ms. White attempted to contact Grievant at home without success.

6. On the morning of October 15, 1993, Grievant went to see Ms. White to find out why she had called him and left a message at his home the previous afternoon. Upon being advised by Ms. White that she had made a mistake but he would nonetheless have to be docked pay for exceeding his available annual leave, Grievant told Ms. White; "F you, Ginny. I don't have to listen to you."

7. Later that morning, Grievant and Mr. Anderson were called to the office of Frank Eder, Director of the Office Services Division, where Mr. Eder attempted to discuss Grievant's improper use of leave. In the course of that meeting, Grievant told Mr. Eder that he sat on his a all day and then worked overtime in the evening. Further, when Mr. Eder told Grievant that as the Division Director,

Grievant was responsible to him, Grievant said; "F you, I don't work for you. I work for the State of West Virginia since your name is not on my paycheck."

8. In another meeting between Mr. Eder and Grievant later that morning, Grievant called Mr. Eder a "lazy a hole."

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer. W. Va. Code §29-6A-6. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Dismissal of a civil service employee must be for "good cause, which means misconduct of a substantial nature affecting rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985).

3. The offense of insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

4. By telling his second-level supervisor, Mr. Eder, that he (Mr. Eder) sat on his a all day and then worked overtime in the evening, that he (Mr. Eder) was a "lazy a hole" and; "F you, I don't work for you, I work for the State of West Virginia since your name is not on my paycheck" in the course of Mr. Eder's effort to counsel Grievant on his failure to take leave in accordance with established procedures, Grievant committed insubordination. See Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

5. By telling Ms. White, "F you, Ginny. I don't have to listen to you," Grievant improperly engaged in abusive and profane language.

6. Having proved by a preponderance of the evidence that Grievant committed insubordination toward his second-level supervisor in the presence of his immediate supervisor, and within the hearing of at least two other DOH employees, and that Grievant engaged in profane and abusive language, DOH has demonstrated good cause for Grievant's dismissal, given Grievant's brief tenure with the agency and otherwise unremarkable work record. See Buskirk v. Civil Service Comm'n, 332

S.E.2d 579 (W. Va. 1985).

Accordingly, this Grievance is **DENIED**.

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

LEWIS G. BREWER

Administrative Law Judge

Dated: April 29, 1994

Footnote: 1This case became mature for decision on February 14, 1994, following receipt of timely post-hearing briefs from the parties.

Footnote: 2Ms. White testified that she had looked at Grievant's leave balance for the prior month rather than the current month.

Footnote: 3Subsequent to these events, Ms. Lucas was reclassified as an Office Manager.

Footnote: 4The testimony of the Employer's witnesses cumulatively indicated that Grievant was angry and upset when he arrived at Mr. Eder's office for the meeting, and that Grievant's anger increased and his voice became louder as the meeting progressed.

Footnote: 5This 3.5 hour suspension was not at issue in this grievance which concerns Grievant's dismissal only.

Footnote: 6Although Mr. Eder responded by saying, "then I guess your boss is Larrie Bailey, because he signs your paychecks," it does not appear that Mr. Eder was merely amused by Grievant's statements.

Footnote: 7Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Footnote: 8332 S.E.2d 579 (W. Va. 1985).

Footnote: 9Although not part of the charges in this case, on the day Grievant was informed of his dismissal, he told his

immediate supervisor, Mr. Anderson, "F you, Curt," upon learning that Mr. Anderson had provided a statement against Grievant.