KELLY RICE,

Grievant,

v.

DOCKET NO. 96-DOH-482

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Kelly Rice, appeals his dismissal from Respondent West Virginia Department of Transportation, Division of Highways, effective October 25, 1996. Hearing on this matter was originally scheduled for January 9, 1997, but was continued for good cause shown at the request of Grievant. A level four hearing was held on September 2, 1997, and this matter became mature for decision on October 6, 1997, following receipt of the parties' proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Respondent's Exhibits

Ex. 1 -

Investigative Report dated 7/16/96, with attachments.

Ex. 2 -

October 11, 1996 letter from Jeff Black, Director, Human Resources to Kelly Rice

Ex. 3 -

West Virginia Department of Highways Administrative Operating Procedures, Disciplinary Action, Suspension and Dismissal

Ex. 4 -

Employee's Verification of Disciplinary Action, dated August 8, 1996

Grievant's Exhibits

Ex. 1 -

Mechanics Parts order dated February 3, 1997

Ex. 2 -

Order Form dated November 21, 1996 from the desk of Kelsey D. Buckley.

Testimony

Respondent presented the testimony of Ken Patrick, Buddy Winnell, Alvin Engelke, Robert Epler, and Jeff Black. Grievant testified in his own behalf and presented the testimony of Dennis Metz, Royce Daugherty, John Griffin, Bill Ward, and Joe Cunningham.

BACKGROUND

Grievant was employed as a Storekeeper II in the Wirt County organization of District Three of the Division of Highways, a position in the classified service. He had been employed since 1991, and was previously employed by the Alcohol Beverage Control Commission. By letter dated October 11, 1996, he was dismissed from his employment with Respondent for the following reasons:

> Pursuant to Section 12.02 of the State Division of Personnel's Administrative Rule, it has been recommended by your District Engineer, Bob Epler, and I have concurred that you be dismissed from your duties as a Storekeeper 2 with the Department of Transportation, Division of Highways effective October 25, 1996 at the close of business. Prior to this decision having been made, you were given an opportunity to discuss with your District Engineer the charges made against you.
>
> The reason for your dismissal is falsifying records, failure to report an accident in a state vehicle and attempting to involve others in a dishonest and deceptive accident

report. More specifically:

> On June 11, 1996 you were involved in an accident in a state vehicle (ED 206-048) with a private vehicle, causing damage to a mirror on the private vehicle. You did not complete an accident report, as required by procedures, but did complete and sign a Mechanics Parts Order for a replacement mirror for the private vehicle. On the Order you indicated that the mirror was being purchased for another Wirt County Division of Highways' vehicle (ED 203-375). When the District Office requested the accident report to support the Mechanic's Parts Order, you approached two fellow employees who operatevehicle 203-375 and asked them to complete a false accident report indicating they had an accident in that vehicle.

The filing of a false mechanics' parts order, and encouraging other employees to file false accident reports is considered cause for dismissal under our discipline and discharge policy.

As an employee under the Division of Personnel System, you have the right to file an expedited grievance concerning this matter (West Virginia Code 29-6A-4(e)) with the Education and State Employee's Grievance Board at 808 Greenbrier Street, Charleston, West Virginia 25311. Such grievance must be filed in writing within ten working days of the date of your dismissal. A copy of your grievance must also be filed with the Commissioner of Highways and the Director of the State Division of Personnel.

Furthermore, you are being given the opportunity to respond to the Assistant Commissioner, Joe Shelton, either personally or in writing for the purpose of communicating any reason why you feel this action is unwarranted. If you choose to respond, please do so within eight calendar days from the date of this letter.

R. Ex. 2.

The disciplinary action taken against Grievant arose out of an incident which occurred on June 12, 1996, while Grievant was driving a DOH Ford truck on Wirt County Route 1. While on that road, he encountered another vehicle, a black Chevrolet truck, and when the two vehicles passed each other, Grievant tore the left, driver's side mirror, off of the Chevrolet truck. The Chevrolet was owned by Jim Stull, who owned J & S Auto Parts in Elizabeth, West Virginia, and was driven at the time of the accident by his wife. The police were not called to the scene, and Grievant told Mr. Stull he would

obtain a replacement mirror for the Chevrolet truck. Grievant did not fill out an accident report on this incident.

The same day as the accident, Grievant went to the District 3 Equipment Division in Parkersburg, West Virginia, and requested they order a standard Chevrolet pick-up type mirror. All requests for parts from the counties are processed through the District Equipment Division. When ordering parts for a piece of equipment, it is required that an E.D. or Equipment Number be identified in order to keep accurate inventory and maintenance records on the equipment.

Based upon the information provided by Grievant, a Mechanic's Parts Order form was completed in the District Equipment Division (R. Ex. 1, Attach. 2) dated June 13, 1996. That form indicates the mirror was requested by “Kelly”, and identifies E.D. 203-375 as the piece of equipment needing the mirror. E.D. 203-375 belongs to a Chevrolet Crew Cab owned by DOH and located in Wirt County. Once parts orders are completed, and prices obtained, the form is presented to Mark Francis, the Equipment Supervisor for District 3, for approval. Mr. Francis' signature appears on the Mechanic's Parts Order form, approving the purchase.

Next, a Small Purchase Requisition/Receipt Record is prepared for the purchase of the part, in this case, the mirror. In this instance, the form indicates the mirror is being purchased from McClinton Chevrolet in Parkersburg, again utilizing E.D. 203-375 as the equipment needing the mirror. The purchase price of the mirror is listed as $55.13. The form shows that Grievant picked up the mirror from the District Equipment Division on June 13, 1996. The information was apparently entered on the form by Janis Coffey, an employee in the Equipment Division, on June 14, 1996. Finally, Mark Francis signed his approval for payment to McClinton Chevrolet for the mirror on June 17, 1996. R. Ex. 1,Attach. 3. On June 13, 1996, McClinton Chevrolet sold a mirror to DOH by invoice number 33387, which references E.D. 203-375, in the amount of $55.13. R. Ex. 1, Attach. 4.

Alvin Engelke, Wirt County Supervisor, received a call from Mark Francis, District 3 Equipment Supervisor, sometime in mid to late June 1996. Mr. Francis indicated he had a parts order for a mirror for E.D. 203-375, and needed an accident report for backup documentation. Mr. Engelke told Mr. Francis he did not know of any accident involving E.D. 203-375, nor did he authorize Grievant to order a mirror. Mr. Francis told Mr. Engelke he would look into the matter, and Mr. Engelke did nothing further at that time.

Mr. Francis then called around the Wirt County organization, requesting an accident report for

E.D. 203-375. Grievant had been on jury duty on Friday, June 14, 1996, when Mr. Francis called about an accident report. When he returned to work, other employees told him Mr. Francis was looking for an accident report on E.D. 203-375.

Grievant approached Buddy Winnell and Bob Woodyard in the Wirt County garage on or about June 24, 1996, and asked them to fill out an accident report for a broken mirror on E.D. 203-375. Those two gentlemen operated that particular piece of equipment. Both gentlemen told Grievant that vehicle had not been in an accident, and Winnell even inspected E.D. 203-375 to make sure the mirror was not broken. Winnell and Woodyard refused to fill out an accident report for E.D. 203-375. R. Ex. 1, Attach. 7, 8.

It is unclear whether Grievant told Mr. Francis at this time that E.D. 203-375 had not been in an accident, but at some point, Mr. Francis concluded that a mirror had been ordered for a vehicle that did not need it. He contacted Mr. Epler, District Engineer, and told him they had ordered a mirror for a truck that did not need it, and asked what to do. At that point, Mr. Epler advised Mr. Francis to return the mirror for credit to McClinton Chevrolet, which he did. R. Ex. 1, Attach. 5.

In the meantime, Mr. Engelke had received a telephone call from Mr. Stull, asking when he was going to get his mirror for his private vehicle. Mr. Engelke told Mr. Stull he did not know what it was all about, but that he was going to find out. He then called Mr. Epler to find out what was going on with the accident involving Mr. Stull.

After receiving the call from Mr. Engelke about Mr. Stull's mirror, Mr. Epler put two and two together and concluded that, since Mr. Stull had been in an accident with Grievant, and the extra mirror Mr. Francis had told him about had been ordered for Wirt County, Grievant was somehow involved with ordering the mirror for Mr. Stull. At this point, Mr. Epler asked Albert Adams, Director of Transportation Auditing Division, to investigate this matter. Mr. Epler was not involved in the investigation until he received the final report.

Mr. Adams assigned Ken Patrick, Procedures and Investigation Section, to investigate the incident. Mr. Patrick talked to Mr. Engelke, who told him how to reach Mr. Stull, and made facilities available to him during his investigation. That was the extent of Mr. Engelke's involvement in the investigation.

Mr. Patrick spoke with Mr. Winnell, Mr. Woodyard, and Grievant. Mr. Winnell and Mr. Woodyard provided Mr. Patrick with affidavits stating Grievant had approached them about filling out an

accident report for E.D. 203-375, which they refused to do. Their statements indicate Grievant did not tell them why he wanted an accident report on that vehicle. R. Ex. 1, Attach, 7, 8.

Grievant provided Mr. Patrick with a handwritten statement on July 2, 1996, in which he admits the accident involving Mrs. Stull, and admits telling Mr. Stull he would obtain areplacement mirror. Grievant states he inquired about obtaining a mirror through the Equipment Division. Grievant admits in his statement that he obtained a mirror from McClinton Chevrolet and took it to the Elizabeth garage “where it stayed until June 27, 1996 when I returned it to the district equipment division.” Grievant states he would not falsify any documents to obtain the mirror, and did not report the accident because he was afraid he would get into trouble, was on jury duty, and felt it wasn't that serious. R. Ex. 2, Attach 6.

Based upon the evidence he acquired, and the events as related above, Mr. Patrick concluded that Grievant had an accident with a private citizen involving a DOH vehicle, which he failed to report, had attempted to acquire a replacement mirror for the private vehicle using a DOH E.D. number for a piece of equipment that did not need a mirror, and had attempted to involve Winnell and Woodyard in completing a false accident report for E.D. 203-375 to justify the purchase of the mirror. R. Ex. 1.

After reviewing Mr. Patrick's report, Mr. Epler recommended that Grievant be dismissed, because he did not report the accident as required by policy, ordered a mirror using a state vehicle E.D. number, which was intended for a private vehicle, and asked two fellow employees to complete accident reports for a vehicle that had not been involved in an accident. Mr. Epler concluded that Grievant had violated the public trust as Storekeeper for Wirt County, and that dismissal was appropriate.

Jeff Black, Director of Human Resources, prepared Grievant's dismissal letter. Mr. Black identified several examples of possible first offense dismissals which would apply to Grievant in DOH's Administrative Operating Procedures, Disciplinary Action. R. Ex. 3. Those include “altering, forging records” or “any similar or like offense.” Mr. Blackconceded that Grievant had not actually filled out the forms ordering the mirror, but had caused those forms to be filled out by providing false information. Further, Grievant had attempted to induce Winnell and Woodyard into preparing a false accident report on E.D. 203-375. Mr. Black opined that causing the altering or forging of records would fall into the “any similar or like offense” category of offenses. Mr. Black testified that the appropriate way for Grievant to have handled this matter would have been to report the accident, file

an accident report, and let the Claims Section of the Enforcement Division handle the settlement with Mr. Stull.

DISCUSSION

In cases dealing with disciplinary matters, the burden of proof rests with the employer 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). Dismissal of a civil service employee must be for “good cause,” which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code § 29-6-11(12); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 385, 264 S.E.2d 151 (1980).

As Grievant's and Respondent's versions of the events leading up to Grievant's dismissal are significantly different, the issue of the witnesses' credibility comes into play. Some factors to be considered in assessing a witness' testimony are the witness': 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit SystemsProtection Board 152-153 (1984). See Burchell v. Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

Grievant went to the Equipment Division in Parkersburg the same day he had the accident and spoke with Dennis Metz, the District 3 Storekeeper. Mr. Metz confirmed that Grievant came into the Equipment Division and spoke with him regarding ordering a mirror. Mr. Metz testified Grievant told him he had a broken mirror, and asked him whether he needed to fill out an accident report. Grievant also asked Mr. Metz where he could get the mirror replaced. Mr. Metz told Grievant they normally did not fill out accident reports for damage less than $100.00, which would apply to a broken mirror. He told Grievant of a couple of places where he could get glass for the mirror.

Mr. Metz testified that the normal procedure for a broken mirror would be to charge it either to the equipment itself, with an E.D. number, or use an authorization number charged to overhead. Mr.

Metz testified that E.D. numbers and authorization numbers are not similar in any way. Authorization numbers normally include an “IXPO2" or “BXP506" for example. E.D. numbers do not have “X” in them, such as 203-375.

Mr. Metz testified that Grievant came back later with the mirror, which was bent, which meant it needed to be totally replaced, not just the glass. He said Grievant asked if he could leave the mirror at the District shop until he found out what he had to do to replace it. Mr. Metz testified that Grievant never told him the mirror was for a privatevehicle. Grievant testified he did tell Mr. Metz that he had been in an accident with a private vehicle, and Mr. Metz told him he did not need to fill out an accident report.

Considering that Grievant has been employed as a Storekeeper for Respondent for five years, and was in a position where he ordered parts every day from the Equipment Division, Grievant's testimony, much of it conflicting, serves to undermine his overall credibility.

First, Grievant's version of events which transpired after the accident is not logical. Grievant testified he went to the Equipment Division the same day as the accident to inquire about ordering a mirror. Mr. Metz confirms this testimony, and clearly a mirror was ordered using E.D. 203-375, which belongs to a piece of state-owned equipment which was not involved in an accident, and which did not need a mirror. Grievant testified he did not provide the Equipment Division with E.D. 203-375 when ordering the mirror, and has no idea how that number appeared on the forms requisitioning the purchase of the mirror. Grievant disagreed with Mr. Metz that the Equipment Division gets information such as E.D. numbers from the person calling in from the county to order the parts.

Later, however, Grievant testified that, as a Storekeeper in Wirt County, if a part is requested by a mechanic, he calls the District Equipment Division and requests parts for the particular piece of equipment. Grievant testified one is <u>required</u> to give an E.D. or authorization number to the Equipment Division in order to process the request. Thus, Grievant clearly contradicts his earlier disagreement with Mr. Metz about how the Equipment Division gets the information, including E.D. or authorization numbers, to order parts. Grievant does not deny that he did not report the accident to his supervisor, Mr. Engelke, or to Mark Francis, the District 3 Equipment Supervisor. The only person Grievant alleges he told about the accident was Mr. Metz. Mr. Metz does not recall being told Grievant had an accident involving a private vehicle. The only thing Mr. Metz recalls is Grievant asking whether he needed to fill out an accident report for a broken mirror, which Mr. Metz assumed

was on a state-owned piece of equipment. Grievant acknowledged that Mr. Metz was not his supervisor.

Grievant testified that when he heard that Mark Francis was calling around for an accident report to backup the request for a mirror for E.D. 203-375, it never occurred to him that the mirror was the same mirror he had requested for the Stull vehicle. Grievant testified that is why he approached Winnell and Woodyard about an accident report for E.D. 203-375, because he thought that piece of equipment had been in an accident. Grievant did not think that problem was related to him at all because Mr. Metz had already told him he didn't need an accident report for his mirror.

However, despite his testimony that he did not connect Mark Francis' request for an accident report for E.D. 203-375 with the mirror he had obtained for Mr. Stull, Grievant later testified that when he heard that Mr. Francis was asking for an accident report, he returned the Stull mirror to the Equipment Division, and the Equipment Division eventually returned the mirror to McClinton Chevrolet when it could not be determined why the mirror had been ordered. Despite all of this confusion regarding the mirrors, Grievant still never reported the accident to his supervisor or Mark Francis. If Grievant did not believe Mark Francis' request for an accident report was at all related to the Stull mirror, why did Grievant returnthe mirror to the Equipment Division, and why didn't Grievant attempt to clear up the confusion by just reporting that he had been in an accident with a private vehicle?

Grievant claims he did not know he had to report the accident, because Mr. Metz told him he did not need to fill out an accident report. DOH Administrative Operative Procedures AR-13 provides as follows:

> APPLICATION: The AR-13 Report of Motor Vehicle Accident Form is prepared whenever manmade damage is discovered to highways, DOH equipment or facilities. The manager of the jurisdiction must survey the damage as soon as possible and prepare the AR-13 and a BF-38. Necessary information includes:
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> a. the location of the damaged property or equipment (route number and milepost, if available); or
>
> b. the identity of the individual or firm responsible for the damage and their address, if available; or

c. the date and time of incident, if possible.

The AR-13 must be completed within five working days following damage notification. The manager then sends the originals of the forms to the District Comptroller after filing a copy for information.

If an employee is operating a DOH vehicle and it becomes damaged or is involved in an accident, the employee will immediately complete and submit an AR-13 to the Claims Section, Enforcement Division. The employee must also send a copy to the proper District Equipment Supervisor. For a Central Headquarters employee, a copy of the AR-13 is submitted to the Division Director, the original is sent to the Claims Section, Enforcement Division. A copy is sent to the District One Equipment Superintendent or the District Equipment Superintendent closest to the damaged vehicle. If the damages are more than $500 dollars, the Equipment Superintendent will send the AR- 13 and the cost estimate to the Claims Section, Enforcement Division. (See footnote 1)

Nowhere in this policy does it support Grievant's assertion that he did not have to file an accident report with his supervisor because the damage did not exceed $100.00. While Grievant contends he relied on Mr. Metz' advice, Mr. Metz was not Grievant's supervisor, nor apparently did Mr. Metz have complete information before telling Grievant he did not have to file an accident report. Indeed, it is not clear that Grievant ever told Mr. Metz he actually had an accident in a state-owned vehicle involving a private citizen. It appears all Grievant asked Mr. Metz was whether he needed to fill out an accident report for a broken mirror on a piece of state-owned equipment. Grievant had a duty as an employee of the state to report to his supervisor that he had been in an accident with a private citizen, no matter how minor the damage. Mr. Black outlined the correct procedure to follow. It would then be within the Claims Section's discretion how to handle settlement of the matter.

Grievant also presented two pages from DOH's Administrative Operating Procedures, Volume III, Chapter 5 regarding establishing a claim regarding accidents, to support his argument that an accident report was not necessary because the damage did not exceed $100.00. (See footnote 2) These pages do not support Grievant's argument at all. This policy establishes that once an accident report has been filed, the District Comptroller will decide whether to establish a reimbursable claim or not, presumably for insurance purposes. What this policy says is that a reimbursable claim will be

established if "the cost of repairs is greater than One Hundred Dollars ($100.00) and the responsible party is known; . . . ". (Emphasis in original). The policy says nothing to support Grievant's assertion that he didnot even have to fill out an accident report for the accident. The policy goes on to say that, "[i]f a claim is not established, the Comptroller notifies the proper supervisor to charge routine authorization (maintenance or equipment).) The Comptroller files all documentation and processes the claim no further." Again, nowhere does the policy authorize an employee to make this decision or charge routine authorization numbers; it is the Comptroller who has that responsibility.

Finally, Respondent's Ex. 4 is a summary of Grievant's statements made during his pretermination meeting with Mr. Epler. Although Grievant denied making those statements at level four, those statements serve to further weaken Grievant's credibility. Remark No. 5 states: "As a Storekeeper I understand that I should be ordering parts for equipment that needs it. I ordered a mirror using authorization 203-375. ED 203-375 did not need a mirror. I used a routine authorization number, not an ED number." This statement directly conflicts with Grievant's testimony that he did not provide the Equipment Division with the E.D. 203-375 number. Here, Grievant merely states that E.D. 203-375 is an authorization number. No witnesses who testified about E.D. numbers and authorization numbers confirmed that this number would be used as an authorization number. Grievant, as a Storekeeper for Wirt County for five years, would know the difference between an E.D. number and an authorization number.

AFFIRMATIVE DEFENSES

The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995). Grievant alleges that he has been discriminated against because other employees have engaged in similar conduct and have not been disciplined. W. Va. Code § 29-6A-2(d) defines "discrimination"as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." It is unnecessary to discuss this allegation further, quite simply because Grievant failed to identify any other DOH employees involved in accidents with private citizens, let alone involved in accidents for which they failed to file accident reports. Respondent, on the other hand, volunteered that other Storekeepers have been disciplined and discharged in cases involving theft and violation of the public trust. Mr. Black testified that the nature of the employee's position is

taken into account in determining discipline. Storekeepers are in charge of ordering and maintaining materials, and handling large sums of money. DOH cannot have someone in that position who is involved in something fraudulent. (See footnote 3)

CONCLUSION

Respondent dismissed Grievant for three reasons: falsifying a mechanic's parts order; failing to report an accident involving a state-owned vehicle; and attempting to involve other employees in the falsification of an accident report. Respondent has proven by a preponderance of the evidence that Grievant caused the filing of a false mechanic's parts order form by the Equipment Division, by providing it with a false E.D. number for ordering the mirror for the Stull vehicle. While it is true that Grievant did not sign the mechanic's parts order form or fill it out himself, he caused it to be filled out by the Equipment Division, utilizing false information. Grievant admits he was involved in an accident in a state-owned vehicle with a private citizen, and admits he did not report that accident to his supervisor or the District Equipment Supervisor. Thus, Respondent has proven by a preponderance of the evidence that Grievant failed to report the accident with the Stull vehicle.

With regard to the third alleged offense, while Grievant undeniably did approach Mr. Winnell and Mr. Woodyard about completing an accident report for E.D. 203-375, he only did this after hearing that Mark Francis was looking for an accident report on that vehicle. Respondent has failed to prove by a preponderance of the evidence that at the time he approached those gentlemen about the accident report, he intended to have them file a false accident report. Clearly, at some point thereafter, Grievant realized the accident report Mark Francis was seeking was related to his ordering the Stull vehicle mirror, but it has not been proven by a preponderance of the evidence that he knew this at the time he approached Winnell and Woodyard.

However, that incident merely reinforces Respondent's contention that Grievant attempted to cover up his accident with the Stull vehicle by ordering the mirror under E.D. 203-375. Once he became aware that Mark Francis was looking for an accident report to cover that mirror, he should have reported the accident to Francis or Mr. Engelke. He did not. He merely returned the mirror to the Equipment Division, with obvious hopes that the matter would just be considered an error in ordering and would resolve itself. It was only because Mr. Stull telephoned Mr. Engelke about the mirror that anyone in District 3 even became aware that there had been an accident involving his

vehicle. Had Mr. Stull not telephoned, the mirror would have been returned as a mistaken order, and no one would have ever known Grievant was involved in an accident. Grievant violated his trust as aStorekeeper for DOH and for the State by not reporting the accident properly. Respondent was justified in dismissing Grievant for his inaction, and his violation of DOH's policy regarding accidents.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following material facts.

1. Grievant was involved in an accident in a state-owned vehicle with a private citizen, and did not report that accident to his supervisor or the District Equipment Supervisor.

2. Grievant caused the filing of a false mechanic's parts order form by the Equipment Division, by providing it with a false E.D. number, 203-375, for ordering the mirror intended for the Stull vehicle.

3. Grievant approached Mr. Winnell and Mr. Woodyard about completing an accident report for E.D. 203-375, only after hearing that Mark Francis was looking for an accident report on that vehicle.

4. Grievant attempted to cover up his accident with the Stull vehicle by ordering the mirror under E.D. 203-375.

CONCLUSIONS OF LAW

1. Dismissal of a civil service employee must be for “good cause,” which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 385, 264 S.E.2d 151 (1980). 2. The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995).

3. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

4. Respondent has proven by a preponderance of the evidence that Grievant caused a false mechanic's parts order form to be created utilizing E.D. 203-375, which belonged to a state-owned vehicle that did not need a replacement mirror.

5. Respondent has proven by a preponderance of the evidence that Grievant was involved in an accident with a private citizen while operating a state-owned vehicle, and failed to report that accident as required by DOH Administrative Operative Procedures.

6. Respondent has not proven by a preponderance of the evidence that Grievant attempted to involve Messrs. Winnell and Woodyard in the falsification of an accident report for E.D. 203-375.

7. Respondent has proven by a preponderance of the evidence that Grievant's conduct was of a substantial nature, rather than trivial or consequential, and was for good cause.

8. Grievant has failed to prove by a preponderance of the evidence that he has been discriminated against by Respondent.

Accordingly, this grievance is **DENIED**.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 21, 1997

Footnote: 1 *Respondent offered this document into evidence following the close of the level four hearing. Grievant objected to the submission of this evidence, unless he could offer additional evidence as well. That request was granted.*

Footnote: 2 *Grievant offered this document as additional evidence following the close of the level four hearing.*

Footnote: 3 *Grievant initially raised the affirmative defense of reprisal for filing previous grievances. However, no evidence was presented regarding this defense, nor was it addressed in Grievant's proposed findings of fact and conclusions of law. Therefore, it is concluded that this affirmative defense has been abandoned.*