THOMAS D. TOLLEY,

Grievant,

v. DOCKET NO. 94-DNR-629

WEST VIRGINIA DIVISION OF

NATURAL RESOURCES,

Respondent.

D E C I S I O N

Grievant, Thomas D. Tolley, filed this grievance on October 27, 1994, directly at Level Four with the West Virginia Education and State Employees Grievance Board pursuant to W. Va. Code § 29-6A-4(e), protesting his dismissal from the West Virginia Division of Natural Resources ("Respondent" or "Department"). Prior to filing this grievance, Grievant filed two others on September 12 and 15, 1994. As the reasons for filing the two earlier grievances were directly related to his disciplinary dismissal, all three grievances were consolidated by Order dated November 9, 1994. Hearings were held at Level Four on March 29 and 30, 1995, and this case became mature for decision following submission of the parties' post-hearing briefs on or about April 28, 1995.

Discussion

Grievant was employed by Respondent's Law Enforcement Section as a Conservation Officer until his dismissal effective October 22, 1994. He was dismissed for:

- falsification of work reports, resulting in payment of salary when services were not rendered;

- insubordination for failure to obey a written directive of establishing a residence in

Cabell County;

- falsifying accounts;

- intent to utter, cheat or defraud others;

- refusing to answer questions of [his] supervisors;

- uttering falsehoods during an administrative investigation; and

- misuse/unauthorized use of State assigned vehicle.

R Ex. 25.

The following discussion of the relevant and material facts is based upon a thorough review of the evidence presented on behalf of both parties and shall be supplemented by appropriately made findings of fact.

Grievant was a Conservation Officer in McDowell County, West Virginia, and resided in War, West Virginia, prior to the incidents which gave rise to his dismissal. Grievant requested a transfer from McDowell County to Cabell County by letter dated November 1, 1993 (R Ex. 20), and a Notice of

Transfer was issued on November 15, 1993. The Notice, signed by Col. Richard M. Hall, Chief of Law Enforcement, advised Grievant that his transfer was effective November 29, 1993, and ordered that "[R]esidence must beestablished in Cabell County within 15 highway miles of the Cabell County Courthouse". R Ex. 4. (See footnote 1)

Grievant was reluctant to move his family from War until his daughter graduated in June 1994. Therefore, Grievant's family continued to reside in War and Grievant, with the help of his supervisor in Cabell County, Lt. Dan L. McKinney, established residence at the State Police Barracks in Huntington, West Virginia. LIV, McKinney. (See footnote 2) Grievant resided at the State Police Barracks for six months, from approximately November 29, 1993, until July 13, 1994. Grievant used the State Police Barracks to receive complaints, telephone calls, departmental mail and his paycheck. LIV, Tolley.

Col. Hall was aware that Grievant was staying at the State Police Barracks. Even though he thought Grievant could not "technically" establish a residence in the State Police Barracks, Col. Hall personally was in favor of the idea and contacted the State Police to inquire whether other Conservation Officers might take advantage of this same type of arrangement. R Ex. 27; LIV, Hall. Unfortunately, the State Police responded that the arrangement was unsatisfactory due to the workload demand being placed on the personnel at the Barracks. R Ex. 27. Lt. McKinneytestified that the State Police Barracks "was [Grievant's] residence for purposes of performing his duties with the DNR" and that he was not required to operate out of that office, only out of Cabell County. LIV, McKinney. Col. Hall confirmed that "most CO's [Conservation Officers] work out of their homes". LIV, Hall. No action was taken against Grievant for taking up residence at the State Police Barracks.

While Grievant was residing at the State Police Barracks, he was looking for a suitable home in Cabell County. Grievant and his family had lived in a State park in War, and were unaccustomed to the crowded living conditions found in Cabell County, and Huntington, in particular. Grievant was working with a realty company during this time, and even made an offer on one house in Cabell County, but the deal did not go through. LIV, Tolley.

Finding it difficult to find a house to buy, Grievant eventually negotiated and executed, on June 10, 1994, a one-year lease with the Greater Huntington Parks and Recreation Board for a house located at Camp Mad Anthony Wayne, on Spring Valley Drive, Huntington. R Ex. 12. Grievant was aware at the time that the house was actually located right across the Cabell County border in Wayne County,

but didn't think the Department would mind as it was still within 15 miles of the Cabell County Courthouse. LIV, Tolley.

On July 13, 1994, Grievant moved his family from McDowell County to the house in Wayne County. The Department's practice was to reimburse Conservation Officers for one move within a 12-monthperiod; however, it would not pay for packing. Grievant obtained estimates from three different moving companies, with an average estimate of $1,600.00. Because of uncertainty about packing expenses, Grievant decided to move himself, renting a moving truck and enlisting the help of several friends. Grievant submitted an invoice for the moving expenses to the Department on July 29, 1994. Included in the invoice were signed receipts showing that $180.00 each was paid to Wayne VanDyke, Dennis Painter, and Jeffrey Allen for labor expenses. R Ex. 9. VanDyke and Allen did not actually sign the receipts.

VanDyke testified that Grievant told him he would submit the invoice for labor expenses to the Department and if it paid the expenses, he would pay VanDyke for his services. Grievant gave Mr. VanDyke a check in the amount of $180.00, but told him not to cash it until he found out whether or not the invoice would be approved. VanDyke, who lived in War, testified that Grievant's wife called him from Huntington and asked for his permission to go ahead and sign the receipt in his stead so that it could be turned in. VanDyke gave his permission to Mrs. Tolley, and she signed his name to the receipt. LIV, VanDyke; R Ex. 9.

Allen gave a statement to Major William Daniel, the investigator in charge of Grievant's case, in which he recounted basically the same explanation as VanDyke as to the receipt attached to the moving invoice. Allen was Grievant's daughter's boyfriend and also helped Grievant move from War to Huntington. Grievant gave Allen a check in the amount of $180.00, also tellinghim not to cash it until he got a response from the Department. R Ex. 11. Allen's girlfriend, Grievant's daughter, asked his permission to go ahead and sign the receipt, as Allen was in War, and the receipt was in Huntington, so that it could be submitted. Allen gave Grievant's daughter permission to sign his name to the receipt. R Exs. 9, 18.

The third individual who helped Grievant move was Dennis Painter, a co-worker. Painter also gave a statement to Maj. Daniel. R Ex. 21. Painter stated that Grievant gave him a check in the amount of $180.00 with the same instructions he gave the others, not to cash it until he heard from the Department. R Ex. 16. Painter signed his own name to the receipt. R Ex. 9.

The invoice was processed for payment with the Department. At some point, it was noticed that Painter helped Grievant move. However, a review of Painter's work records showed that he had worked the day of the move. LIV, Hall. Col. Hall met with Painter on August 5, 1994, and Painter told him he helped Grievant move and Grievant had given him a check for $180.00, but told him not to cash it. R Ex. 21. Col. Hall instructed Maj. Daniel to investigate the invoice submitted by Grievant. LIV, Hall.

Maj. Daniel instructed Lt. McKinney to check the location of the residence listed on the moving invoice. Lt. McKinney discovered the residence was actually in Wayne County, "maybe 5 miles across the border". LIV, McKinney. Maj. Daniel informed Col. Hall Grievant's residence was in Wayne County. LIV, Daniel. Despite the fact Grievant had moved to Wayne, and not CabellCounty, Col. Hall approved payment of the invoice, less the labor costs, which Grievant had submitted. Col. Hall testified he knew at the time he authorized payment that Grievant was living in Wayne County, and did not object because he thought Grievant would eventually be moving to Cabell County. LIV, Hall. Grievant submitted a change of address form to the Department on July 14, 1994, indicating his permanent home address was the Spring Valley Drive residence in Wayne County, and listed his office address as the State Police Barracks. The office address was changed to a Winfield DNR office address after Col. Hall was informed by the State Police the arrangements with Grievant were no longer satisfactory. R Ex. 28. Col. Hall instructed Captain Ben Gragg to inform Grievant he had until September 1, 1994, to move to Cabell County. LIV, Hall; Gragg. Capt. Gragg talked to Grievant, who told him he was trying to find a place in Cabell County. LIV, Gragg. Capt. Gragg followed up his conversation with an August 8, 1994, letter to Grievant informing him to establish a residence in Cabell County by September 1, 1994. R Ex. 19.

It is unclear from the evidence exactly how the transaction came about, but between August 8, 1994, and September 16, 1994, Grievant and Tom Canterbury, owner of A-1 Wrecking Service in Barboursville, West Virginia, entered into an arrangement whereby Grievant rented a room in the building owned by Canterbury. Canterbury testified he had just completed remodeling the building and the room Grievant rented was originally designed to be Canterbury's office. Canterbury testified there was a telephoneline in the office, and Grievant received mail there, including mail from the Department. Grievant kept clothes, toiletries and a sleeping bag in the office, and there were bathroom and shower facilities available to him on the premises. Canterbury also testified Grievant

parked his State vehicle at the premises. LIV, Canterbury.

Grievant submitted another change of address form on September 16, 1994, indicating the Barboursville address as his home and office addresses. The mailing address for his check and the telephone number listed were both for the Spring Valley Drive address at Camp Mad Anthony Wayne. Lt. McKinney checked the address and found it was the A-1 Wrecker Service building. LIV, McKinney. (See footnote 3)

During this time, Maj. Daniel had been conducting an internal investigation of Grievant's activities since requesting the transfer to Cabell County in November 1993. Grievant's daily and weekly work records, and vehicle maintenance logs and expense receipts from November 1993 to July 1994, had been compiled and reviewed by Maj. Daniel and a Department attorney. R Exs. 5-8. Calendars from the McDowell County Magistrate Court were also obtained in order to check court dates against Grievant's workrecords. R Ex. 1. Grievant's Coast Guard Reserve military orders were also inspected. R Exs. 2, 3.

Grievant was interviewed by Maj. Daniel as part of this investigation on August 24, 1994, and a written statement was obtained from Grievant. The primary subject of that interview was Grievant's move from War to Huntington and the checks written to VanDyke, Painter and Allen. When Maj. Daniel began asking questions about the checks and Painter's involvement in the move, Grievant ". . . decline[d] to make any further comments." Grievant specifically did not want to answer questions regarding Painter. R Ex. 12. Grievant made some initialed corrections on the written statement, but refused to sign the statement. Although the Department has a form "Internal Investigation Warning" which is typically given to individuals being interviewed as part of an administrative investigation, informing them that anything they say cannot be used against them in criminal proceedings, Maj. Daniel did not inform Grievant of these rights or have him sign such a form. G Ex. 4; LIV, Daniel.

Immediately following the interview, Grievant, Maj. Daniel, and Capt. Gragg, met in Col. Hall's office. Col. Hall told Grievant there were no criminal charges against Grievant, the investigation was internal, and if Grievant did not answer their questions, he could be disciplined. Grievant asked what his rights were and informed Col. Hall that he wanted an attorney present, at which time the meeting ended. LIV, Hall; Gragg; Tolley.

The following day, on August 25, 1994, Grievant was suspended for 5 days without pay by Col. Hall for his "refusal to cooperate during an internal administrative investigation." G Ex. 6. The

effective dates of the suspension were September 2 through 8, 1994. Grievant filed a grievance over this suspension on September 12, 1994. Col. Hall testified he talked to the prosecuting attorney before suspending Grievant, and was told to proceed administratively. Col. Hall testified if Grievant had said anything which might have incriminated him, he would have stopped him. LIV, Hall.

Grievant met with Col. Hall again on August 31, 1994, because he wanted "to get things settled." LIV, Hall. Col. Hall advised him to talk about the charges against him and to write down his story. Grievant told Col. Hall he needed to talk to his wife and the meeting ended. Grievant met once again with Col. Hall on September 12, 1994. Col. Hall asked Grievant whether he had contacted Painter, as Painter had been instructed not to talk with Grievant. Col. Hall testified Grievant's "attitude hadn't changed about answering questions", and he told him he was going to dismiss him for refusal to cooperate in an investigation, attempting to illegally obtain money from the moving invoice, and for misuse of his state vehicle. LIV, Hall. (See footnote 4)

Col. Hall met with Division of Personnel and a dismissal letter was prepared on October 3, 1994. The letter was hand-delivered to Grievant on October 6, 1994, and was effective October 22, 1994. The dismissal letter sets forth the reasons for Grievant's dismissal as indicated above, as well as 5 pages of specific incidents supporting the charges. The dismissal letter did not give Grievant an opportunity to respond to the charges, either orally or in writing, prior to the effective date of the discharge. R Ex. 25.

Argument

Respondent argues it has proven by a preponderance of the evidence all of the charges set forth against Grievant, which constitutes good cause for Grievant's dismissal on October 3, 1994.

Grievant argues: 1) Respondent has not met its burden of proving the charges against him; 2) his dismissal was in retaliation for his activities as President of the West Virginia Conservation Officers Association; 3) he was denied due process of law when he was not given a pre-termination hearing, or opportunity to respond to the charges set forth against him; and 4) he was denied his constitutional rights during the internal investigation.

Discussion

In disciplinary matters, the burden of proof is on the Respondent to prove the charges by a

preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). The dismissal of a Civil Service employee must be for good cause, which means "misconduct of a substantial naturedirectly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intent." Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980). Respondent contends it has met its burden of proving the charges against Grievant by a preponderance of the evidence. The October 3, 1994, dismissal letter lists several reasons for Grievant's dismissal, along with numerous specific incidents to support the charges. Respondent elected at Level IV not to address each and every incident, but merely to address what it felt were the most egregious examples of misconduct by Grievant. Respondent again limited itself to those incidents in its Proposed Findings of Fact and Conclusions of Law. The undersigned, for brevity's sake, has elected to combine the selected incidents into groups which correspond to the charges leveled against Grievant and will address them in that manner, rather than discuss each and every incident separately.

Although a discussion of the individual charges brought against Grievant is necessary in this matter, because of the seriousness of the consitutional challenges brought by Grievant, the undersigned will discuss those issues first, and then discuss the individual charges in order of perceived importance.

A.

Refusing to answer questions of supervisors.

Grievant was interviewed four separate times regarding the incidents reported by Respondent: On August 24, 1994, he was interviewed once by Maj. Daniel, and a second time by Maj. Danieland Col. Hall; and again on August 31, 1994 and September 12, 1994, by Col. Hall. There is no dispute Grievant refused to answer questions asked of him during these interviews. Grievant testified he answered questions as fully as he could with the information which was being presented to him. He testified he was given copies of his work reports, some 8 months old, and asked to recount in detail what he did on each day. Grievant had none of his own documents or information. When the questioning turned from his move to Cabell County to other matters which Grievant could reasonably have believed were criminal in nature, Grievant informed Maj. Daniel and Col. Hall he wished to have

an attorney present. The interviews ended at that point. LIV, Tolley; Hall.

The United States Supreme Court in Garrity v. New Jersey, 385 U.S. 493 (1967), held the Fourteenth Amendment of the United States Constitution prohibits the use of confessions obtained from public officers under a threat of removal from office in subsequent criminal proceedings. Thus, a public employer performing an internal investigation of a public officer must inform that officer he can be disciplined for refusing to answer questions, but that anything he does say cannot be used against him in subsequent criminal proceedings.

In the instant case, Grievant was not told any statements he made during the internal investigation could not be used against him in any criminal proceeding. LIV, Tolley. He was not given a written explanation of his rights, as the Department had done in other internal investigations. G Ex. 4; LIV, Daniel; Hall; Cook. Col. Hall testified he told Grievant the interview was not part of a criminal investigation. LIV, Hall. Merely informing Grievant the interview was not a criminal investigation is not sufficient to comply with the rights conferred under Garrity. There was no promise a criminal proceeding might not be forthcoming. Grievant could reasonably believe the charges which were leveled against him were criminal in nature: falsifying work reports, resulting in payment of salary when services were not rendered; falsifying accounts; and intent to utter, cheat or defraud.

Respondent contends Col. Hall's statement to Grievant that the administrative investigation was not a criminal proceeding was sufficient to comply with Grievant's rights under Garrity. Further, Respondent states, "if criminal charges had been brought, Grievant could have challenged those charges based upon constitutional grounds." Respondent's Proposed Findings of Fact and Conclusions of Law, p. 17.

The question is whether an employee can be discharged for failing to answer questions during an internal administrative investigation when he has not been told that any statements given will not be used against him in a subsequent criminal prosecution; or, must he answer the questions anyway, secure in the fact that once he is charged with a crime, he may then challenge the use of his statements in the criminal proceeding? This, indeed, presents an employee with the proverbial "Hobson's choice".

In a line of cases following Garrity, the U.S. Supreme Court has held a public employee may be compelled (i.e., the agencystates that the employee must answer the questions on the pain of disciplinary action if he refuses) to answer questions if there is immunity from federal and state use of

the compelled testimony or fruits of that testimony in connection with criminal proceedings against the person testifying. Gardner v. Broderick, 392 U.S. 273 (1968). The questions to the public employee must be specifically, directly, and narrowly related to the performance of official duties. Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation, 392 U.S. 280 (1968).

It is improper to require responses to these questions and at the same time require a waiver of immunity from prosecution. Only in a proper proceeding is an employer warranted in dismissing a public employee upon his refusal to answer questions. A "proper proceeding" means such proceedings in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choice. Id. More specifically, "given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." Lefkowitz v. Turley, 414 U.S. 70, 84 (1973).

In Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982), public employees refused to appear for a polygraph test in connection with an investigation relating to the performance of their jobs and were dismissed. The employees argued the employer had to offer a tender of immunity before their appearance for the polygraph, citing Gardner, Uniformed Sanitation Men, and Lefkowitz, supra, andseveral circuit court decisions following that line of cases. The Court held those cases did not stand for the proposition that a tender of immunity had to be offered before questioning began. However, the Court found that:

> . . . had Gulden or Sage responded to the request to appear for the polygraph exam and been faced with questions which they for reasons of self-incrimination refused to answer, their refusals to answer absent some assurance that their compelled answers could not be used against them, would be supported by the holdings of these circuit decisions.

Id, at 1075.

Finally, in United States v. Camacho, 739 F. Supp. 1504 (S.D. Fla. 1990), the court held a state has a choice between demanding a statement from an employee on a job-related matter, in which case it could not use such statement in a criminal prosecution, or prosecuting the employee, in which case it could not terminate the employee for refusing to give a statement.

This line of cases makes it clear an employee cannot be terminated for refusing to give a

statement when he has not been informed his statements will not be used in a subsequent criminal proceeding. Even though the testimony shows it was the Department's practice in internal administrative investigations, Grievant was not informed of his rights, even after requesting them, and was dismissed for failing to answer questions directly relating to his job performance, and which he had reason to believe were criminal in nature. Therefore, the undersigned finds theDepartment trampled Grievant's constitutional rights under Garrity and its progeny and his dismissal should be reversed. (See footnote 5)

B. Denial of Pretermination Hearing.

There is no dispute that Respondent did not offer Grievant an opportunity to respond to the charges brought against him in his dismissal letter. Respondent argues Grievant could have asked for a hearing, or in the alternative, that because Grievant had been uncooperative thus far, a pre-termination hearing was not necessary.

The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest. Syl. Pt. 1, Waite v. Civil Service Com'n, 241 S.E.2d 164 (W. Va. 1977). A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment. Syl. Pt. 4, Waite v. Civil Service Com'n, 241 S.E.2d 164 (W. Va. 1977).

The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Fraley v. Civil Service Com'n, 356 S.E.2d 483 (W. Va. 1987).

These principles of due process have been recognized and adopted in the West Virginia Division of Personnel's Administrative Rules, specifically Section 12.02:

> Dismissals: The appointing authority, fifteen (15) calendar days after notice in writing to a permanent employee stating specific reasons therefor, may dismiss any employee for cause. The employee shall be allowed a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The reasons for dismissal and the reply, if any, shall be filed with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice, and is at the discretion of the appointing authority for employees in any case when the cause of dismissal is gross misconduct. (Emphasis added).

Denial of a pretermination hearing does not always compel reinstatement, however. Reinstatement is appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. Fraley, 356 S.E.2d at 487. In Fraley, the grievant's continued employment was in direct violation of a statute prohibiting state employees from holding public office. Therefore, the Court found that a pretermination hearing, in that case, would not have changed the ultimate outcome and upheld the dismissal. Nevertheless, the grievant was awarded full back pay and benefits from the date of his dismissal to the date of his Civil Service Commission hearing as compensation for the denial of his due process rights. Fraley, 356 S.E.2d at 488.

In the instant case, from the evidence and testimony presented at Level IV, and as summarized below in the discussion of specific charges against Grievant, the undersigned finds had Grievant beengiven an opportunity to explain his side of the story, the outcome may very well have been different.

C.

Insubordination for failure to obey a written directive to establish a residence in Cabell County.

Grievant's orders directed him to establish a residence within the county assigned, Cabell County, and within 15 miles of the Cabell County Courthouse. Grievant initially found a place of residence at Camp Mad Anthony Wayne in Huntington, West Virginia, and moved from McDowell County to the house at Camp Mad Anthony. It is undisputed the house at Camp Mad Anthony was just over the Cabell County border and was actually located in Wayne County. The house at Camp Mad Anthony was within 15 miles of the Cabell County Courthouse. When Grievant's superiors became aware of this fact, Grievant was told he would have to establish residence in Cabell County, and was given 30 days to effect the move. No disciplinary action was taken against Grievant at this time. As noted above, Col. Hall authorized the move to Wayne County and did not object because he believed Grievant would eventually establish a residence in Cabell County.

It is also undisputed there are other Conservation Officers who have residences in two counties. Their families live in one county and the officer lives in the county of assignment. Indeed, Capt. Gragg testified Grievant was "not being disciplined because he has two residences". Rather, Grievant

was disciplined because Respondent did not believe the rented room at A-1 Wrecker Services was an appropriate "residence".

Respondent argues Grievant deliberately violated the order to establish residence in Cabell County when he rented a room at a commercial place of business located in Barboursville, Cabell County, West Virginia. The rented room was also within 15 miles of the Cabell County Courthouse. Respondent's argument rests on its contention that the room rented by Grievant was not an appropriate "residence". The undersigned disagrees with Respondent.

The issue is whether Grievant's rented room qualified as a "residence" under W. Va. Code § 20-7-1, which states in pertinent part:

> The chief conservation officer shall designate the area of primary residence of each conservation officer, including himself.

"Domicile" and "residence" are not synonymous; one may have several residences, but only one domicile. State v. Stalnaker, 412 S.E.2d 231 (W. Va. 1991); Lotz v. Atamaniuk, 304 S.E.2d 20 (W. Va. 1983). This is not an issue of "domicile", which becomes important for such issues as voting rights, determination of venue for divorce proceedings, and tax collection. Indeed, W. Va. Code § 20-7-1 does not authorize the designation of a conservation officer's domicile, only residence.

"Residence" is defined as follows:

> Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently.

Black's Law Dictionary, 5th Ed. (1983), p. 680.

"Abode" is defined as:

> One's home; habitation; place of dwelling; or domicile.

Black's Law Dictionary, 5th Ed. (1983), p. 2.

Grievant retained the house at Camp Mad Anthony Wayne and moved his family there from

McDowell County. There is no doubt that for the time in question, Grievant had established his "domicile" in Wayne County. Grievant also rented the room in Cabell County, where he testified he slept and received mail, including mail from Respondent, and parked his state assigned vehicle. Respondent contends because this room was in a commercial establishment, it cannot be a "residence".

The West Virginia Supreme Court has held that "a man may live in several different places but he can have only one domicile," and a "change in residence for convenience in working conditions does not, without more, indicate a change in domicile". Shaw v. Shaw, 155 W.Va. 712, 716, 187 S.E.2d ___ (W. Va. 1972). In Shaw, the Court found that a rented room in one county, when the appellant's domicile was in another county, did not satisfy venue requirements for filing a divorce action.

This premise was confirmed in White v. Manchin, 318 S.E.2d 470 (W. Va. 1984), where a political candidate established a residence in Putnam County, the county in which he intended to run for office. In that case, the candidate established a residence in a room in a commercial establishment. The Court reiterated that a man may live in several difference places and "change his residence for convenience in work conditions," however, the room in PutnamCounty did not meet the residence requirements for election law purposes wherein a candidate must establish his domicile in the county in which he intends to run. Id, at 486.

The test for "residence" is not as strict as the test for "domicile", and Respondent has not demonstrated the term "residence" in W. Va. Code § 20-7-1 should be held to be synonymous with "domicile". Indeed, Respondent clearly believed the State Police Barracks, a commercial establishment, was an acceptable residence for its conservation officers. The Barracks provided shower facilities and a place to sleep, which is exactly what was provided to Grievant at the A-1 Wrecker Service establishment.

The undersigned finds Grievant's rented room in a commercial establishment meets the definition of "residence" for the purposes of the chief conservation officer's orders to establish a residence in Cabell County. Therefore, Grievant did not violate Col. Hall's order when he rented the room in Barboursville for the purposes of establishing a residence in Cabell County within 15 miles of the Cabell County Courthouse.

D.

Falsification of work reports, resulting in payment of salary when services were not

rendered.

The incidents Respondent describes to support the above charge include several notations on Grievant's daily work records (R Ex. 5) which indicate he was preparing Criminal Investigation (CI) Reports. Respondent alleges no CI reports were submitted to Grievant's supervisor and thus do not exist; hence, Grievant falsified his work reports and was paid for services not rendered to the State.

Conservation Officers are required to appear at Magistrate Court in cases in which they were the arresting officer or assisted in the arrest. Grievant testified he prepared CI reports for most of his cases in order to be prepared if called to court to testify on the matter. Preparation time also includes interviewing witnesses and gathering information about the case, and could sometimes be very confusing with lots of people involved. LIV, Tolley. Grievant testified there is no policy about submitting CI reports to the Department.

Several witnesses testified regarding CI reports. Lt. McKinney testified there was no written policy about CI reports, but said "anytime one was required by the prosecutor that it should be turned into the District office." LIV, McKinney. He admitted there might be different practices throughout the districts.

Capt. Dan Farley testified that, although there was no policy in writing, CI reports were submitted to the Department for all cases going to Circuit Court or at the request of the prosecutor. Also, CI reports for cases involving hunting or boating accidents with injuries or fatalities should by submitted by the officers. LIV, Farley.

Officer Glenn Cook testified he only submitted CI reports to the Department which were prepared at the request of the prosecutor. LIV, Cook. Officer Jeffrey Sweeney testified he has never submitted a CI report to the Department for contested ticket cases even if the prosecutor requested them. He does submit CIreports for serious offenses involving injuries or fatalities. LIV, Sweeney.

Respondent offered nothing more than a conclusory statement that since no CI reports were submitted to the Department at or near the time Grievant indicated he worked on them, they simply do not exist and Grievant's records were falsified. Respondent presented no evidence of the types of cases Grievant was working on, or whether reports were requested by the prosecutor for those cases. More importantly, Respondent did not produce any evidence of a consistent, known policy within the Department regarding CI reports. Therefore, the undersigned finds with respect to the

charges of falsification of work records relating to the CI reports, Respondent has failed to prove by a preponderance of the evidence that Grievant falsified his records and did not actually do the work indicated on his work records.

The "falsification of work reports" charge also includes references on Grievant's daily work record to travel time to and from court and court time. Respondent notes several instances where Grievant had court time marked on his daily record, but no corresponding court time appeared on various McDowell County Magistrate Court calendars. R Ex. 1. Respondent again states in a conclusory manner that because the court times do not "match", Grievant was falsifying his daily work records.

Contrary to Respondent's assertions, Grievant's daily work record and the Magistrate Court calendars clearly do match in many instances. It was clear from a review of the Magistrate Courtcalendars and Grievant's work records that some of the cases Grievant had listed were "crossed out" on the Magistrate Court calendar, thus evidencing that the cases were at some point rescheduled. A review of the calendars showed those cases to be rescheduled at some later date. Also, Nina Church, the clerk of the McDowell County Magistrate Court, testified sometimes cases were delayed anywhere from 15 minutes to 3 hours. LIV, Church. Grievant explained that often times he met with the prosecutor before or after scheduled hearings in order to discuss the case or other pending cases. Finally, Grievant testified he often would have to appear and testify in his co-worker's cases as he assisted in the arrest, but the docket would not show the case as Grievant's. LIV, Tolley.

Once again, Respondent relies on mere conclusory statements, without anything more, to support its charge of falsification of work reports against Grievant, and the undersigned finds Respondent has failed to meet its burden in this matter by a preponderance of the evidence.

E.

Falsifying accounts; misuse/unauthorized use of State assigned vehicle.

Respondent contends Grievant falsified mileage and expense reports submitted to the Department for reimbursement for use of his state assigned vehicle. This charge is so intertwined with the charge of misuse/unauthorized use of the state assigned vehicle that these two charges will be discussed together. Again, in the October 3, 1994, dismissal letter, Respondent lists many instances of alleged misuse and falsification of reports, but chose only tofocus on a few at hearing for

purposes of illustrating Grievant's conduct.

While not raised in the dismissal letter or the Level IV hearing, Respondent asserts in its Proposed Findings of Fact and Conclusions of Law that Grievant "manipulated" his work schedule to enable him to make unauthorized trips in his state assigned vehicle to War, West Virginia. Specifically, Respondent points to certain entries in Grievant's daily work schedule where he had a hearing scheduled in War on, for instance, a Monday morning, and gas charge slips show he drove his state vehicle home to War on the preceding Friday evening. (See footnote 6) Respondent contends these trips were "unauthorized" and constitute a "misuse" of the state vehicle. Other than the fact Grievant was driving his State vehicle home on an evening or weekend prior to a scheduled hearing date in War, Respondent offered no evidence that Grievant used his state vehicle continuously during the weekend or was "joyriding" in the vehicle. Rather, Respondent contends Grievant could have driven from Huntington to McDowell County on the days the hearings were scheduled. While this is certainly true, noting that it takes approximately 3-1/2 to 4 hours to make such a trip, the undersigned does not find it a "misuse" to instead drive to War on an eveningor weekend preceding a scheduled hearing date in order to appear in court the next day.

Respondent also offered into evidence gas charge slips which indicated Grievant put gas in his state vehicle or had maintenance done on the vehicle on his reported days off. Almost without exception, every witness presented by Respondent and Grievant testified they, too, had put gas in their state cars and had maintenance done on their vehicles on their days off. In fact, Lt. McKinney testified he thought it was "conscientious" on the part of an officer to prepare his vehicle for work on his day off in order to save work time for productive activities. LIV, McKinney.

Finally, Respondent concentrated on Grievant's use of his state vehicle while he was on military leave. Grievant was ordered to report for Coast Guard Reserve duty in Huntington, from March 12 through March 25, 1994. Gas charge slips show Grievant got gas for his State vehicle on March 12 in Huntington, at which time the odometer showed 43,000 miles. Grievant had a hearing scheduled in Cabell County during his military leave, on March 14, and was granted permission by Sgt. Ballard, his immediate supervisor, to use his state vehicle and appear in uniform for that hearing. LIV, Ballard. Following the scheduled military leave, Grievant, on Friday, March 25, 1994, drove his state vehicle back to War. Grievant was not scheduled to work from March 26-29, 1994, and had a meeting scheduled in connection with one of his cases in Bluefield, West Virginia, on March 30, 1994.

Grievant testified he also had permission to take his state vehicle home to War in orderto be closer to Bluefield. LIV, Tolley. No evidence was presented to contradict this testimony.

Respondent presented a gas charge slip for March 25, 1994, from War, which showed an odometer reading of 43,200, an increase of 200 miles from the previous gas ticket on March 12. Respondent concludes because Grievant was on military leave at that time, he had no cause to use his state vehicle, and thus, the 200 miles is evidence of his misuse and unauthorized use of the vehicle.

The evidence clearly indicates Grievant had permission to have his state vehicle in Huntington for the hearing on March 14, during his military leave. The evidence also indicates Grievant had permission to drive his state vehicle back to War following his military leave in order to be closer to Bluefield for a scheduled meeting. Given that it takes approximately 3-1/2 to 4 hours to drive from Huntington to War, it is not difficult to ascertain how the additional 200 miles appeared on Grievant's state vehicle.

Accordingly, the undersigned finds Respondent has failed to prove by a preponderance of the evidence the misuse/unauthorized use of the State vehicle charge brought against Grievant.

F.

Intent to utter, cheat or defraud others.

Respondent alleges Grievant attempted to utter, cheat or defraud others. First, it alleges Grievant uttered false checks to Messrs. Painter, VanDyke, and Allen for $180.00 each for helping him move from War to Huntington, knowing he did not have that money in the bank. In addition, Respondent alleges Grievant, or those working on his behalf, forged the signatures of VanDyke and Allenon the moving receipts submitted to the Department for reimbursement. The undersigned rejects the forgery allegation as the evidence clearly and unequivocally shows both VanDyke and Allen gave their permission to Grievant or others to sign their names on the receipts. Respondent makes much of the fact there were no "initials" beside the signatures indicating someone else had actually signed the receipts. While perhaps this would have been a better way to sign the documents, the undersigned does not find any criminal or otherwise fraudulent activity was intended by Grievant, his wife or daughter when they signed the receipts on behalf of Mr. VanDyke and Mr. Allen.

Also, as Grievant clearly told the three gentlemen not to cash the checks until he found out whether he would be reimbursed by the Department, the undersigned finds Grievant had no intent to utter false checks.

More troubling to the undersigned is evidence presented Grievant falsely indicated on his military leave travel voucher that he traveled from War to Huntington and back again, using his personal vehicle, thus obtaining reimbursement from the Coast Guard Reserve for the mileage, when Grievant had traveled in his State assigned vehicle. R Ex. 2. Grievant did not testify regarding this incident. Given Grievant's 15-year employment with no prior disciplinary action and "very good" performance evaluations, the undersigned does not believe that this offense, taken alone, would warrante dismissal. G Exs. 5, 11, 12.

Grievant submitted a document, prepared by Respondent's attorney, which lists various incidents of wrongdoing committed by other Conservation Officers in the past, and the discipline imposed by the Department. G Ex. 16. A review of those incidents, some very similar to the charges brought against Grievant, and the disciplines imposed, convinces the undersigned that dismissing Grievant for falsifying his military leave voucher as noted, alone, would not warrant dismissal. However, some type of disciplinary action is appropriate, and the undersigned finds a 3-day suspension, without pay, is sufficient for this offense.

G.

Uttering falsehoods during an administrative investigation.

It is unclear from Respondent's presentation exactly what this charge refers to, however, it seems to assert Grievant's initialed corrections on the written statement taken during the August 24, 1994, interview with Maj. Daniel, evidence he uttered falsehoods during the interview. To the contrary, Grievant answered as many questions as he could until the questioning took a turn away from his move to Cabell County to other matters, some of a decidedly criminal nature. At that point, Grievant informed Maj. Daniel he did not want to answer any more questions. Maj. Daniel and Grievant then went to see Col. Hall, where Grievant informed him that he thought he needed a lawyer.

Grievant's initialed corrections on the written statement are just that: corrections. There is no evidence Grievant lied or uttered any falsehoods during the administrative investigation - to the

contrary, as Respondent has made abundantly clear, Grievantsimply did not answer questions. Therefore, the undersigned finds this charge against Grievant to be without merit.

H. Retaliation.

Grievant claims Respondent's actions are in retaliation for his involvement as President of the Conservation Officers Association. While the undersigned is not convinced by the evidence Respondent retaliated against Grievant for this involvement, because the undersigned has found Respondent has failed to meet its burden of proving the charges against Grievant in the first instance, this defense need not be addressed.

Conclusion

This case involves an internal investigation arising out of a seemingly innocuous event: Grievant established a residence in a commercial facility in Cabell County. From there, Respondent proceeded to investigate Grievant's activities, going back nearly a year. In a "rush to judgment", Respondent repeatedly and carelessly glossed over the facts, and trampled Grievant's constitutional rights in the process, thus resulting in an investigation fraught with error.

Based upon the foregoing discussion, the evidence and the testimony, it is appropriate to make the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant refused to answer questions of his supervisors during an internal administrative investigation, and requested a lawyer be present for any further questioning.

2. Respondent did not, as was its practice, advise Grievant of his rights and grant him immunity for any statements he made during the internal administrative investigation.

3. Grievant did not utter falsehoods during the internal administrative investigation.

4. Respondent did not offer Grievant an opportunity to respond, either orally or in writing, to the charges brought against him in the October 3, 1994, dismissal letter, prior to his dismissal from the Department.

5. Grievant did not falsify work reports, resulting in payment of salary when services were not rendered.

6. Grievant did not violate the November 15, 1993, Notice of Transfer when he rented a room

in a commercial establishment where he slept, received Departmental mail, and parked his state assigned vehicle.

7. Grievant did not misuse his state assigned vehicle, nor has Respondent demonstrated any evidence of Grievant's unauthorized use of the state assigned vehicle.

8. Grievant did not intend to utter, cheat or defraud Messrs. VanDyke, Allen, Painter, or the Department, in issuing the three men checks for moving expenses, with clear instructions not to cash them until he heard whether the Department would approve the labor expenses.

9. Grievant did falsely report on his military leave voucher that he traveled from War to Huntington and back, by his personal vehicle, when in fact he traveled by his state assigned vehicle.

Conclusions of Law

1. "Given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment". Lefkowitz v. Turley, 414 U.S. 70 (1973). Respondent did not offer Grievant adequate immunity, despite its practice in internal administrative investigations, and thus wrongfully discharged Grievant for asserting his Fifth Amendment right not to incriminate himself when he refused to answer questions directly relating to the performance of his duties as a Conservation Officer.

2. The constitutional guarantee of procedural due process requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Fraley v. Civil Service Com'n, 356 S.E.2d 483 (W. Va. 1987); Scragg v. BOD/WVSC, 93-BOD-436 (Dec. 30, 1994). Respondent violated Grievant's constitutional right to due process by not offering him the opportunity to respond, either orally or in writing, to the charges brought against him prior to his dismissal from the Department.

3. Respondent has failed to prove by a preponderance of evidence all but one of the charges brought against Grievant in the October 3, 1994, dismissal letter, thus Respondent has failed to prove that Grievant's dismissal was for good cause. Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980);Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

4. Respondent has proven by a preponderance of evidence that Grievant falsified his military leave voucher.

5. A rented room in a commercial establishment in which Grievant slept, received Departmental mail, and parked his state assigned vehicle, qualifies as a "residence" for purposes of the residence requirement of W. Va. Code § 20-7-1.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is hereby **ORDERED** to return Grievant to his employment as a Conservation Officer with full back pay and benefits, with interest, offset by the 3-day suspension without pay imposed herein for Grievant's falsification of his military leave voucher.

Any party or the West Virginia Division of Personnel 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: May 18, 1995

Footnote: 1 *Grievant claimed the order he received did not contain the residency requirement other than he must reside within 15 miles of the Cabell County Courthouse. Grievant did not produce any order to rebut the evidence presented by Respondent, and the undersigned finds the order presented as R Ex. 4 contains the information provided to Grievant in his Notice of Transfer.*

Footnote: 2 *Testimony from the Level IV hearing will be referenced as LIV, _____ (name of witness).*

Footnote: 3 *Grievant filed one of the grievances herein on September 15, 1994, challenging Respondent's authority to order its Conservation Officers to establish residences in their county of responsibility. Because Grievant was originally ordered to establish residence in Cabell County on November 15, 1993, this grievance is found to be untimely.*

Footnote: 4 *Interestingly, despite Col. Hall's assurances to Grievant that this was not a criminal investigation, Col. Hall used the word "illegal" in his description of Grievant's attempts to obtain monies, and talked with the prosecuting attorney about the investigation.*

Footnote: 5 *Grievant's 5-day suspension for the same offense, refusing to answer questions asked of him during an internal administrative hearing, must also be reversed as Grievant also was not presented with his rights under Garrity at that time.*

Footnote: 6 *It is undisputed that Grievant still had cases pending in McDowell County after his transfer to Cabell County and had to appear in McDowell County Magistrate Court from time to time on these cases. Also, these entries were made before Grievant moved his family to Huntington, and while he was residing at the State Police Barracks.*