DANIEL WILEY,

Grievant,

v. **DOCKET NO. 97-DNR-274**

WEST VIRGINIA DIVISION OF NATURAL RESOURCES, PARKS AND RECREATION,

Respondent.

D E C I S I O N

On September 10, 1996, Daniel Wiley (Grievant), a Supervisor I employed by Respondent West Virginia Division of Natural Resources (DNR), filed a grievance at Level I, in accordance with W. Va. Code §§ 29-6A-1, et seq., challenging his suspension without pay for ten days. The grievance was processed through the lower levels of the grievance procedure without resolution, and advanced to Level III, where a hearing was conducted on April 11, 1997. (See footnote 1) The grievance was thereafter denied in a written decision issued by Grievance Evaluator Jack McClung on June 2, 1997. Grievant appealed to Level IV onJune 6, 1997. Following a telephonic pre-hearing conference on September 5, 1997, this matter was separated from another grievance. Thereafter, for administrative reasons, this matter was reassigned to the undersigned administrative law judge. After a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on November 4, 1997. The parties elected to submit written post-hearing briefs, and this matter became mature for decision on January 27, 1998, following receipt of timely submissions from the parties. Consistent with W. Va. Code § 29-6A-4, and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

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

DNR has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determina tions are required. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96- HHR-371 (Oct. 30, 1996); 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). Accordingly, it is necessary to discuss certain aspects of this matter in detail.

On August 26, 1996, DNR Parks & Recreation Department Director Charles B. Felton, Jr. issued a 10-day suspension to Grievant stating the following as the basis for his action:

> The purpose of this letter is to advise you of my decision to suspend you without pay for a period of ten working days from your duty as Supervisor I with the West Virginia Division of Natural Resources, Beech Fork State Park, and to issue a final notice of your pending dismissal for future violations. This personnel action is being taken in accordance with the West Virginia Division of Personnel Administrative Rule Section 12.03 and will be scheduled at the direction of your immediate supervisor.
>
> On December 26, 1995, you were issued a letter of reprimand by Superintendent Debbie Keener which clearly outlined her expectations of how you should discharge your responsibilities and the type of attitude and behavior you were expected to exhibit. On Thursday, May 30, 1996, you were informed by District Administrator Robert Beanblossom that he had received reports from Superintendent Keener and Assistant Superintendent Mathis regarding an incident in which you were involved which occurred on May 20, 1996, that seemed contradictory to the above mentioned expectations. You stated to Mr. Beanblossom that you believed the incident in question was harassment on the part of Assistant Superintendent Mathis. Subsequent to that conversation, Mr. Beanblossom visited the park and conducted an inquiry by interviewing several members of park staff including yourself. After reviewing all of the information available to me including the results of Mr. Beanblossom's on site-inquiry, I have decided that a suspension is warranted.
>
> So that you will be aware of the specific reasons for this action, I offer the following:
>
> Beginning on May 15, 1996, Beech Fork State Park experienced flooding as a result of heavy rains. Over the next few days, the effect of this flooding was:

Closure of the park to the public for a period of eight days beginning May 16, 1996.

High water prevented access to the assistant superintendent's residence and allowed access to the maintenance area only by boat or canoe for a period of approximately four days.

Total submersion of at least two campground electrical systems.

The necessity to retrieve approximately 100 picnic tables from the lake.

Extensive clean up of debris and other drift.

You observed approved annual leave beginning on Wednesday, May 15, 1996, through Friday, May 17, 1996, and then were on regularly scheduled days off on May 18 and 19. You returned to duty on Monday, May 20, 1996, and reported to the park maintenance shop. At approximately 7:00 a.m. Assistant Superintendent Mathis visited the maintenance shop to share the weekend flooding information with the staff and to initiate clean up assignments.

On arrival at the maintenance shop, Assistant Superintendent Mathis outlined to the crew some of the effects of the flooding during the past four days. During the conversation, some of the crew questioned and commented to Mr. Mathis about the damage and the mess left by the receding water. You were seated on a mower near the door which Mr. Mathis entered and the rest of the crew was standing a short distance from you at the work bench and time clock. You did not offer to join Mr. Mathis upon his arrival into the shop area but were within ten feet of him and the rest of the crew. During this conversation with the crew regarding the flood, Mr. Mathis responded to questions and comments from the crew and developed a clear impression that most of the staff had driven through the park to see what it looked like since the water had receded. (During an investigation into this incident on June 17, 1996, by your own admission to District Administrator Beanblossom, you were aware of the severity of the flooding since you had observed the area from the check-in booth to the maintenance shop.) Mr. Mathis then commented about the need for repairs to be made to the electrical systems, clearing of debris and trash, and the fact that there was a large number of picnic tables to be retrieved from the lake. He then departed the shop area to begin picking up trash fully expecting to see the crew heading out to begin the clean-up in a short period of time. Mr. Mathis believed that with your years of service and the number of floods on the Beech Fork grounds you had personally observed that it would be inconceivable that you would not understand that the flood clean-up would be top priority especially since only four days remained

before the busiest holiday and weekend of the year and since he had personally visited the maintenance shop that morning to emphasize that flood repair had the highest priority.

After approximately 30 minutes, Mr. Mathis realized that no other staff was beginning flood clean-up within the park, and he returned to the maintenance shop area. On arrival at the maintenance shop, Mr. Mathis observed the maintenance crew mowing grass at this non-public use area. Mr. Mathis immediately inquired of you as to why you were attending to this non-priority duty. You responded that Mr. Mathis had been vague in his directions and not been specific in his assignments, so you assigned staff to mow grass at the maintenance shop.

As a supervisor with more than 15 years of experience at Beech Fork State Park, you should have realized the priority of flood clean-up assignments even without any direction from Assistant Superintendent Mathis. Again, during an investigation into this particular incident by District Administrator Beanblossom on July 17, 1996, each crew member stated that they were aware of flooding that had occurred and most believed that the flood clean-up should and would be the first priority. Even considering that you were on annual leave and regularly scheduled days off immediately preceding the work day of Monday, May 20, 1996, you still should have possessed sufficient knowledge regarding the need to perform flood clean-up and repair that you would have realized the inadvisability of assigning staff to mow grass in an area that was not even specifically on the original work plans for that day.

As stated earlier you were given a reprimand on October 26, 1995, by Superintendent Debbie Keener wherein among other things she stated, in part, that:

> "...I have serious concern about your support for the mission of the park. It is clear that your energies are often devoted to your own agenda rather than that of the park..."

> "...you fail to bring a balance to work priorities and often assign a low priority to the appearance and function of public-use area and facilities."

> "Other concerns relative to your priorities and supervisory practices include concentrated attention to the maintenance area when the lawns in the campground and picnic areas are being neglected."

I find this most recent incident a direct continuation of the conduct and behavior that the December 26, 1995, written reprimand had hoped to redirect. Therefore, I can only conclude that your actions were deliberate.

You claim that Assistant Superintendent Mathis' instructions were vague yet those instructions were issued some ten feet from your location during a conversation in which you chose not to actively participate but which was clearly within your hearing range. You could have sought clarification of the directions from Mr. Mathis if needed. A supervisor should not have to inform an employee either to join or not to depart from a conversation in which work instructions are being issued. In fact, Mr. Mathis had every reason to believe, since you were within hearing range and did not ask questions, that you clearly heard and understood his instructions.

It is management's obligation to maintain good employee and employer relations within the work force. If an employer were to permit the behavior you exhibited from any employee and particularly a supervisory staff member such as yourself, it would create a source of mistrust of management willingness to take appropriate action to ensure continued good labor relations. Your behavior cannot be tolerated as it seriously diminishes both your ability and that of park management to exert leadership and maintain good labor relations.

As a Supervisor I, you serve as a role model for subordinate staff and are expected to observe a higher standard of conduct than your subordinates. It is your basic responsibility to create a model of how employees are to interpret and apply the agency's policies and procedures and how they are to respond to problems that they may confront in their daily activities. Your failure to perform your duties may no doubt cause you to be ineffective in providing leadership and is not acceptable behavior for other employees to emulate.

After careful consideration I have concluded that your neglect of your duties was deliberate and so irresponsible as to warrant my recommendation of this suspension. The West Virginia Division of Natural Resources has the right to expect its employees to maintain and observe a standard of conduct which will not reflect discredit upon the abilities and integrity of their employees or create suspicion with reference to their employees['] capacity in discharging their duties and responsibilities. You did not meet this standard of conduct. Such negligence cannot and will not be tolerated. Any future act of misconduct will result in more severe disciplinary action.

So that you may realize the seriousness of your continued actions, I would be remiss if I failed to share with you that willful disregard of the employer's interests or wanton disregard of the standards of behavior which the employer has a right to expect of its employees results in a determination of "gross misconduct." Additionally, continual demonstration of conduct and behavior that is judged to be irreconcilable with your supervisors' lawful and reasonable expectations, may result in dismissal from employment. Therefore, you must learn to discipline yourself in the matters

previously cited.

DNR Ex 5 at L III. The gist of the charges against Grievant is that he engaged in willful (See footnote 2) neglect of duty by either deliberately or wantonly failing to perform his assigned duties as a Supervisor I at BFSP on the morning of May 20, 1996. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Furthermore, "[e]mployees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). The pivotal issue to be resolved in this matter is whether Grievant knew, or reasonably should have known, the duties he should have performed during the first thirty minutes or so of his work day on May 20.

After 10 years as an Army officer following graduation from Marshall University, Stanley Mathis began working for DNR in 1991. In 1993, he became Assistant Superintendent (A/Supt.) at BFSP. By that time, Grievant had been working at BFSP as a Supervisor I in charge of the Maintenance Department since 1981, having started at BFSP as a Conservation Aide in 1978. A/Supt. Mathis favorably evaluated Grievant for 1993 and 1994 in the highest category of "exceptional," and personally considered him an "excellent" employee during that time. See G Exs B & C. After Deborah Keener becameBFSP's Superintendent in 1995, A/Supt. Mathis became aware Grievant filed grievances over a reprimand issued by Supt. Keener, and later, the evaluation he received from Supt. Keener for 1995. See G Exs A & D.

A/Supt. Mathis described how, starting on Wednesday, May 15, 1996, BFSP was subjected to "major flooding" which covered approximately 85 percent of the public use camping facilities in a park comprising nearly 3000 acres. A/Supt. Mathis' residence at BFSP was surrounded by water, but not flooded. Over the weekend, he had to use a rowboat to get his infant son to the doctor. Grievant was not present during these events, because he was on approved annual leave the previous Wednesday through Friday, and had Saturday and Sunday as his regular days off.

Following a written reprimand Grievant received from Supt. Keener in December 1995, Grievant had been required to attend a meeting each Friday morning with Supt. Keener and A/Supt. Mathis. The purpose of the meeting was to review the jobs completed by the Maintenance Department during the previous week, and plan the work to be done in the week ahead. Since this weekly meeting process had been instituted, Grievant's supervisors had no complaints about Grievant accomplishing their objectives, and Grievant acknowledged that the meetings made his job "easier." Because Grievant had been off work the previous Friday, no meeting had been held since the flooding began. Indeed, Grievant had been out of state for the past five days and was not aware that BFSP had experienced a flood until he drove through the park gate that Monday morning.

A/Supt. Mathis stated that he routinely went to the maintenance area at BFSP to speak with one or more of the employees, although he seldom appeared there at the start of the work day. On the morning of May 20, 1996, A/Supt. Mathis went to the maintenancearea at approximately 6:50 a.m. The normal working hours for Grievant, and those employees under his immediate supervision, are from 7:00 a.m. to 3:00 p.m. When A/Supt. Mathis entered the maintenance building via a garage door, Grievant was sitting on a lawn mower near the door. He asked Grievant if he had a good weekend, and Grievant replied, "yes, didn't you," or words to that effect. A/Supt. Mathis felt that Grievant's comment was inappropriate, given the flooding which occurred over the weekend.

A/Supt. Mathis proceeded over to a bench where most of the maintenance crew, approximately five or six employees, were "standing around." Some of the crew members asked how things had gone over the weekend, because they had been sent home on Friday when flooding kept them from doing any work. A/Supt. Mathis told the crew that they had a lot of work to do before Memorial Day, fishing picnic tables out of the lake, and picking up drift and debris which was so extensive, an end-loader would be needed.

A/Supt. Mathis admitted that he did not specifically talk to Grievant after going in the maintenance facility on the morning of May 20. Likewise, he gave no direct orders to Grievant regarding what he should do that morning. A/Supt. Mathis did approve an electrician's request to start checking the breakers in an area of the park where the flood waters had already receded. He estimated that Grievant was sitting approximately eight to ten feet from where he was talking to the rest of the maintenance crew. However, Grievant did not participate in the conversation. Moreover, A/Supt. Mathis' back was to Grievant while he talked to the rest of the maintenance crew.

Grievant testified that from where he was sitting, he was unable to hear anything A/Supt. Mathis said, except for the electrician obtaining approval to buy breakers. Two ofthe temporary employees on the crew remarked to A/Supt. Mathis about the most significant damage they had observed while going through the park. A/Supt. Mathis left the area about fifteen to twenty minutes after he arrived. He drove to the vicinity of the park office and started picking up trash. After noting that there were no vehicles or personnel arriving to assist with the clean-up, A/Supt. Mathis drove back to the mainte nance area. Upon arrival, he found the maintenance crew with lawn mowers and weed eaters, cutting the grass around the maintenance facility.

A/Supt. Mathis immediately confronted Grievant and told him there was a major holiday coming up, and he needed to get the park cleaned up, not to mow grass. He recalled Grievant's response as "you were vague, you weren't clear." Grievant recalled that A/Supt. Mathis addressed him in a scolding manner, and he simply replied, "Well, Stanley, what do you want us to do?" A/Supt. Mathis did not reply, but immediately left the area, and resumed cleaning up the park. At that point, Grievant instructed the crew to stop mowing, and they went to the point in the park where A/Supt. Mathis was working and started helping with the clean-up effort.

Later that morning, Grievant requested a grievance form from Supt. Keener, indicating that he wanted to file a grievance against A/Supt. Mathis for the manner in which he had spoken to him in the parking lot. Supt. Keener asked Grievant to hold off until she had a chance to get A/Supt. Mathis' side of the story. Thereafter, District Administrator Robert Beanblossom came to the park, conducted an investigation, and Grievant received the 10-day suspension which led to this grievance.

A/Supt. Mathis had driven through the park that morning after the water receded, to see which areas of the park needed the most work to reopen. Even as of 7:00 a.m. onMay 20, parts of the park were still under water or inaccessible due to flooding. Grievant testified that, upon arriving at work, he had likewise decided to look around the park and determine what clean-up could be accomplished that morning, including which areas were accessible and what tools would be required. Therefore, he assigned the crew to mow grass around the maintenance facility as "make work" until he could return.

Unlike Superintendent Keener and A/Supt. Mathis, neither of whom had apparently experienced a previous flood at BFSP, Grievant was confident that he and his crew could clean up the park in four days. Grievant estimated, without contradiction, that the five employees he assigned to mow around

the maintenance complex could finish that task in fifteen minutes. Moreover, Grievant estimated that he would be able to drive through the park, assess the damage, and return to the maintenance area within ten to fifteen minutes, and make appropriate work assignments to start cleaning up the park.

Grievant was previously reprimanded for insubordination and substandard performance in the execution of his duties as a Supervisor at BFSP. The suspension letter suggests that Grievant's conduct on May 20 was a continuation of the actions described in the earlier reprimand. To a certain extent, the undersigned agrees with that characterization. It is apparent that Grievant's performance on the morning in question properly caused Grievant's supervisors to question whether he had yet adopted their priorities as his own.

Accepting DNR's recitation of the flood-related damage which had transpired at BFSP during the days preceding that Monday morning, Grievant and his work crew faced a daunting task. The park had been severely flooded, there was an extensive amount of damage to be repaired, and the park was scheduled to reopen for the Memorial Day weekend in only four work days. Given these circumstances, both A/Supt. Mathis andGrievant were in agreement that there was not much time to waste. Because Grievant was less familiar with the specific damage than A/Supt. Mathis, Grievant reasonably determined that he could benefit from a short tour of the park facilities, in order to ascertain exactly what equipment and personnel would be required to get the park back in order. A/Supt. Mathis agreed that Grievant should have had an opportunity to survey the damage to the park before making his job assignments to the maintenance crew.

The evidence indicates that Grievant received no meaningful guidance from A/Supt. Mathis. Grievant credibly denied hearing most of A/Supt. Mathis' conversation with the crew. Because A/Supt. Mathis turned his back on Grievant after entering the maintenance facility, Grievant's testimony presented the most likely scenario. Indeed, for whatever reason, it appears that A/Supt. Mathis had already written off Grievant as the person to deal with in directing the maintenance crew. Thus, although Grievant could have obtained the information he needed to issue appropriate clean-up assignments from A/Supt. Mathis, Grievant should not be suspended because A/Supt. Mathis failed to impart his knowledge to Grievant without being asked.

It was suggested that proper protocol for a Supervisor I would have been for Grievant to stand up, greet A/Supt. Mathis, and join in the discussion with the rest of the maintenance crew. Ideally, this would have been appropriate. However, A/Supt. Mathis had control of the situation and could have

told Grievant to round up his employees so that he could explain to Grievant and the entire maintenance crew what had transpired over the weekend and what needed to be done over the next four days in preparation for the upcoming holiday. In any event, the undersigned is convinced that Grievant received no specific guidance from A/Supt. Mathis. Even if Grievant had heard the entire conversationbetween A/Supt. Mathis and the rest of the crew, A/Supt. Mathis did not give the crew any specific instructions beyond approving certain work to be initiated by the electrician. Grievant took no action to countermand that guidance.

Nonetheless, a reasonable Supervisor I with Grievant's length of experience would necessarily have recognized that flood clean-up would be the number one priority for the maintenance crew for the next four days, without any guidance from his supervisors. During Grievant's tenure at BFSP, he had previously dealt with four major floods and six minor floods. The record clearly indicates that BFSP faced a crisis on the morning of May 20, and Grievant became aware of that situation as soon as he drove in the park. It is also apparent that crisis management was not one of Grievant's attributes. Indeed, he had been soundly reprimanded for his inability to deviate from the routine priorities he had established over many years running the Maintenance Department at BFSP. Accordingly, it is imperative to characterize Grievant's response to the situation he confronted on May 20 correctly.

DNR suggests that Grievant's actions represented a deliberate and obstinate refusal to cooperate in the priorities Supt. Keener had set for BFSP and the Maintenance Department. Grievant claims he needed some time to plan what work his crew should tackle first, and decided to keep them busy mowing until he could figure out what to do. Ronnie Davis, one of the maintenance crew members, testified it was still so muddy when they started cleaning up trash and debris that morning, that it was difficult to stand up. He suggested Grievant should have delayed the clean-up effort even longer, until the mud dried up some and it was truly safe to walk about. Grievant's demeanor and candor during his testimony convinced the undersigned that his action, or lack thereof, did not represent an intentional and concerted effort to impede the reopening of BFSP, or disregard the previous guidance he had received from Supt. Keener. Although Grievant exercised very poor judgment in choosing the particular mode of "make work" for the crew to accomplish, it was completely sensible for Grievant to want to reconnoiter the park to survey the damage first hand and have that information before assigning tasks. Otherwise, even more time might be lost by sending crew members to work in an

area that was not even accessible due to continued flooding.

Rather than send his maintenance crew out to gather debris, the initiative upon which A/Supt. Mathis embarked, Grievant put his crew in a holding pattern, telling them to cut grass around the maintenance area until he returned from inspecting the flood damage. Undoubtedly, these employees could have been engaged in a number of tasks that were directly related to cleaning up the flood damage, even if it was just checking out the park equipment to verify that each tool and machine normally required to clear away the flood damage was in working order. Unfortunately, the make-work task Grievant chose to assign his crew that morning involved the same activity for which he had been expressly criticized in an earlier reprimand, placing the appearance of his work area around the maintenance facility ahead of the appearance of the public use areas in the park. To make matters worse, Grievant took several minutes to help get one or more of the mowers running.

The gravamen of the conduct for which Grievant was suspended, as emphasized near the end of his suspension notice, allegedly involved the "willful disregard of the employer's interests or wanton disregard of the standards of behavior which the employer has a right to expect." See DNR Ex 5 at L III. Although it was clearly established thatGrievant exercised substandard judgment for an experienced Supervisor I, his inability to deal with a dire predicament for BFSP was a direct result of Grievant's previously documented performance deficiencies, rather than either a conscious disregard or indifferent concern for the needs of his employer. Thus, DNR proved Grievant had a continuing problem involving failure to perform in accordance with the standards that could reasonably be expected from a long-term Supervisor I, but not that his decision to mow grass resulted from willful or wanton misconduct.

Because DNR failed to prove the charges against Grievant by a preponderance of the evidence, it is not necessary to address Grievant's affirmative defense that he was suspended in retaliation for filing prior grievances against his employer in violation of W. Va. Code § 29-6A-2(p). (See footnote 3)

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 Respondent West Virginia Division of Natural Resources (DNR) as a Supervisor I at Beech Fork State Park (BFSP).

2. Grievant's immediate supervisor is BFSP Assistant Superintendent (A/Supt.) Stanley Mathis. A/Supt. Mathis reports to BFSP Superintendent Deborah Keener. 3. From May 15 through May 19, 1996, BFSP was subjected to a major flood which covered approximately 85 percent of the public use areas on the 3000 acre park with water. As a result of the flooding, as of May 20, 1996, BFSP was closed to the public, and extensive work was required to get the park ready to reopen in time for the upcoming Memorial Day weekend, only four work days hence.

4. Grievant was on scheduled annual leave from May 15 through May 17, and did not work on May 18 and 19, his regular days off. Indeed, Grievant was out of state until the evening of May 19, returning to work at BFSP on the morning of May 20, to find that the park had been severely flooded, with some parts of the park still under water. Grievant had worked at BFSP for over 18 years, and had previously dealt with four major floods and six minor floods. Although Grievant was not fully aware of the extent of damage to BFSP, he believed that he and his crew could get the park in condition to reopen for the upcoming Memorial Day weekend in the next four work days.

5. A/Supt. Mathis came to the maintenance facility at BFSP at approximately 6:50 a.m., and spoke informally to some of the employees regarding the amount of damage the park had received and the magnitude of the work that needed to be accomplished in the next four days. A/Supt. Mathis did not address these comments to Grievant and Grievant did not hear them.

6. Grievant and the personnel assigned to the maintenance department work from 7:00 a.m. to 3:00 p.m. A/Supt. Mathis left the maintenance facility around 7:00 a.m. and started picking up debris without telling Grievant where he was going. 7. As a Supervisor I at BFSP for over fifteen years, Grievant knew that flood clean-up work was the first priority for the Maintenance Department at BFSP on the morning of May 20, 1996.

8. Prior to May 20, 1996, Grievant had been criticized by Supt. Keener and at least one prior BFSP Superintendent for giving too much priority to the appearance of the maintenance facility and the sewage treatment plant at the expense of the public use areas of the park.

9. Grievant determined that he needed to spend ten to fifteen minutes driving around the park to see the extent of the damage, find what areas were accessible, and determine what tools and equipment would be required to repair the damage. Grievant elected to assign his crew, with the exception of an electrician who A/Supt. Mathis had permitted to start on electrical work, to mow grass around the maintenance facility as a "make work" project while he took ten to fifteen minutes to drive

through the park and inspect the damage. Grievant began assisting the crew in repairing one or more lawn mowers that would not start, and was still at the facility when A/Supt. Mathis returned twenty to thirty minutes later, and chastised him for cutting grass instead of starting with the clean-up effort.

10. Grievant and his crew then followed A/Supt. Mathis to another area of the park, and started the clean-up effort.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Wellman v. W. Va.Dept. of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

3. DNR failed to demonstrate by a preponderance of the evidence that Grievant engaged in willful or deliberate neglect of his duties as a Supervisor I at BFSP when he assigned the maintenance crew to "make work" duties involving mowing and trimming around the maintenance facility, until he could drive through the park, assess the damage, and make appropriate work assignments directly related to cleaning up the park from a major flood.

Accordingly, this Grievance is **GRANTED**. Respondent West Virginia Division of Natural Resources is hereby **ORDERED** to rescind the suspension Grievant received on August 26, 1996, remove all references to the suspension from his personnel file, to pay him full back pay with interest, and reinstate any other benefits which he would have received had he not been suspended.

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 26, 1998

Footnote: 1

After this matter was elevated to Level IV, Respondent DNR rejected Grievant's request for a copy of the Level III transcript, offering to allow Grievant or his counsel to come to its office in Charleston, and make a copy. Pursuant to a request from Grievant's counsel, the undersigned ordered DNR to provide a copy of the Level III transcript pursuant to W. Va. Code § 29-6A-6. See District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. W. Va. Dept. of Health, 189 W. Va. 445, 377 S.E.2d 498 (1989). As DNR took exception to that Order, the ruling on this issue is hereby incorporated by reference into this decision.

Footnote: 2

It is apparent that the terms "willful" and "deliberate" are employed interchangeably in Grievant's suspension notification.

Footnote: 3

However, it is disturbing to note that A/Supt. Mathis indicated no plans to initiate a complaint or recommend that disciplinary action be taken following his confrontation with Grievant, telling him to get started with the clean-up effort. It was only after Grievant went to A/Supt. Mathis' supervisor expressing his desire to file a grievance that the employer began an investigation which led to Grievant's suspension.