SHARON AMAR-ABRAMS,

Grievant,

v. DOCKET NO. 96-HHR-520

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

CHILD SUPPORT ENFORCEMENT DIVISION,

Respondent.

DECISION

Grievant, Sharon Amar-Abrams, filed grievances directly at Level IV dated December 10, 13, and 27, 1996, protesting termination of her employment by Respondent on the grounds of deliberate neglect of duties, alleging withholding of information in her personnel file, and suspending her without pay pending her termination, respectively. (See footnote 1) These grievances were consolidated by Order dated January 9, 1997. A Level I grievance filed on November 21, 1995 regarding a three day suspension was also consolidated, by agreement of the parties. (See footnote 2)

Grievant stated that all of the disciplinary actions were unwarranted and violated Division of Personnel Administrative Rule Section 12.02 and the West Virginia Code. She requested reinstatement to her position with back pay, expunging of her disciplinary record, and other relief.

A Level IV evidentiary hearing was held on April 14 and 15, 1997. This grievance became mature for decision on June 3, 1997, the due date for the parties' proposed findings of fact and conclusions of law.

ISSUES

The issues in this grievance are: 1) whether Respondent had cause on November 7, 1995, to suspend Grievant without pay for three days, effective December 1, 1995; 2) whether Respondent had cause on December 5, 1996 to dismiss Grievant from her employment, effective December 30, 1996; 3) whether Respondent had cause on December 13, 1996, to suspend Grievant without pay for the remainder of her notice period; and 4) whether Grievant proved any affirmative defenses.

For the reasons discussed below, I find that Respondent proved that it undertook progressive

discipline in a reasonable fashion, that Grievant failed to comply with negotiables handling policy and procedure, and that Grievant was insubordinate. Grievant's dismissal, and her suspensions without pay, were for good cause, and she failed to prove any affirmative defenses.

FINDINGS OF FACT

1 1. Grievant has been employed with the Department of Health and Human Resources' (HHR) Child Support Enforcement Division, Raleigh County unit (CSEU) since 1991. The main purpose of CSEU is to receive, process, collect and distribute monies for dependent children. She was hired by supervisor Joyce Phipps in 1991, and most recently held the title Office Assistant II. 2 2. Throughout her tenure with CSEU, Grievant has been responsible for processing negotiable instruments, receiving monies through the mail or from legal assistants (See footnote 3) , processing payments, and forwarding monies to another State office. Handling negotiables was an essential job duty. Occasionally, responsibility for handling negotiables was rotated among Grievant and other employees, although usually Grievant had primary responsibility and other employees only processed negotiables in Grievant's absence. Grievant also had other job duties.

3 3. In 1993, Respondent distributed copies of relevant portions of the Common Chapters Manual and the Child Support Enforcement Manual, and instruction on the processing of negotiables, to employees handling negotiables. R. 2 and R. 2 Addendum. This information was available on the computer system used by Grievant at least as of June 1994. Grievant was personally given copies by Sue Staples, Child Advocate Regional Manager, on February 13, 1995, and by Phyllis Davis, CSEU Team Leader, in September 1995. (Testi- mony of Sue Staples and Phyllis Davis; and Tr. pp. 53-54. (See footnote 4))

4 4. Respondent's policies and procedures require that negotiables be kept secure and be processed in a timely fashion. These requirements have been in place since at least 1993. See, R. 3, R. 12. 5 5. Respondent has ostensibly required negotiables to be processed within 24 hours of receipt since at least November 1, 1993. R. 2 Addendum. Ms. Davis, CSEU Team Leader since May 1995, began emphasizing the 24-hour time limit at least as of September 1995. Current policy requires negotiables to be processed and mailed by the end of the same business day on which they are received.

6 6. The location and manner in which negotiables are to be secured has changed numerous times during Grievant's employment. When Grievant was initially hired and trained, locking negotiables in her desk drawer was accepted practice. At some point, policy required negotiables to be locked in a file cabinet. At other times, negotiables were required to be taken to a safe in another unit to be secured over night. Several employees have been confused about the specific procedures required at particular times. (Tr. pp. 26-27, 36-37, and 52; and Testimony of Grievant, Karleana Meeks, Minnie Vandall, Donita Beard, John Richardson.)

7 7. CSEU's file cabinet in which negotiables are locked is, itself, to be locked, as there is no lockable drawer inside the cabinet. The file cabinet keys were kept in a desk in the file room or in the receptionist's desk, in a drawer accessible by all workers, in contravention of the Common Chapters Manual requirements. The file cabinet contains forms used by all CSEU legal assistants, office assistants, and secretaries. Grievant was not the only employee to use the file cabinet.

8 8. Ms. Phipps gave Grievant satisfactory to very good evaluations from the time she was hired by CSEU through December of1994. G. 5. Ms. Phipps was promoted in March 1995, and thereafter was no longer Grievant's supervisor.

9 9. From February 1995 through May 1995, Grievant was supervised by Ms. Staples, who was filling in while the Team Leader position was vacant. In May 1995, Ms. Davis became Grievant's supervisor.

10 10. Ms. Staples evaluated Grievant's performance for the period from January 1, 1995 to June 30, 1995. She evaluated Grievant's performance in all areas as "Fair" and made voluminous comments in an attachment noting deficient performance. The evaluation form was signed by Grievant under protest on September 28, 1995. As a result of a grievance filed regarding the evaluation, certain portions of the written comments were deleted. However, the remainder shows marginal or unsatisfactory performance in several areas, including negotiables handling. R. 1.

11 11. On June 8, 1995, a temporary employee filling in for Grievant found a one-dollar bill and a check for one dollar in Grievant's desk drawer, one of which was attached to a receipt dated in February 1992. Ms. Staples and John Richardson, Child Advocate Attorney, confronted Grievant with this information when she returned to work. She was given a copy of memoranda and policy on negotiables handling, and was counselled about proper procedures for handling negotiables and the importance of timely processing them. Grievant was specifically instructed not to keep negotiables in

her desk drawer.

12 12. In mid-July 1995, several checks were found by Ms. Davis on a work table which all employees used in common. Grievant wassuspected of having left the checks there, and Ms. Davis again counselled her as to proper procedures.

13 13. On September 15, 1995, a Friday, Minnie Vandall, a CSEU legal assistant, received two hand-delivered checks. Ms. Vandall gave the checks to Grievant and told Grievant to "special handle" (See footnote 5) them. There was a difference of opinion between Grievant and Ms. Vandall over proper handling of the monies. Grievant told Ms. Vandall she would place the checks in the Financial Clerk's safe overnight, as Grievant did not know how to properly process the checks. On Tuesday, September 19, 1995, Grievant placed a coupon with one of the checks on Ms. Vandall's desk. Ms. Vandall asked Grievant for the other check, and observed Grievant remove the check from Grievant's desk drawer. Ms. Vandall then completed a new coupon and form covering both checks. Ms. Davis discussed this incident with Grievant, and specifically reminded her of Respondent's policy not to keep negotiables overnight, after numerous appointments to do so were cancelled due to Grievant taking sick leave. It was Grievant's responsibility to process the checks after Ms. Vandall had relinquished them to Grievant's custody.

14 14. On October 4, 1995, Grievant signed a statement that she understood the negotiables policy. R. 3.

15 15. On October 19, 1995, Grievant failed to appear at a scheduled staff meeting. Grievant was sought out by Mr. Richardsonand was brought to the meeting. During the portion of the meeting where negotiables handling was discussed, Grievant left the room angrily, stating "I'm sick of all this." Immediately after the meeting concluded, Mr. Richardson and Ms. Davis informed Grievant that her conduct was unacceptable.

16 16. Respondent notified Grievant by letter dated November 7, 1995, that she was being suspended for three days without pay from December 1, 1995 to December 5, 1995, and that she was being placed on a 90-day improvement plan. The letter stated "[t]he reason for this personnel action is your unacceptable work performance," and specifically noted the incidents on June 8, 1995; mid-July 1995; and September 15, 1995. R. 1. This three-day suspension was grieved.

17 17. Grievant's performance improved during the 90-day improvement period. R. 3, memorandum dated January 5, 1996.

18 18. On February 6, 1996, nine checks and money orders, totalling over $900 and dated from January 30, 1996 through February 3, 1996, were found in the file cabinet in which negotiables were to be secured. Grievant was not present, as she took sick leave that day. When confronted the next day, February 7, 1996, Grievant stated that all the items had been received on February 5, 1996. As the computer was inoperable, Grievant stated, she was unable to process the negotiables immediately, so she locked them in the file cabinet. She then forgot about them. Ms. Davis gave Grievant a verbal warning.

19 19. On Monday, October 21, 1996, Carolyn Lafferty, an Office Assistant II, was acting as Grievant's backup, since Grievant wassick. She processed the mail late in the morning. She found the file cabinet unlocked, with two checks and a money order inside. The checks were both dated October 16, 1996, and had not been "logged in" in accordance with standard procedure. Grievant was responsible for processing negotiables on the preceeding work days, October 17 and 18, 1996. Ms. Davis confronted Grievant, who stated she did not remember seeing these negotiables and that she could not explain how they got there or who was responsible. Grievant did not deny that she processed the mail and negotiables on the preceeding work days, but suggested that other employees may have left the negotiables in the file cabinet, as all had access to it.

20 20. By letter dated December 5, 1996, Respondent notified Grievant that Grievant's employment with CSED would be terminated effective December 30, 1996. Grounds for dismissal were specified on page 3 of the letter as "deliberate neglect of your duties" and "poor performance... sufficient to... determine that you did not meet a reasonable standard of conduct." The letter specifically based dismissal on the incident of October 15, 1996, and also referenced the incidents on June 8, 1995; mid July 1995; September 17, 1995; and February 6, 1996. Respondent allowed Grievant to continue working during the notice period. This dismissal was grieved.

21 21. On December 13, 1996, CSEU had a training session regarding confidentiality issues, which Grievant attended. Grievant had a microcassette tape recorder with her at that session, which was in plain view. Ms. Staples questioned Grievant during a break, and Grievant stated she was not taping the session. Grievant subsequently refused Ms. Staples' requests to hand over the recorder and tapes, to take the recorder to the car, or to leave the meeting. Because of Grievant's refusal to obey any of these instructions, Ms. Staples felt a breach of confidentiality was possible, so she cancelled the rest of the meeting.

22 22. Upon return to the office following the cancellation, another employee stated Grievant had her tape recorder in the bay area. Ms. Staples directed Grievant not to tape anything in the office. Grievant refused to give intelligible answers to questions about whether she had taped office conversations, or whether she would comply with directives not to tape conversations. Ms. Staples then verbally suspended Grievant for the remainder of the 15 day notice period. (See footnote 6) Ms. Staples directed Grievant to relinquish her keys to the building and leave. Grievant refused. Ms. Staples threatened to call police. Grievant gave another individual her keys, and left the building.
23 23. On December 20, 1996, Respondent confirmed in writing the verbal suspension without pay of December 13, 1996, on the grounds of insubordination. The letter noted Grievant's refusal to comply with directives of the supervisor, refusal to answer questions, and refusal to relinquish the keys to the building. This suspension was grieved.

DISCUSSION

In disciplinary proceedings involving state employees, W. Va. Code §29-6A-6 places the burden of proof on the employer, and thestandard of proof is by a preponderance of the evidence. Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). The employer must show that the employee engaged in the conduct complained of and that the conduct was of a substantial nature directly affecting the public's interest. Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980). The employee bears the burden on any affirmative defenses raised. Smith v. W. Va. Div. of Corr., Docket No. 95-CORR-547 (June 28, 1996).

State employees, such as Grievant, who are in the classified service can only be dismissed for cause, and usually must be given 15 days' notice (See footnote 7) and an opportunity to respond to the charges. Section 12.02, Administrative Rule, W. Va. Div. of Personnel. "Cause" means "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 22, 1990); W. Va. Code §29-6A-6. The dismissal notice must set out sufficient facts of alleged misconduct so that the details are known with some particularity, and an act of

misconduct should be identified by date, specific or approximate, unless its singular characteristics leave no reasonable doubt whenit occurred. Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977).

A. Suspension letter of November 21, 1995:

The 1995 suspension letter specifically cited "unacceptable work performance" due to "irresponsible and careless handling of negotiables," as demonstrated by incidents on June 8, 1995; mid- July 1995; and September 15, 1995. R. 1. The letter also noted that Grievant's most recent performance evaluation indicated the overall quality of her work was barely acceptable. A three day suspension without pay was imposed "to emphasize the seriousness of [Grievant's] failure to meet the expectations of [her] position." Grievant was informed that her "casual and irresponsible handling of negotiables" would not be tolerated, and that her "performance in many areas has fallen below tolerance level," and a ninety day improvement period was established. The letter went on to specify performance expected, including immediate processing of negotiables on the same day as received, following standard procedure, and checking the locked file cabinet at least twice each day. R. 1. Each of the incidents upon which the suspension was based must be considered, to determine whether Respondent has met its burden.

Evaluation: While Grievant signed the evaluation under protest, and grieved it, with the result that some written comments from Ms. Davis were deleted, the evaluation still shows performance problems in a number of areas, several of which are unrelated to negotiables processing. For instance, Grievant's handling and delivery of mail, and taking and delivering telephone messages were criticized, as well as her handling of negotiables. The evaluationoverall shows that Grievant's supervisor had grave concerns regarding Grievant's performance, and clearly communicated these concerns to Grievant.

June 8, 1995: Respondent proved that two dollars were found in Grievant's desk drawer, one of which was attached to a receipt dated February 18, 1992. However, Respondent failed to prove that Grievant had placed the monies in the desk or knew of their presence, and it failed to rebut Grievant's testimony that other employees routinely slipped monies into her locked desk drawer in 1992.

Still, Respondent proved that its negotiables procedures were reviewed with Grievant when Ms. Staples and Mr. Richardson confronted her about the incident on June 13, 1995. The testimony of

Ms. Staples and Mr. Richardson is generally deemed more credible than that of Grievant, who stated that she was not given a copy of the negotiables handling policy on this date. Grievant's testimony was muddled and sometimes internally inconsistent on a number of points, and she was evasive in answering questions on cross- examination. Ms. Staples and Mr. Richardson gave consistent accounts of this and other incidents, and their answers were straightforward. After being counselled on June 13, 1995, Grievant was clearly on notice that Respondent was concerned about her negotiables handling, that she needed to adhere to handling requirements, and that requirements were embodied in written policy.

July 1995: While moving work areas within the office, Ms. Davis found a stack of checks on a commonly used work table. Unidentified staff allegedly told Ms. Davis Grievant had placed the checks there. Ms. Davis directed Grievant to process the checks. Grievant denied that she placed the checks there, although she was unable to explain how checks got to that location.

Respondent's rather vague evidence regarding this incident is insufficient to prove that Grievant placed the checks on the table. No allegation was made that Grievant did not appropriately handle these checks when they were given to her for processing afterward.

September 15, 1995: On this Friday, Minnie Vandall, a CSEU legal assistant, gave two checks to Grievant, telling her to "special handle" them, as a lien was affected. There was a difference of opinion between Grievant and Ms. Vandall over proper handling of the monies, so Grievant left the checks in the safe. On Tuesday, September 19, 1995, Grievant processed the checks. Ms. Davis discussed this incident with Grievant on September 19, 1995, and specifically reminded her of Respondent's policy not to keep negotiables overnight.

Grievant's testimony generally agreed with that of other witnesses regarding this incident, although she questioned Ms. Vandall's testimony as to when Grievant gave her the coupon and check. Ms. Vandall's testimony that the checks were not prepared for forwarding until Tuesday, September 19, 1995 is credible, as Ms. Vandall prepared a memorandum on September 22, 1995 which referenced this date and her testimony was supported by the recollections of Ms. Staples and Ms. Davis. Grievant was unable to state with certainty when she acted. Grievant testified that, because the computer was not functional, she could not process the checks upon receipt, and later she forgot that she had locked them in the file cabinet. Grievant did not contest Ms. Vandall's and Ms. Staples' testimony that it was Grievant's responsibility to process the checks after Ms. Vandall had

relinquished them to Grievant's custody. Grievant's admissions are sufficient to show that Grievant failed to properly handle the negotiables when she failed to determine the appropriate handling of the checks on the date she received them. She also failed to properly handle the negotiables when she failed to process them on two following work days.

Respondent showed that Grievant improperly handled negotiables on this occasion. Clearly, mishandling negotiables at CSEU has a substantial and direct effect on the rights and interests of the public, particularly those citizens whose finances are impactedby child support payments. In light of prior occasions when Respondent expressed its concern about Grievant's handling of negotiables, and prior individual counselling and training sessions, Respondent's determination to suspend Grievant without pay for three days is not unreasonable, even if based upon the September 15, 1995 incident alone. This suspension was for good cause.

B. Dismissal letter of December 5, 1996:

Respondent's dismissal letter of December 5, 1996 was based on the incident of October 21, 1996. It also referenced other incidents, including those for which Grievant had previously been suspended in 1995, and an incident of February 6, 1996. Groundsfor dismissal were specified as "deliberate neglect of your duties" and "poor performance... sufficient to... determine that you did not meet a reasonable standard of conduct."

February 6, 1996: An employee processing negotiables in Grievant's absence found nine checks and money orders in the negotiables file cabinet. Grievant admitted that all the negotiable items had been received on February 5, 1996. She stated since the computer was "down" she could not process them immediately. Grievant stated that she put the items in the file cabinet to process later, but forgot. Ms. Davis gave Grievant a verbal warning.

Again, Grievant essentially admitted to the improper handling of these items, simply by admitting she forgot about the negotiables. Thus, Grievant admitted to negligence and failure to adhere to established agency policy, if not willful neglect of duty or incompetence. However, as a verbal warning was given, Respondent cannot rely on this incident to independently support its December 5, 1996 dismissal. Respondent must prove that the incident of October 21, 1996 is sufficent grounds for dismissal.

October 21, 1996: On this Monday, Carolyn Lafferty, an Office Assistant II, was acting as Grievant's backup, since Grievant was sick. She processed the mail in the late morning. She testified

that she found the file cabinet unlocked, with a money order and two checks dated October 16, 1996 inside. She asked everyone in the office if they had accepted any monies that day, she said. No one had, according to Ms. Lafferty's testimony. Ms. Davis stated that, according to her records, Grievant was responsible for processing negotiables on the two preceeding work days, October 17 and 18, 1996. Ms. Davis later inquired of Grievant, who stated she did not remember seeing these negotiables. Grievant could not explain how they got there or who was responsible. Ms. Davis was satisfied that the checks had been received on Friday, from the dates on the checks themselves and by having determined that the Financial Clerks had not returned checks left in their safe. (See footnote 8)

Grievant testified that she did not believe she had handled those items, as she had begun leaving herself notes about negotiables which could not be immediately processed, so she would not forget. Grievant argued that some other unidentified employee may have put the negotiables in the file cabinet, as other employees also received checks and money orders, and had access to keys for the file cabinet. Moreover, the file cabinet contained forms used by many employees in the daily course of business. Thus, it is possible that other employees could have put the items in the file cabinet, and that other employees may have left the cabinet unlocked.

Grievant's point is well taken. Respondent failed to call all of the other employees in the office that day as witnesses, and, other than Ms. Lafferty, those who were called as witnesses were not asked about this issue specifically. Thus, the evidence that no other employees had handled those negotiables is hearsay. Whilehearsay is not barred as evidence in grievance proceedings, in this instance it is deemed insufficient to prove the matter for which it is asserted. Respondent failed to prove that no other employees placed the negotiables in the file cabinet. However, this is markedly different from showing that other employees did place the negotiables in the file cabinet.

Respondent proved, by a preponderance of the evidence and through Grievant's admissions, that 1) Grievant used the file cabinet to secure negotiables; 2) Grievant had previously forgotten about negotiables she placed in the file cabinet; 3) unprocessed negotiables were discovered in the file cabinet by Grievant's substitute on October 21, 1996; 4) the negotiables were dated October 16, 1996; and 5) Grievant was responsible for processing negotiables on October 17 and 18, 1996, the two work days immediately preceeding this discovery. These facts are sufficient to prove that, more likely than not, Grievant had placed the negotiables in the file cabinet and failed to process them in

accordance with policy and procedure. Grievant's statement that she did not remember doing this, and the mere possibility that another employee could have placed the negotiables there, are insufficient to overcome Respondent's evidence.

The evidence as a whole shows that, more likely than not, Grievant had improperly handled negotiables again. Respondent carried its burden of proving, by a preponderance of the evidence, that Grievant engaged in the conduct upon which its dismissal was based. Taken with prior occurrences and disciplinary actions, Grievant's failure to adhere to established policy, even afterrepeated counselling, constitutes incompetence bordering on deliberate neglect of duty, and failure to meet a reasonable standard of conduct. Dismissal was permissible under these circumstances.

C. Suspension letter of December 20, 1996:

Grievant was subsequently suspended without pay for the remainder of her notice period on the grounds of "flagrant and blatant insubordination," verbally on December 13, 1996 and confirmed by letter dated December 20, 1996. (See footnote 9) The incidents of December 13, 1996 which led to Grievant's second "suspension" are now considered.

On December 13, 1996, Grievant attended a regional training session at which confidential information was discussed. Grievant had a microcassette tape recorder with her, on the table. Grievant refused Ms. Staples' requests to hand over the recorder and tapes, to take the recorder to her car, or to leave the meeting. Ms. Staples then cancelled the meeting, in order to protect client confidentiality.

Upon return to the office, another employee stated Grievant had her tape recorder in the work area. Ms. Staples directed Grievant not to tape anything in the office. Grievant would not state if she would comply, refusing to give an intelligible answer to this and other questions.

Ms. Staples then verbally suspended Grievant for the remainder of the 15 day notice period. Ms. Staples directed Grievant to handover her keys to the building, and to leave the premises. Grievant refused. After Ms. Staples threatened to call police, Grievant gave another individual her keys, and left.

Although she sought to excuse her conduct, stating that Ms. Phipps had approved of her taping training sessions, and that she had not sought to hide her tape recorder, Grievant essentially admitted to the above facts. Even if Grievant believed Ms. Staples' instructions to be unnecessary or

in error, the proper course of action was for Grievant to comply, even if she did so under protest. Her outright refusal to comply with reasonable and lawful demands of her supervisor proves insubordination.

Acts of insubordination, such as failing to obey a lawful order of a superior, have been held to constitute gross misconduct justifying immediate dismissal. Bone v. W. Va. Dep't of Corr., 163 W. Va. 253, 255 S.E.2d 919 (1979). See also, Artrip v. W. Va. Dept. of Health and Human Services, Docket No. 94-HHR-146 (Sept. 13, 1994). Suspension without pay for the remainder of Grievant's notice period was justified.

D. Affirmative defenses: (See footnote 10) **Insufficient notice of charges:** Grievant, through her representative, asserted that Respondent impermissibly altered the basis for its disciplinary actions when it asserted that Grievant had mishandled negotiables not just in **where** they were kept, but in **how** they were processed, citing Yates v. Civil Serv. Comm'n, 154 W. Va. 696, 178 S.E.2d 778 (1971) and Mackin v. Civil Serv. Comm'n, 155 W. Va. 139, 181 S.E.2d 684 (1971). However, both cases are easily distinguished from Grievant's situation.

In Yates, the employee was dismissed verbally, and no reasons for the dismissal were given at all. Yates held that an employee must be given specific reasons justifying dismissal at the time she is dismissed. Grievant was given reasons for her dismissal in the letter of December 5, 1996.

In Mackin, the employee was given a written dismissal letter, which merely stated dismissal was for "negligence..., inefficiency... and dereliction of duty," without any further specification of charges. Mackin held that such charges, without further information, are conclusions rather than specific reasons for discharge. The Mackin decision finds the employer must tell the employee "in what specific manner he has performed unsatisfactorily. Only if he knows the specific charge against him can the employee adequately appeal and defend his position."

Here, Respondent gave Grievant adequate reasons for dismissal at the appropriate time. Respondent clearly was dissatisfied with Grievant's performance in handling negotiables, and cited specific incidents of mishandling in its dismissal letter. Respondent's dismissal letter included situations involving location, security,and timely processing of negotiables. Grievant was clearly advised and able to defend her position.

Inadequate training on changing procedures: Grievant argued that the policy and procedures governing negotiables processing were constantly changing, and that Respondent was unreasonable

in its expectations of her. A similar argument succeeded in Wiggins v. Bureau of Employment Programs, Docket No. 94-BEP-599 (Jan. 31, 1995), where the Grievant's dismissal was mitigated. Certainly, evidence was presented which showed that many CSEU employees were confused about which locations were acceptable for securing negotiables in different situations and at different times. For that reason, the locations of negotiables, as opposed to the timely handling of them, has not been found to justify the disciplinary actions discussed above.

However, it was clear to all witnesses that negotiables were to be processed upon receipt, within 24 hours, if not earlier. Moreover, Grievant was personally instructed about timely processing on numerous occasions and given copies of relevant policies, which the grievant was not in Wiggins. Therefore, failure to process negotiables within 24 hours of receipt, alone, shows Grievant's failure to adhere to established policy and procedure. That several aspects of the procedure were in something of a state of flux does not excuse her failure to adhere to an established, and well-documented, requirement.

Mitigation: Grievant submitted evidence of her satisfactory work performance at CSEU prior to the change in supervisors inFebruary of 1995. (See footnote 11) While Grievant's initial performance was acceptable, Grievant's subsequent performance was clearly inadequate. Overall, her past work history at CSEU was unremarkable. This evidence is insufficient to show that mitigation is in order. See Pingley v. Div. of Corr., Docket No. 95-CORR-252.

Moreover, other evidence presented in this case showed that Grievant had been insubordinate prior to December 13, 1996. On October 19, 1995, Grievant failed to attend a scheduled staff meeting. After being brought into the meeting, which was held to discuss negotiables policy and procedure, Grievant stated "I'm sick of all this," and abruptly left the room, slamming the door. Grievant stated that her behavior resulted from her feeling that her supervisors had called the meeting specifically to harass her about negotiables handling. However, she admitted the facts of the incident.

Willful failure to attend scheduled meetings and ignoring orders of a superior to attend such meetings has been held to be insubordination constituting gross misconduct, which justifies termination of employment. Dooley v. Bureau of Employment Programs, Docket No. 93-BEP-128 (Aug. 30, 1993). Grievant's storming out of a meeting she was clearly required to attend on this date constituted insubordination, at a minimum. **Summary:** The evidence supported somewhat

Grievant's assertion that negotiables policy and procedure was in a state of flux during the time covered by events discussed above. However, Respondent still proved that Grievant mishandled negotiables on several occasions, after repeated counselling and training, and progressive disciplinary actions. She also was insubordinate. Respondent engaged in progressive discipline by counselling Grievant, giving verbal reprimands and warnings, and imposing a three day suspension prior to terminating her employment. Grievant failed to prove any affirmative defenses. Thus, Respondent proved that Grievant's performance warranted discipline, up to and including dismissal. Thereafter, flagrant insubordination justified her immediate suspension without pay for what remained of the 15 day notice period prior to her dismissal on December 30, 1996.

CONCLUSIONS OF LAW

1 1. In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's dismissal and suspension by a preponderance of the evidence. W. Va. Code §29-6A-6; Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92- HHR-486 (May 17, 1993).

2 2. State employees in the classified service, such as Grievant, can only be disciplined or dismissed for cause, which means "misconduct of a substantial nature directly affecting therights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Ser. Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Syl. Pt. 1, Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3 3. Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." McKinney v. Wyoming Co. Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992). "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). Failure to obey a lawful order of a superior constitutes insubordination and gross misconduct justifying the employee's dismissal. Bone v. W. Va. Dept of Corr., 163 W. Va. 253, 255 S.E.2d 919 (1979); Payne v. W. Va. Dept. of Trans., Docket No. 93-

DOH-454 at 11-12 (Apr. 29, 1994).

4 4. Respondent proved good cause justifying its suspension of Grievant for three days in 1995 because of her unsatisfactory job performance. Grievant's subsequent mishandling of negotiables established cause for Respondent to dismiss Grievant from its employment.

5 5. Respondent proved by a preponderance of the evidence that Grievant was insubordinate in refusing to obey the reasonable orders of her superior. Her insubordination on December 13, 1996was shown to be gross misconduct which disrupted the workplace, affecting the rights and interests of the public. The insubordination constitutes good cause for Respondent's suspension of Grievant without pay immediately prior to her termination date.

6 6. Grievant failed to prove any affirmative defenses, or that mitigation of the discipline was warranted.

Therefore, this grievance is hereby **DENIED.**

Any party may appeal this decision to the Circuit Court of the county in which the grievance occurred. 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.

Dated: July 2, 1997

JENNIFER J.MEEKS **Administrative Law Judge**

Footnote: 1

The grievance regarding withholding personnel file information was not addressed at the hearing or in Grievant's post-hearing submission, and is therefore deemed abandoned.

Footnote: 2

No action had been taken on the November 21, 1995 grievance at the lower levels, and the parties advanced it to Level IV, waiving the right to hearings and decisions at the lower levels. As no formal grievance documents were filed at Level IV regarding the 1995 suspension, the parties again confirmed their waivers in a recorded telephone conference of June 30, 1997.

Footnote: 3

Legal assistants have client contact, and sometimes receive cash, checks and money orders which are hand-delivered to CSEU.

Footnote: 4

"Tr." refers to the transcript of a Level III grievance hearing held on October 28, 1996. That grievance was separate from those involved here, and addressed the evaluation which is discussed in Finding Number 11, below.

Footnote: 5

"Special handling" was not specifically described, but the evidence permits an inference that it meant, in this instance, completing at least one form different from those usually completed, thus notifying other handlers of the checks that they were not routine payments.

Footnote: 6

At the time, Ms. Staples was not aware that this suspension would be without pay.

Footnote: 7

Advance notice is not required in cases of gross misconduct. Section 12.02, Administrative Rule, W. Va. Div. of Personnel.

Footnote: 8

One of the Financial Clerks testified that she remembered Ms. Davis inquiring about the issue. The other Financial Clerks were not called as witnesses.

Footnote: 9

Although phrased as a suspension, the action essentially constitutes immediate dismissal from employment.

Footnote: 10

Grievant abandoned the affirmative defense of discrimination. However, this defense would have failed. The evidence showed that other employees received verbal warnings or reprimands for mishandling negotiables. However, no other employee was shown to have mishandled negotiables on more than one occasion, and thus no other employee was similarly situated to Grievant, who mishandled negotiables repeatedly. There was no evidence to support Grievant's claim that Ms. Staples and Ms. Davis were "out to get her" from November of 1994 because Grievant applied for a position and successfully got her position reclassified. Indeed, this claim is implausible in view of the fact that Ms. Davis did not become Team Leader until May 1995. Even if Grievant had shown some illegitimate animus, Respondent proved legitimate, non- discriminatory reasons for its disciplinary actions, as noted above.

Footnote: 11

Grievant testified that she had worked for the Alcohol Beveridge Control Commission, and for another state agency, prior

to her employment at CSEU. However, no evidence regarding her work history at these other agencies was submitted.