

YVONNE M. STAMPER, .

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Grievant, .

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v. . Docket No. 95-HHR-144

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WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES, OFFICE OF .

WORK AND TRAINING .

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Respondent. .

DECISION

Yvonne M. Stamper (Grievant) initiated a grievance on November 12, 1993, challenging a five-day suspension that she received for various incidents of alleged insubordination. [\(See footnote 1\)](#) This matter was pursued to Level III where evidentiary hearings were conducted on March 31 and May 5, 1994. The Grievance Evaluator at Level III determined that the Department of Health and Human Resources (DHHR or Respondent) failed to sustain one of the charges against Grievant and reduced the penalty to a three-day suspension. Grievant timely appealed to Level IV where evidentiary hearings were conducted in this Board's Charleston office on August 17 and September 19, 1995. [\(See footnote 2\)](#) This case became mature for decision on October 10, 1995.

BACKGROUND

Several factual matters necessary to resolve this grievance are in controversy. Ultimately, the outcome in this matter hinges upon determinations of witness credibility and appropriate inferences that may be drawn from pertinent facts. The reasons for Grievant's suspension are set forth in considerable detail in a November 4, 1993, letter from Sharon Paterno, Director of the Office of Work and Training. Pertinent portions are quoted below:

This is to inform you of my decision to suspend you without pay for a period of five (5) working days from your position as an Employment Service Supervisor with the Department of Health and Human Resources. . . . This action is being taken in accordance with the Division of Personnel Administrative Rule, Section 12.03, and represents an eight (8) day notice of suspension. The reason for this personnel action is your insubordination and the resultant incurred expense to the State.

* * *

So you may discern, in retrospect, the seriousness of your infractions and in order to emphasize your faltering performance so you may take remedial action, I offer the following chronology of events which led to your suspension:

By memorandum dated January 7, 1993, to Region II Work and Training Supervisors from Wayne F. Riley, Regional Administrator, supervisors were instructed to bring any "bare bones" equipment purchase requests with them to a January 19, 1993 meeting. At this meeting you submitted your equipment needs for 1993. You requested: "1) repair of an Epson 286 E printer; 2) calculators - electric, heavy duty; and 3) BIC micro metal ink pens - 6 dozen @ 7.25 per box." No action was taken on either your or other supervisors' requests at this meeting. On January 20, 1993, Mr. Riley communicated by memo to all Regional [sic] II Work & Training Supervisors information he had received from the Central Office that "...all equipment purchases and/or equipment repairs are suspended until further notice."

Although you were aware, as previously demonstrated by Mr. Riley's January 20, 1993 memo, that equipment repairs were not authorized, you submitted a repair order to Computerland on May 19, 1993. Computerland Work Order 1830012 contains the following statement which you signed on May 19, 1993:

The service and repairs indicated above including parts are hereby authorized and the estimated cost is acceptable to the undersigned. It is understood that the price will not exceed the estimate without my approval. An express mechanic's lien is hereby acknowledged on the above described equipment to secure the amount of repairs thereto.

The repair was completed and signed by Kevin Smith, Computer Technician at Computerland on May 26, 1993.

* * *

Another example of your insubordination occurred in late July 1993. You asked Mr. Riley if he would authorize the purchase of a particular type of pen for your unit. He informed you that he would not authorize ordering a particular pen for your unit unless it was commonly ordered for other units within the Kanawha County offices. You, however, informed Carolyn Bills, Financial Clerk, that Mr. Riley had approved your request for these pens. Ms. Bills approached Mr. Riley to confirm his approval; however, he informed her that he had not approved your request and directed her not to order the pens.

Finally, I remind you that on April 7, 1993, you received a reprimand for your unprofessional behavior during the relocation of the Kanawha County Office. During the relocation you were informed by Mr. Riley that the Work and Training Unit would be located with the Quality Control Unit on Bullitt Street. You were also informed that only the bare essentials were to be moved during the relocation. Mr. Riley later discovered, however, that you had moved everything out of the office except the desks and terminals, and you informed the Quality Control Staff that they would not be located with the Work and Training Staff.

* * *

DHHR Ex 10 at L III. [\(See footnote 3\)](#)

Grievant denied any wrongdoing in regard to the three alleged incidents of insubordination, testifying in her own behalf at Levels III and IV. Grievant has been employed by DHHR for 23 years, serving as a supervisor for the last 13 years. She presently supervises the Work and Training Unit in Kanawha County which assists welfare clients in becoming gainfully employed, assessing their employment and training needs and providing appropriate services to overcome barriers impeding their employ ability.

Grievant generally contends that this disciplinary action related back to her 1986 proposal to automate her unit's operation through a grant. At that time, Ms. Paterno rejected Grievant's proposal as being "without merit." Subsequently, her proposal was approved for \$28,000 by the Private Industry Council (PIC) of Kanawha County after she and her immediate supervisor at the time, Frederick Boothe, by-passed Ms. Paterno. See G Ex B. Later, after the computer equipment became the property of DHHR, Ms. Paterno told Grievant that funds were not available to make necessary repairs. Again, Grievant succeeded in obtaining the necessary funds from PIC. After Ms. Paterno became her second-level supervisor in a reorganization, Grievant's performance ratings began declining, although Grievant believes her performance remained the same. See G Ex C. Likewise, Grievant was no longer selected to represent the agency in various outside activities.

Because the events alleged to constitute insubordination are largely unrelated, the testimony and evidence regarding each will be discussed separately. For simplicity in following this discussion, the three allegations will be designated as the "excess furniture," "pen purchase" and "printer repair" incidents, with the excess furniture matter being discussed first.

EXCESS FURNITURE

Wayne Riley, currently retired, was previously employed as the Regional Administrator for Work and Training in DHHR Region II. In that capacity, he was Grievant's immediate supervisor. He recalled that on March 15, 1993, heavy snow partially collapsed the roof of the Washington Street office where Grievant's unit was located. On March 17, 1993, Mr. Riley met with various employees on his staff, including Grievant. It was determined that Grievant's unit would move to another DHHR office on Bullitt Street in Charleston, and share space there for an indefinite period.

Due to limited space in the temporary location, supervisors were instructed to move only the "bare essentials" to Bullitt Street. Clients were instructed via the media not to come in for scheduled appointments. Only "emergency" services were to be provided until the unit moved back to its original location. Mr. Riley told Grievant that she could bring a special typewriter and "viewer" for a legally blind staff member, but not to move file cabinets, desks or chairs. "Essential" materials were to be moved in packing cartons or cardboard boxes. Mr. Riley described "essential" to include work in progress which was in an employee's work basket, but not the case files stored in the filing cabinets. In addition, it was noted that the engineers had declared the regular office area unsafe to enter.

Despite these instructions, Mr. Riley later found that Grievant had moved 15 chairs, 6 tables, 10 file cabinets, and 2 large double-door storage cabinets to the Bullitt Street office. In Mr. Riley's judgment, all of these items were excessive for performing "emergency" services. Based upon this incident, he verbally reprimanded Grievant on April 7, 1993. [\(See footnote 4\)](#) Grievant described her working relationship with Mr. Riley as "very good" before March 1993 when the collapsed roof forced her unit to move to a temporary location on Bullitt Street. Grievant recalled that the roof had "buckled" from the heavy snow, dropping approximately three feet in one corner of the office. She was instructed to move out of that location "as rapidly as possible." Grievant related that she was told to bring "only the barest equipment necessary to do the job." Grievant explained that she told Mr. Riley and Ms. Paterno that their case files were essential to make payments to clients. According to Grievant, Ms. Paterno verbally authorized bringing the case files. Ms. Paterno recalled telling

Grievant she could bring needed materials, but specifically warned against moving file cabinets full of case files. L III HT, May 5, 1994, at 56.

Although Grievant was instructed to use cardboard boxes to move any necessary files, she claimed that such boxes were not available. Donna Price, Kanawha County Operations Supervisor, testified that only the "basic necessities" were to be moved to Bullitt Street and that boxes were normally available to accommodate that task. However, she could not recall if Grievant asked her for file boxes to move her files.

Grievant elected to move the active case files in their file cabinets rather than leave the files behind. Grievant further explained that she brought three small tables to accommodate computer terminals that needed access to the only available electrical outlet. With regard to other office equipment, Grievant explained that Operations was tasked with providing the necessary tables and chairs for the Bullitt Street site. Operations used temporary employees from Manpower to assist in this activity. These employees brought several items, including various tables, to the Bullitt Street site without any direction from Grievant. See G Ex 1 at L III.

PRINTER REPAIR

On January 7, 1993, Mr. Riley sent a memo to his staff asking them to submit a "bare bones" equipment request. DHHR Ex 6 at L III. On January 19, 1993, Grievant attended a staff meeting and submitted her "essential" equipment needs to include repair or purchase of an Epson 286E printer at a cost of \$475 and 6 dozen Bic micro metal ink pens at a cost of \$7.25 per box. DHHR Ex 7 at L III. Mr. Riley noted that the \$475 cost to repair or replace the printer was the same as quoted on an estimate Grievant obtained from Computerland on January 15, 1993. See DHHR Ex 2 at L III. During the staff meeting, Mr. Riley told his staff that he would let them know which requests were approved.

The following day, Mr. Riley received a memo from his supervisor, Sharon Paterno, advising that all equipment purchases and repairs were to be suspended until further notice. Mr. Riley disseminated this directive to his subordinate supervisors in a memo dated January 20, 1993. DHHR Ex 8 at L III. However, on May 20, 1993, Donna Price, Kanawha County Operations Supervisor, sent a memo to Daisy Clark, Regional Administrator, forwarding a request from Grievant to repair a printer at a cost of \$475.09. DHHR Ex 3 at L III. This was submitted the day after Grievant had taken the printer back to Computerland. The request was denied.

Mr. Riley became aware of the unauthorized repair of a printer when Grievant called him on May

26, 1993, telling him a terrible mistake had been made. Grievant said she had taken a printer to Computerland for an estimate and it had been repaired in error. Mr. Riley did not recall if he authorized Grievant to contact Computerland to see if the work could be undone.

According to Grievant, Donna Price, the Operations Supervisor in the Kanawha County Office, asked her to print some signs. She told Ms. Price that the printer that could make signs needed repairs, but such repairs had previously been rejected. Ms. Price told her to resubmit the request, as it was near the end of the fiscal year and money might then be available. Grievant had previously received approval from Daisy Clark, Regional Administrator, to get a computer repaired. Grievant took both the computer and printer to Computerland. Steve McCloud, the network administrator in Grievant's unit, assisted Grievant in loading the computer and printer in her car. [\(See footnote 5\)](#) Mr. McCloud testified at Level III that it was his understanding that Grievant was simply taking the printer in for a new estimate since he could not locate the previous estimate. He was told by Grievant that Ms. Clark needed an estimate to process a request for repair.

Grievant testified that she asked Mr. Smith to repair the computer and do an estimate on the printer. Mr. Smith told her that he recognized the printer and he had an estimate on file. He agreed to "fax" the original estimate to her when he found it. She then signed for the equipment before leaving the store without reading the form. According to Grievant, she believed she was simply signing a receipt for DHHR's equipment, rather than authorizing repairs. Grievant previously testified at Level III that she called Mr. Smith a few days before she brought the items in, but they only discussed repairing the computer. The printer was not even mentioned in that discussion. L III HT, May 5, 1994, at 80.

After Mr. Smith located the original repair estimate, he called Grievant. She obtained the number for the facsimile machine, called Mr. Smith with the number, received the "fax" from Mr. Smith, and sent it to Operations, requesting approval for the repair in accordance with her conversation with Ms. Price. See DHHR Ex 3 at L III.

Several days later, an employee informed Grievant about a call from Computerland advising that the computer and printer had been repaired and were ready to be picked up. Grievant stated that she became "extremely upset" at that point, and went to see Ms. Price to determine if approval to repair the printer had been obtained. Ms. Price recalled that Grievant asked her if the request had been approved by Ms. Clark, telling her that Computerland had gone ahead and fixed the printer. L III

HT, Mar. 31, 1994, at 27.

At that time, Ms. Price contacted Ms. Clark, who denied the expenditure request. At this point, Grievant returned to her office and called Mr. Riley, advising him as to what had transpired. She told Mr. Riley that she would have Computerland "undo" the repair. He told her not to do that, but to put her explanation of what took place in writing and submit it to him.

Kevin Smith, a service technician with Computerland in South Charleston, West Virginia, testified that Grievant brought in an Epson printer for repair on May 19, 1993. See G Ex E. He recalled that another DHHR employee (Wilson Hudson) brought the same printer in for a repair estimate on December 29, 1992. [\(See footnote 6\)](#) See R Ex 1 at L III. Mr. Smith recalled Grievant calling him approximately two weeks before May 19, telling him she was bringing the printer back to be repaired. L III HT, Mar. 31, 1994, at 4. Mr. Smith further recalled telling Grievant that the cost of repairing the printer would exceed the printer's value. He related that Grievant told him it was easier to get a piece of equipment repaired than to purchase a new item.

When Grievant brought the printer to Computerland, she again specifically asked that the printer be repaired. Grievant also requested a copy of the original work order from December 1992, and he agreed to send it to her by facsimile machine as soon as he located it. This was accomplished either that same day or the following day.

PEN PURCHASE

As previously noted, Grievant submitted a written request for Bic micro metal pens in January 1993. Grievant subsequently spoke to Mr. Riley on May 3, 1993, renewing her request for these particular pens. Responsibility for placing supply orders for Grievant's unit was delegated to Carolyn Bills, the Financial Supervisor for the Kanawha County office. Mr. Riley spoke with Ms. Bills about the particular pen Grievant was requesting. Ms. Bills told him that the pen Grievant wanted was more expensive than the pens she was ordering for the office. Accordingly, Mr. Riley advised Grievant that day, or the following day, that he would not approve the pens because they were not being used in the Kanawha County office. This same determination was repeated to Grievant in subsequent conversations on June 6, July 22, and August 2, 1993.

Describing his dealings with Grievant on this matter, Mr. Riley noted that "no was not an acceptable answer." He recalled that Grievant even called his secretary and asked her to order the pens, indicating that she had obtained his approval. This led to a query from Ms. Bills, and Mr. Riley

blocked the purchase. Grievant testified that she obtained approval in 1991 for the Bic Micro Metal pens from the Regional Administrator who preceded Mr. Riley, Joanne Porterfield, despite protestation from Ms. Bills that they were "way too expensive." Grievant contends that the pens are a "standard revolving fund item." She explained that she had been told by supervisors from other counties that they could be obtained through her "financial clerk." However, Grievant's financial clerk, Carolyn Bills, told her that these pens were too expensive. Ms. Bills told her to go through Work and Training to get the pens approved.

Thelma Thompson, an Office Assistant who worked under Ms. Bills' supervision ordering supplies, was called as a witness by Grievant. Ms. Thompson indicated that the pens Grievant wanted to order were not a standard item that she routinely ordered in 1993, although they were available in her catalog as a "revolving fund item." Frank McCartney, an HHR employee working with the Office of Quality Control, testified at Level III that, during a meeting when ordering supplies was discussed, Grievant told him the pens she wanted were available to others, but not to the Kanawha County staff. L III HT, May 5, 1994, at 11.

Grievant also called Mr. Riley's secretary, Vicky Wood, who was handling special equipment requests for Region II. Ms. Wood told her that she did not approve "revolving fund" items, such as Bic micro metal pens, and referred Grievant back to Ms. Bills. Grievant stated that she did not pursue the matter at that time. Ms. Wood testified at Level IV, describing her conversation with Grievant in much the same manner. She explained that the Bic pens Grievant wanted had been ordered for Grievant using funds that were available at the regional level when Ms. Porterfield was the Administrator, approximately two years earlier. According to Ms. Wood, Grievant did not indicate that she had already spoken to Ms. Bills before calling her about the pens.

When Grievant later spoke to Mr. Riley about ordering the pens, he asked her if the pens were a "commonly used item" in the Kanawha County office. Grievant testified that she told him she did not think so, but Mr. Riley agreed to check on the matter with Ms. Bills. Without hearing from Mr. Riley, Grievant again went to Ms. Bills and told her she had talked with Mr. Riley about the pens and that she wanted to order the pens, indicating that she thought Mr. Riley would support her request. Ms. Bills told her that Mr. Riley had told her not to order the pens for Grievant unless she was ordering them for everyone in the office. Grievant later called Mr. Riley to ask him what he told Ms. Bills. He provided Grievant substantially the same explanation as Ms. Bills, and Grievant did not pursue the

matter after that.

Carolyn Bills, the Financial Supervisor for the Kanawha County DHHR Office in 1993, also testified at Level IV. Among her various duties, Ms. Bills was responsible for ordering supplies for the office. She recalled that when Grievant approached her about ordering the Bic pens, she told Grievant that pen was not being ordered for anyone else in the Kanawha County office. She further stated that Grievant told her that Mr. Riley had said to go ahead and order the pens. [\(See footnote 7\)](#). According to Ms. Bills, Grievant indicated that "Riley told her, just order the pens."

DISCUSSION

Under W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters falls on the employer. Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Consequently, the testimony and other evidence from the Level III and IV hearings must be carefully examined to determine if DHHR established sufficient facts to prove the charges alleged. Moreover, where the existence or nonexistence of certain contested facts hinges on witness credibility, it is necessary to make explicit credibility determinations and detailed findings of fact. Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See Harper v. Dept. of the Navy, 33 M.S.P.R. 490 (1987).

Grievant was alleged to have been insubordinate. Generally, insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." 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). However, this Grievance Board has also 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.

Applying the foregoing standards to the allegation that Grievant moved excessive furniture and equipment to the temporary worksite on Bullitt Street, the evidence is clear that Mr. Riley and Ms. Paterno communicated reasonably clear guidance regarding the type and amount of equipment and

files which should be moved from the damaged office to the temporary Bullitt Street location.

Grievant correctly notes that the situation which resulted from the partial roof collapse created an emergency situation, requiring her to make decisions on how best to carry on with essential work. Indeed, making these kinds of decisions would be expected of an employee in a supervisory role, such as Grievant.

However, Grievant was instructed in no uncertain terms that she should not bring her case files in their filing cabinets. The undersigned Administrative Law Judge is persuaded that Grievant simply disagreed with her supervisors as to what was "essential" for her clients, and elected to move whatever equipment she decided would allow her to conduct most transactions for current clients at the temporary location. The supply cabinets, for example, were clearly excessive to the unit's needs as routine supplies were provided through the unit already operating at that location.

Had Grievant's superiors asked her to do her best to maintain business as usual at the temporary location, Grievant's actions would have merited commendation. However, given the clear instructions to limit services provided and to bring only the equipment necessary to support those activities, Grievant's conduct manifests the requisite defiance of authority involved in the offense of insubordination. See Sexton, supra. Mr. Riley's decision to issue a verbal reprimand to Grievant was not unreasonable in these circumstances.

In assessing the available evidence regarding the printer incident, it is noted that Grievant's action in physically taking the printer back to Computerland is more consistent with seeking repair of the item than getting an estimate, as that simply involved locating the proper document in the files. This observation is amplified by Grievant's testimony that Mr. Smith recognized the printer and agreed to send her a "fax" copy of the original estimate. At that point, there was no reason to leave the printer at Computerland, except for repair. The evidence also suggests that Grievant's conversation with Ms. Price led her to assume that approval to repair the printer would be forthcoming, since Ms. Price had an interest in getting the computer repaired and funds are sometimes available at the end of the fiscal year. However, Mr. Riley's memo of January 20, 1993, banning all equipment purchases or repairs, was still in effect, and Ms. Price had no real or apparent authority to authorize such an expenditure.

Obviously, Grievant's credibility is at issue because she contradicts the sworn testimony of multiple witnesses. In that regard, the undersigned observed the demeanor of Mr. Riley and Mr.

Smith during their testimony and found them to be sincere and straightforward. Other than some understandable confusion over dates, Mr. Riley's testimony was consistent. Mr. Smith's testimony at Level IV was consistent with his testimony at Level III and his earlier written statement. Contrary to Grievant's contentions, no bias, prejudice or motive to fabricate was observed nor seriously suggested by any credible evidence.

Considering all the circumstances, including Mr. Smith's explicit and credible testimony that Grievant asked him to repair both the printer and computer, Grievant's version does not survive scrutiny. Knowing that the same piece of equipment had previously been taken to Computerland for an estimate, common sense would suggest that obtaining a "second estimate" would be the basis for explicit conversation and written memorialization, rather than relying on an implicit understanding. While it is plausible that a misunderstanding could arise over whether a piece of equipment is brought in for repair or an estimate, Mr. Smith's specific recollection of an earlier phone conversation with Grievant further negates the likelihood of a simple misunderstanding. In this situation, someone has to be lying. Grievant is the person who consistently remembers events differently from the other witnesses involved in critical conversations. Collectively, these factors corroborate Mr. Smith's recollection of events surrounding this matter, leading the undersigned to find that Grievant left the printer for repair without obtaining prior authorization to spend DHHR funds for that purpose.

The remaining charge involving the pens hinges upon the credibility of Carolyn Bills. Ms. Bills' testimony was completely candid, and she made no effort to shade her testimony toward either party. There was no demonstrated prejudice against Grievant. Thus, her statement that Grievant told her that Mr. Riley had said to "just order the pens" is accepted as a credible recounting of their conversation. Grievant was aware that although the pens she wanted were a "revolving fund item" and were in use by DHHR employees in other counties, they were not routinely ordered for the staff in Kanawha County. After Mr. Riley told Grievant that he would approve the pens, provided they were a common item ordered for all Kanawha County employees, Grievant's actions in misrepresenting his position to Ms. Bills represents a disregard for authority falling within the scope of insubordination. See Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995); Sexton, supra.

A three-day suspension for the charges proven falls within the range of penalties for such misconduct authorized by DHHR's regulation dealing with "progressive discipline." G Ex A. Given the

seriousness of the offenses and Grievant's level of responsibility as a supervisor, a three-day suspension does not appear to represent an arbitrary and capricious penalty. See Martin v. W. Va. State Fire Comm'n, 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989).

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 is employed by the Respondent Department of Health and Human Resources as an Employment Service Supervisor in the Office of Work and Training.

2. Grievant has over 23 years of satisfactory employment with DHHR, the last 13 of which have been in a supervisory capacity.

3. Grievant supervises DHHR's Work and Training Unit in its Kanawha County office, located on Washington Street in Charleston, West Virginia.

4. At all pertinent times, Grievant's immediate supervisor was Wayne Riley, Regional Administrator for Work and Training in DHHR Region II. During the same time, Mr. Riley's supervisor (and Grievant's second-level supervisor) was Sharon Paterno, Director of DHHR's Office of Work and Training.

5. On March 15, 1993, the Kanawha County office became temporarily uninhabitable when heavy snow partially collapsed the roof.

6. On March 17, 1993, Grievant attended a meeting with Mr. Riley and Ms. Paterno where plans were discussed to move Grievant's unit, along with other DHHR operations, to a shared location in another DHHR office located on Bullitt Street in Charleston, West Virginia, on a temporary basis.

7. During the course of the March 17 meeting referenced in Finding of Fact Number 6, Mr. Riley or Ms. Paterno, or both, instructed Grievant to move only the "bare essentials" necessary for "emergency services" from the old location to the new location. Grievant was advised that cardboard boxes would be available to move necessary case files, but filing cabinets were not to be moved.

8. Grievant was unable to locate sufficient cardboard boxes to transport the client case files which she deemed essential for her unit, and elected to transport virtually all open files in 8 filing cabinets. In addition, 2 large double-door storage cabinets for supplies were moved to the Bullitt Street

location. See G Ex 1 at L III.

9. On April 7, 1993, Mr. Riley issued a verbal reprimand to Grievant for moving excessive office furnishings to the Bullitt Street site.

10. On January 15, 1993, Computerland in South Charleston rendered an estimate to repair an Epson printer that belonged to Grievant's unit. DHHR Ex 2 at L III.

11. Consistent with the estimate from Computerland, Grievant submitted a "bare bones" equipment request to Mr. Riley on January 19, 1993, seeking \$475 to repair an Epson printer. DHHR Ex 7 at L III. 12. On January 20, 1993, Mr. Riley informed his staff, including Grievant, that all equipment purchases and repairs were suspended until further notice. See DHHR Ex 8 at L III.

13. Sometime in May 1993, Donna Price, Operations Supervisor for the Kanawha County office, asked Grievant's assistance in printing some signs. Grievant explained that the only printer capable of making signs needed repair, and such repair had previously been disapproved. Ms. Price suggested to Grievant that funds might be available as it was closer to the end of the fiscal year, and she could resubmit the request through her to Daisy Clark, Regional Administrator.

14. On May 19, 1993, Grievant took the Epson printer which had been the subject of the January 1993 estimate to Computerland in South Charleston. She spoke with Kevin Smith, a repair technician who had prepared the earlier repair estimate. Grievant authorized repair of the printer both verbally and in writing. Grievant asked Mr. Smith to send her a facsimile copy of the previous repair estimate, leaving the printer to be repaired.

15. On May 20, 1993, Grievant submitted a copy of the earlier estimate, obtained by facsimile transmission from Mr. Smith, to Donna Price, seeking approval of the repair. DHHR Ex 3 at L III.

16. On May 27, 1993, Grievant received word that the printer repairs had been completed by Computerland. Grievant contacted Ms. Price, who spoke with Ms. Clark, and determined that the repairs were not approved. 17. Included in the January 19, 1993, equipment request described in Finding of Fact Number 11, was a request from Grievant for 6 dozen Bic micro metal ink pens at a cost of \$7.25 per box. DHHR Ex 7 at L III.

18. The same pens described in Finding of Fact Number 17 had previously been purchased for Grievant's unit in 1991, using funds from the Regional Level.

19. Grievant spoke with Mr. Riley in May 1993, renewing her request for the pens. Mr. Riley indicated that he would discuss the pens with Carolyn Bills, the Financial Supervisor for the Kanawha

County office, and approve ordering the pens, if they were commonly used in the Kanawha County office.

20. Grievant thereafter went to Ms. Bills, representing that Mr. Riley had told her to order the pens. Mr. Riley conferred with Ms. Bills, determined that the pens were not being regularly ordered in Kanawha County, and denied Grievant's request.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

2. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." 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). Insubordination also "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).

3. Respondent proved by a preponderance of the evidence that Grievant engaged in insubordinate conduct in March 1993 by moving excessive office furniture from the Washington Street office to a temporary location on Bullitt Street, contrary to explicit instructions from her supervisors.

4. Mr. Riley's issuance of a verbal reprimand to Grievant on April 7, 1993, for the conduct described in Conclusion of Law Number 3 was not an excessive or inappropriate punishment.

5. Respondent proved by a preponderance of the evidence that Grievant engaged in insubordinate conduct on May 19, 1993, by taking a printer to Computerland to be repaired without obtaining prior authorization to expend DHHR funds for such purpose.

6. Respondent proved by a preponderance of the evidence that Grievant was insubordinate by representing to Carolyn Bills, Financial Supervisor for Kanawha County, that her supervisor, Wayne Riley, had authorized purchase of a particular ink pen, then knowing that Mr. Riley had not approved

the purchase and was unlikely to do so. See Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995); Sexton, supra. 7. Having proven that Grievant engaged in two acts of insubordination as stated in Conclusions of Law Number 5 and 6, and given that Grievant had properly been verbally reprimanded for an earlier insubordinate act, the three-day suspension ultimately imposed on Grievant for these offenses was not an arbitrary and capricious penalty. See Martin v. W. Va. State Fire Comm'n, 89- SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989). Moreover, a three-day suspension falls within the range of penalties authorized by DHHR's policy on progressive discipline. See G Ex A.

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: March 20, 1996

[Footnote: 1](#)

Grievant also submitted a grievance on February 15, 1994, alleging that her immediate supervisor had unfairly placed a document questioning her credibility in her administrative file. This grievance was consolidated with the earlier grievance at Level III but withdrawn at Level IV, as the challenged document had been removed from Grievant's file after one year.

[Footnote: 2](#)

Prior to the Level IV hearing, DHHR filed a Motion to Dismiss this grievance based upon the theory that Grievant had accepted the Level III decision by cashing her employer's check for two days' back pay, thus waiving her right to appeal to Level IV. DHHR renewed this motion at the hearing. W. Va. Code § 29-6A- 4(d)(1) provides, in pertinent part:

If the grievant is not satisfied with the action taken by the chief administrator or his designee [at Level III], within five days of the written decision the grievant may request . . . that the grievance be submit ted to a hearing examiner . . . [at Level IV]. (emphasis added).

Nothing in this provision, nor anywhere else in the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., supports DHHR's position. Likewise, DHHR failed to cite to any decisions of this Grievance Board or any court of record which has adopted this theory. Accordingly, the interlocutory ruling denying DHHR's Motion to Dismiss at the Level IV hearing is affirmed.

[Footnote: 3](#)

The underlined portion of the charges were not sustained by the Level III Hearing Examiner and Grievant's penalty was reduced to a three-day suspension. This particular charge was not further considered at Level IV.

[Footnote: 4](#)

Ordinarily, a prior disciplinary action may not be contested in a grievance involving a subsequent action. See Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994). However, it is apparent that DHHR accepted this issue as part of Grievant's complaint and the Grievance Evaluator at Level III made explicit findings of fact relating to this incident. Hence, DHHR made no objection to this issue at Level IV. Accordingly, the merits of this earlier reprimand will be addressed as it does not involve a new issue. See W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

[Footnote: 5](#)

Although Mr. McCloud has primary responsibility for the computer systems, he does not drive. Therefore, someone other than Mr. McCloud has to transport the equipment to be repaired.

[Footnote: 6](#)

Mr. Hudson testified at Level III, recalling his conversation with Mr. Smith in December 1992. It was mutually agreed that Computerland would complete a repair estimate on the printer at that time.

[Footnote: 7](#)

Ms. Bills noted that, technically, Ms. Clark, the Regional Administrator for Operations, had final authority to approve or disapprove items that were not regularly purchased for the Kanawha County office.