**DAVID ADKINS,**

**Grievant,**

**v.** **Docket No. 98-HHR-151**

**WEST VIRGINIA DEPARTMENT OF**

**HEALTH AND HUMAN RESOURCES,**

**Respondent.**

# D E C I S I O N

**Grievant, David Adkins, states he was "[t]erminated without just cause", and requests as relief to "make whole[,] all lost wages, vacation days, sick days, all allegations removed from file." As this was a termination, the grievance was appealed directly to Level IV, and Level IV hearings were held on July 8, 1998, and August 5, 1998. This case became mature for decision on September 16, 1998, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 1)

**Grievant was terminated by letter dated April 15, 1998. This letter from Regional Director Thomas Gunnoe stated the following pertinent information:**

> **This is to inform you that we have concluded an internal investigation regarding the allegation of your continuing inappropriate personal relationship with a family who is receiving services through the Department. Based on the findings of this investigation, it is my decision to dismiss you from your position as a Social Services Worker with the West Virginia Department of Health and Human Resources as I have determined your misconduct to be substantial and to directly affect the rights and interests ofthe public we serve. This personnel action will be effective April 30, 1998 at the end of your scheduled work day and is in accordance with Section 12.02 of the Division of Personnel's Administrative Rule, providing the required fifteen (15) calendar day written notice. For the duration of the notice period, you are hereby advised to continue your reassignment to desk duty.**
>
> **On April 13, 1998, Sandy Burton held a discussion with you regarding your misconduct and shared with you that your dismissal was being contemplated. Your response was that you believed the Department was making too much of this situation and the Code of Ethics is only a guide. Although I have carefully considered your response, I believe your reasoning and judgement regarding**

**this matter to be flawed. I believe that you have been given more than ample opportunity to correct your unacceptable behavior. Because of your continued behavior and your failure to correct such, I have not only lost confidence in your ability to maintain an expected standard of conduct, but I believe the State may have potential legal liability in the future were you to be retained. While this concern is perhaps speculative at this point, I believe it is well founded that you are either unable or unwilling to correct the behavior for which you are being dismissed. Quite frankly, I believe the evidence suggests it is more likely that your past misconduct will be repeated, rather than not. So you may understand my reasoning, I offer the following information that has been made known to me:**

**The investigation has established by a preponderance of the evidence that you:**

**1. Violated the Code of Ethics of Social Workers;**

**2. Engaged in behavior which is in contravention with the Child Protective Service System; and,**

**3. Violated the Department's Policy Memorandum #2108, Employee Conduct.**

**More specifically, the investigation has established that in spite of specific directives to the contrary, you have maintained an perpetuated an inappropriate, personal relationship with a thirteen year old child, D.H., and with his family who are clients of the Department. Although you were counseled regarding this matter on January 23, 1998 and again on February 24, 1998, the investigative findings demonstrate that you have continued to ignore directives to discontinue your personal relationship with D.H. After reviewing all information pertinent to the investigation, including a statement by D.H.'s step-mother made on March 16, 1998 and your sworn statement dated March 30, 1998, I believe your misconduct is more serious andoccurred more frequently than was previously known by your supervisor and by Ms. Burton, CSM, Lincoln District.**

**The following is a chronology of events which lead me to conclude that you have engaged in misconduct, the cumulative effect of which seriously affects the public interest and causes you to be ineffectual in your position:**

*** On January 20, 1998, Jane Gonzola, Residential Care Manager of the Florence Crittenton Home contacted Ruth Wade, Social Services Supervisor, to express concerns regarding your relationship with their resident, T.H. Ms. Gonzola told Ms. Wade that T.H.** **(See footnote 2)** **had consistently reported the following information:**

**(1)**
**On more than one occasion, you had used your personal money to cover expenses for T.H., her boyfriend, her son, and her younger brother. T.H. reported that you paid for her son's pictures, her son's stroller, her brother's coat, and that you gave she and her boyfriend $200 to spend during Christmas break.**

**(2)**
**You spend time with T.H.'s younger brother by taking him out, sometimes calling off work to do so, and that you let her younger brother drive your car.**

**(3)**

**T.H. has your home telephone number.**

**(4)**
**T.H. says you told her that she does not belong at Crittenton and that you would obtain court orders to change the rules for her and you do not feel she is being properly medicated for anxiety. Also that you would try to secure foster care for her through Pressley Ridge and would try to stop the court from locking her up but the judge had been in a bad mood lately.**

**Although Ms. Gonzola reported that these were allegations made by T.H., she said she had personal concerns regarding your approach to treatment issues, and your failure to return her calls and discuss your recommendations for T.H.'s treatment prior to the court hearing.**

*** CPS Supervisor, L. Hickman interviewed D.H. on January 22, 1998. D.H. related to Ms. Hickman that you had taken him to your home and he had assisted you in moving some things around. He also told her that you had purchased some shirts for him because he needed them and that youhad taken his Mom and sisters shopping and had bought a stroller for T.H.'s baby. He also said he called you if he needed a ride and that you would sometimes, but not always transport him. He denied driving your car and denied spending the night at your house.**

*** On January 23, 1998, Sandy Burton, CSM, and Ruth Wade, CPSS, met with**

**you to discuss the issues that had been raised by the Crittenton Center. During this conference, you admitted to the following information:**

**Have you used your personal money to purchase items for the "H" family? --- I helped them move at Christmas, bought a TV for D.H., a Nintendo, some stuff for T.H.'s baby. You said you believed D.H. would stay home more if he had a TV and Nintendo to hold his attention.**

**Has D.H. ever been to your house?--He has spent the night 3 or 4 times. You said you had not seen the family or D.H. very much since their move to Kanawha County.**

**Do you give your home telephone number to clients?--Yes, I give it to certain ones I trust. You added it is easier for them to reach you at home. You said you had paid for long-distance calls before.**

**Did you inform the Court that the Crittenton Center is not the best placement for T.H.?--You said you had taken that position due to T.H.'s not progressing as she should in this program. You said you discussed that with representatives of the Center.**

**When asked why you would purchase items for this family and let D.H., a 13 year old male spend the night in your home, you responded that you like and care for the family and that you had developed a special bond with D.H.**

**On January 23, 1998, you signed the following statement: You would not make home visits or transport clients after hours without supervisor approval; you would stop receiving telephone calls from children and their parents at your home (in the case of an after hours emergency, clients and child care facilities can telephone the child abuse hotline); you would stop purchasing gifts with your personal money as this could be a conflict of interest. Further, you were told that a violation of the agreement would result in a recommendation for disciplinary action.**

*** On February 23, 1998, you called the office and said that you had to take a vacation day as you had no transportation. You told Linda Hager that you had bent the rim of your car wheel and had a dent in your door. This was reported to your supervisor, Ms. Wade.**

*** On Monday, February 23, 1998, Ruth Wade, CPSS, received a call from D.H.'s step-mother who reported that Mr. H. had received a call from 911 to come to the police office to pick up D.H. as he had been apprehended that morning, driving your automobile. Ms. H. also reported that D.H. was supposed to have gone to a friend's home on Friday night; however, they hadn't heard from him all weekend and she was concerned since he is only 13 years old. Ms. H. said she had tried calling you at your home beginning around midnight last night until about 8:00 a.m. today.**

**Ms. Wade contacted Deputy Bowmen of the Lincoln County Sheriff's Department who confirmed that he had apprehended D.H. and two other boys and that D.H. was driving your car. Deputy Bowmen said that D.H. told him that you live at Alum Creek and that you had confirmed this information. Ms. Wade, however, told the Deputy that you reside in West Hamlin. Deputy Bowmen then said he would not release your car until he had more details regarding the situation. After speaking with you, Deputy Bowmen called Ms. Wade back and reported to her that you told him you had transported the "H" family to Princeton on February 22, 1998 to visit T.H. When they returned, you took D.H. to visit a friend at Alum Creek and although you did not accompany the children, you permitted the 18 year old friend to drive your car with D.H. as passenger. You also clarified to the deputy that you did not live in Alum Creek, but were at a friend's house.**

*** On February 24, 1998, Ms. Burton and Ms. Wade met with you to discuss the information that had been received from the Lincoln County Sheriff's Department. You provided the following information regarding their inquiry concerning your activities on the weekend of February 22, 23, 1998:**

**You transported T.H.'s baby and the baby's caretaker, T.H.'s boyfriend, and D.H. to visit T.H. at the detention center in Princeton, WV. When you returned, you delivered everyone to their homes except D.H. who you stated would not go home. You said D.H. "crashed" at your place Saturday night and you were together on Sunday. You reported that late Sunday evening (at Alum Creek) you allowed D.H. to drive your car to the end of the hollow. You said you were notified on Monday morning that D.H. was stopped by Deputy Jerry Bowmen for speeding in a school zone in the Duval area. You said that you went to the Sheriff's office and believe you may probably face some type of charge over the matter. You also said that D.H.'s father did not know that D.H. had been with you over the weekend.**

**When questioned as to why you placed yourself in this situation this past weekend, you said that you had developed a bond with D.H. about 1 ½ years ago and that you care for him more than anyone you have known. You used the word "love" when talking about D.H. and said the "H" family are your friends.**

**Ms. Burton reminded you of the January 23, 1998 agreement you had signed and asked if you had had contact with D.H. since signing the agreement. You admitted that you had during this past weekend and at the court house on February 16. Additionally, you admitted to telephone conversations and frequent**

**messages D.H. leaves on your answering service (MCI). When asked if you believed it appears inappropriate for a 42 year old man to spend so much time with a 13 year old, you defended your actions as being similar to a teacher who takes a child under his wing.**

**You were informed during the February 24, 1998 meeting that disciplinary action was being considered. Additionally, effective that date, you were again directed to have no further contact with the "H" family or other clients. You were placed on desk duty and removed from the after hours call down list and all field work. Reassignment of your case load was under consideration.**

*** On March 16, 1998, D.H.'s step-mother was interviewed. She related the previous night's incident when D.H. allegedly held a knife to her throat when they disagreed about the loudness of his stereo. Ms. "H" told the investigator that you had purchased the knife for D.H. and although his father had put the knife in the trunk of the car, D.H. had retrieved it without their knowing it. She said she believed you had contributed to the incident, the police said they would have to submit a petition to juvenile court and the court would contact them.**

**During this visit, Ms. "H" showed the investigator the stereo she said you purchased for D.H. during the past week-end (sic). The box that the stereo came in was in the room and the cost was marked on it as $159.96. There were also two cartons of cigarettes on D.H.'s bed and cassette tapes which Ms. "H" reported that you had purchased for D.H. over the past week-end. She also told the investigator that you had given D.H. about $50.00 in cash during the week-end and she said she believed this may have contributed to his ability to buy drugs.**

**Further, Ms. "H" reported to the investigator that you had picked up D.H. in your vehicle at the church below their house on either Friday night or Saturday and that he was not returned home until twenty minutes before midnight on Sunday. She said that D.H. denied being with you, but the friend's mother where D.H. had been on Friday confirmed that a blue car picked him up and the description of the car matched yours. Ms. "H" said that D.H.'s sister J. was in Lincoln County that weekend and also reported seeing D.H. with you and said that D.H. had a lot of money.**

**Ms. "H" reported to the investigator that her children did not believe it was fair that D.H. received gifts from you and believed D.H. was being rewarded forhis bad behavior. After discussing this with you, Ms. "H" said you took the girls and bought them clothing. When asked about the other gifts for D.H., she reported that about two weeks after the car incident, she overheard D.H. talking to you on the phone telling you that he needed a winter coat. She said the next day D.H. had a new coat and although he says he steals items, she believes the gifts come from you because D.H. has phone conversations with you and then the**

**items appear.**

**Ms. “H” also reported to the investigator that the week-end prior to March 14/15, 1998, you purchased D.H. a new pair of Nike tennis shoes. When questioned about a TV and a Super Nintendo, Ms. “H” reported that you purchased the TV for D.H., but you bought the Super Nintendo for the whole family. She said D.H. pawned the TV several weeks prior to March 16 to obtain money, and they had pawned the Super Nintendo to obtain money.**

**Ms. “H” reported questioning you as to why you spent so much time with D.H. and bought things for him. She said you told her it was because you felt sorry for him because he had lost his mother. Ms. “H” found this hard to believe because D.H.'s mother died six years ago.**

*** D.H. was also questioned by the investigator on March 16, 1998 and he described his relationship with you as a friendship rather than a professional relationship. He reported that the two of you “hang out” together which he defined as driving around or “cruising”.**

*** Finally, on March 30, 1998, you provided a sworn statement in which you admitted the following:**

**(1) permitting D.H. to spend the night at your personal residence on at least five or six occasions;**

**(2) giving D.H. money, in sums as large as one hundred dollars on occasion, and in smaller amounts on other occasions;**

**(3) purchasing gifts for D.H. of clothing, shoes, a television with six months of HBO cable, a radio, a CD player, and school supplies;**

**(4) taking D.H. on social outings to the movies, to Marshall University football games and to Bridge Day in Fayetteville WV in October 1996;**

**(5)**

**providing transportation for D.H. to pool halls;**

**(6)**

**transporting T.H.'s boyfriend, T.H.'s baby and the baby's caretaker, and D.H. to visit T.H. at the detention center where she is housed andwearing your official Agency identification and representing yourself as being present in your official capacity, when in fact you were not;**

**(7)**

**permitting D.H., a non-licensed minor child, to drive your personal vehicle;**

**(8)**

**purchasing cartons of cigarettes for D.H. and for other children; and**

**(9)**

**smoking marijuana with D.H.**

**In your statement, you admit that you knowingly violated your directive not to have any contact with D.H. Also, you admit to knowing that giving a minor cigarettes and smoking marijuana are illegal activities. By your own admission and by the statements of others, I find that your conduct concerning the "H" family and in particular, D.H., to be prohibited by: (1) the Social Worker code of Ethics; (2) DHHR Policy Memorandum #2108, Employee Conduct; and, (3) the CPSS System.**

**The Social Worker Code of Ethics requires the maintenance of high standards of conduct in the capacity of or identity as a social worker. Further, this Code requires a social worker to maintain the integrity of the profession by upholding and advancing the values, ethics, knowledge and mission of the profession and to promote the general welfare of society.**

**DHHR Policy #2108, Employee Conduct, states that an employee's off the job conduct should not reflect adversely on an employee's ability to perform his job, nor impair the efficient operation of the Department.**

**The Child Protective Service System has two purposes: (1) to control the safety needs of children who are at risk of maltreatment; and (2) alter or change the conditions in families where risk is present.**

**As a Social Service Worker III, your admitted behavior is not only a violation of professional ethics and policy, but a violation of the public trust as well. You have received specific training in which such environmental factors as you contributed to have been identified as endangering to children. To have behaved in such a manner demonstrates a lack of appreciation for your responsibility in your position and reflects such poor judgement that the public trust in our ability to protect children from such abuse will be undermined if you were to continue in your responsibilities. I believe your actions, as described in this letter not only cause you to be ineffective as a Social Service Worker, but are also at cross purposes with the mandate of this agency.**

**I find your actions warrant your dismissal as the State has reason to expect its employees to observe a standard of conduct which will not reflectdiscredit on their abilities or integrity or create suspicions with reference to their honesty and capacity to discharge their duties and responsibilities which affect the safety, welfare, and rights of others.**

**You may respond to the matters of this letter in writing or in person provided that you do so during the fifteen (15) day notice period. For any appeal rights you may have, refer to WV Code §29-6A-4(e), the Expedited Grievance Process. If you choose to exercise your rights, you must submit your grievance in writing directly to the Education and State Employees Grievance Board . . . .**

**After receiving this letter Grievant appealed his dismissal to Level IV.**

## Issues and Arguments

**Respondent argues Grievant's personal relationship with DH, a 13 year old client of Department of Health and Human Resources ("HHR" or "Department"), was inappropriate and violated the Code of Ethics of Social Workers and HHR's Policy Memorandum 2108 on Employee Conduct. HHR also asserted that after this relationship was discovered by the Department, and Grievant was clearly told that he was not to have any further relationship**

**with the H family, Grievant's continuing failure to follow these guidelines set by HHR and agreed to by Grievant, constituted insubordination. Grievant's continuing and illegal behavior constitutes gross misconduct and a disregard for the Department and its rules and regulations. Additionally, Respondent notes Grievant engaged in illegal behavior with this minor child, which could subject HHR to possible legal action. Further, Respondent notes, even at this point in time, Grievant does not appear to understand the seriousness of his actions, or that they were improper given his status as the family's Social Worker.**

**Grievant argues DH was not a client of HHR; thus, it was acceptable to develop a personal friendship with DH, and his off-duty behaviors of allowing DH to drive his car,buying cigarettes for DH , and smoking marijuana with this minor child are not the proper concern of his employer. Grievant also contends he did not know the statement he gave to the Investigator could be used to terminate him. Further, he believes the disciplinary action was disproportionate to the charges and notes his unblemished work record.**

**After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

## Findings of Fact

**1. Before his termination, Grievant was employed as a Social Worker III with HHR. Grievant was a foster care worker, and had worked for HHR since 1984. The parties stipulated Grievant was a good employee with good evaluations prior to the events which resulted in his dismissal.**

**2. Grievant was assigned the case of TH in his capacity as a social worker with HHR. TH is the sister of DH. Although TH has spent much of her time outside the family unit which consists of a father, step-mother, another sister, and two step-sisters, this group is viewed as the "family" of TH.** (See footnote 3)

**3. When a case is opened on one member of a family, the entire family unit is assessed by the worker, and a service plan is developed to meet the needs of this unit. The entire family is seen as clients of HHR. Grievant did such an assessment on the family, and this assessment included a separate assessment on DH.**

**4. In 1996, a separate case file was opened on DH due to suspected abuse, because DH,**

**then approximately 12 years old, was picked up by the police in anintoxicated state. The charges were not proven, and on October 13, 1997, the Child Protective Service Worker recommended the abuse file be closed.**

**5. Grievant has worked with DH as his Social Worker. He took him to the detention center in 1996, when he was intoxicated. Additionally, Grievant completed a Social Summary Assessment on DH and his family when he assessed the entire family on August 28, 1997, as is required by HHR. The family views Grievant as their Social Worker.**

**6. HHR policy is to view the entire family as clients, even when only one individual's name appears on the case file. This technique is utilized because a child cannot be treated in isolation, and the family unit is approached as a whole for services. 7. During 1996, Grievant took DH to Marshall home football games and to Bridge Day in Fayette County.**

**8. At a point in time that is unclear, Grievant decided DH and his family were not clients. He then considered DH and his family to be his friends. He continued to work with TH as her social worker, and he continued to try to find services for DH utilizing his contacts and knowledge from the social work area.**

**9. Grievant bought DH Nike shoes, clothes, and a television with six months of cable. He loaned the family money to move when they were evicted from their home, bought them an Nintendo, and when the step-mother complained Grievant was spending money on DH, and not the other children, Grievant bought them several hundred dollars worth of clothes. Grievant also bought things for TH and TH's baby as well as giving TH and her boyfriend $200.00 of spending money at Christmas time.**

**10. Grievant also gave all the family members his home telephone number and, at times, accepted long-distance telephone calls from them. 11. It is inappropriate for a Social Worker to give clients his own personal money. There are agencies and referrals to assist families in need, and it is the case worker's responsibility to refer the families to the appropriate agency and to assist them in finding and receiving this help. HHR workers are not to give out their personal phone number, and there is a 24 hour emergency call down list for clients to call if they need help after hours.**

**12. Conflicts can arise when a Social Worker becomes too personally involved with a family, and this closeness can impair the professional, objective judgement needed to provide**

**the proper care, guidance, and direction.**

**13. HHR was unaware of Grievant's behaviors until it received a letter dated January 20, 1998, from Jane Gongela, Residential Care Manager at the Florence Crittenton Home where TH was placed during her pregnancy and post-partum period. This letter stated in pertinent part:**

> **T.H. has been a resident in our program since August 27, 1997. I am writing to express concerns that our treatment team has had about T.'s reports regarding her relationship with Social Worker David Adkins. I have attempted unsuccessfully to reach Mr. Adkins to express these concerns. We would appreciate your efforts in finding whether or not Mr. Adkins has said or done the following things as reported by T.**
>
> **1.** **That Mr. Adkins has, on more than one occasion, used his personal money to cover expenses for T., her boyfriend, her son, and her younger brother. T. reports that Mr. Adkins paid for her son's pictures, her son's stroller, her brother's coat, and that Mr. Adkins gave her and her boyfriend $200 to spend during Christmas Break.**
>
> **2.** **That Mr. Adkins spends time with T.'s younger brother by taking him out, sometimes calling off work to do so, and that Mr. Adkins let her younger brother drive his car while on the last home visit.**
>
> **3.** **T. has Mr. Adkins' home telephone number and she encourages staff to call him at home, staff permits this occasionally but encourages T. to use this number as little as possible.**
>
> **4.** **That Mr. Adkins tells T. that she does not belong at Crittenton, that the program rules should not apply to her and that he will have court orders obtained to change the rules for T. Mr. Adkins also allegedly told T. that due to a recent incident in which a fire alarm was pulled that T. should give custody of her son to her son's father, that Mr. Adkins is trying to secure foster care for her through Pressley Ridge and that he will try to stop the court from locking her up but the "judge has been in a bad mood lately because other people are filing things on him and he might get fired." T. also reports that Mr. Adkins feels that she is not being properly medicated for anxiety at Crittenton.**

> **The above concerns are only allegations and consistent reports by T. I personally have some concerns regarding Mr. Adkins' approach to treatment issues. For example, when I attended the last court hearing, I did not know whether or not he would be attending or what his recommendations for T. and her son would be as I had several calls not returned. Mr. Adkins did attend court but did not have the report I sent him, so I gave him another. We spoke briefly before the hearing and he stated he was recommending that T. return home with her father and we were recommending that T. complete the program. In the actual court hearing, Mr. Adkins did recommend for T. to return home and even alleged that she was inappropriately placed at Crittenton and that we were not meeting T.'s psychiatric needs. He also stated that we were too far from her home and did not permit her to use the phone to call her family. This was a surprise to me and I answered all questions that came about from this in court and the judge offered T. the option of completing and cooperating with our program or to be placed in Salem. Mr. Adkins then stated that he felt if she had to remain in placement then it should be Crittenton, not any other foster care placement. I was concerned that none of this came up in conversation prior to the hearing.**
>
> **. . .**
>
> **We would appreciate it if you could please address these concerns with Mr. Adkins. We understand that T. reports are only allegations, however, they are consistently reported and cause concern regarding professional boundaries.**

**14. On January 21, 1998, Ms. Ruth Wade filed a written report with her supervisor, Ms. Sandra Burton, Community Services Manager for HHR staff in Lincoln County about Ms. Gongela's letter and her subsequent investigation. Ms. Wade discovered the H family had moved to Kanawha County. She attempted to interview DH,but he was not at school. She then interviewed DH's fifteen and twelve year old sisters. Grievant visited the family once or twice a week and frequently took DH for outings on the weekends . Grievant bought the family, including TH and her baby, many gifts, and bought DH a lot of things. The sisters saw Grievant as DH's Social Worker and believed Grievant was attempting to help DH with his temper. Resp. Ex. 1, Report of Ms. Wade to Ms. Burton.**

**15. On January 23, 1998, Ms. Sandra Burton, the Community Services Manager in Lincoln and Grievant's second level supervisor, called Grievant in to discuss the allegations. Grievant admitted he had frequent contact with the family and utilized his own money to meet their needs. Grievant argued the H family were his friends and not his clients. Ms. Burton explained this belief was incorrect, and that the H family were clients pursuant to HHR**

**guidelines. Grievant explained it would be hard for him to stay away from the H family.**

**16. Ms. Burton also noted that during this conference Grievant admitted DH had spent the night at his house three or four times, he viewed the family as his friends and not clients, that he likes and cares for this family, and "he has developed a special bond with DH."**

**17. At the end of this meeting, Grievant noted his agreement with the following guidelines as they related to his interaction with the H family by initialing each of the following paragraphs.**

> **The H. family resides in Kanawha county. This case will be transferred to the Kanawha County DHHR office. Our office will contact the Kanawha office and request services to be provided to this family. D.H. is displaying behavior problems at school, and using explicit sexual language. M.B. is truant.**
>
> **David Adkins is not to be making home visits, and transporting clients after hours without supervisor approval.**
>
> **David Adkins is to stop receiving telephone calls from children, and their parents at his home. In case of an after hours emergency, clients and child care facilities can telephone the child abuse hotline.**
>
> **David Adkins is to stop purchasing gifts with his personal money for children. Since this could be a conflict of interest.**

**18. Ms. Burton informed Grievant if there were no violations of the agreement, the matter would be considered closed, but if even one step were violated disciplinary action would be taken. The parties agreed the file should be transferred to Kanawha County, and that a staffing with that county be conducted.**

**19. Grievant received several phone calls at work about TH after she was placed at the detention center in Princeton, as the facility was concerned about her lack of progress and wanted the input of her Social Worker. On February 19, 1998, Grievant took TH's baby, the baby's care giver, TH's boy friend, and DH to see TH at the detention center in Princeton. Grievant used his HHR identification to secure entrance to the facility. He had not received prior permission from his supervisor for this trip. Grievant did not think prior permission was necessary because he believed he took this trip as a friend of the family.**

**20. After this trip, Grievant took all the passengers home, but DH refused to get out of the car, and Grievant took DH to his house in Lincoln County to spend the night. DH's family did not know where he was. During this time Grievant had purchased a new car. While in Alum Creek visiting DH's friends on Sunday night, February 22, 1998, DH asked to drive Grievant's car to the end of the hollow. Grievant got out of the car and gavethe keys to DH, who was then 13 years old. DH did not return, and Grievant did not call the police.**

**21. Grievant called in to work Monday morning February 23, 1998, to say he did not have transportation and would not be in the that day.**

**22. DH's step-mother called the Lincoln County HHR office on that same Monday morning. She stated she had not known where DH had been during the weekend and had tried to call Grievant without success Sunday night to find DH. Ms. H reported DH had been pulled over for speeding in front of Duval High School that morning, and the police had impounded Grievant's car.**

**23. Ms. Wade called Deputy Jerry Bowen at the Lincoln County Sheriff's office and found Ms. H's story to be true. Grievant informed Deputy Bowen that he had given the keys to DH's 18 year old friend.**

**24. On February 24, 1998, Ms. Wade, Ms. Burton, and Grievant met to discuss the situation. Grievant told them about the trip to the detention center and DH's refusal to get out of the car. Grievant was asked why he would allow himself to be placed in such a situation as occurred the past weekend. Grievant replied that he had developed a bond with DH and "cares for him more than anyone he has ever known." He used the term love when discussing this relationship.**

**25. Grievant indicated he had breached all aspects of the prior agreement. Ms. Burton informed Grievant that disciplinary action was possible, and that she would discuss the matter with the Regional Director. 26. As the result of this meeting, Grievant was: 1) placed on desk duty; 2) directed to have no further contact with the H family or any other clients; 3) informed his case load may be reassigned; and 4) told he would receive a written copy of this plan.**

**27. On February 25, 1998, Grievant received a written copy of this plan.**

**28. On February 27, 1998, Ms. Wade received the following letter from Ms. Jennifer**

**Fazzolari, the Program Director at Pressley Ridge. This facility provides services to troubled youth, both on an in-patient and out-patient basis. This letter stated:**

> **Per your request, I am documenting any information I have regarding David Adkins' contact with D.H. and faxing it to you. Approximately ten days ago I received a return call from David Adkins regarding D.H.['s] case.** (See footnote 4) **I had called him to inquire the details (sic) about D.'s behaviors, etc. This is standard procedure when our agency receives a referral for in-home services. Mr. Adkins and I spoke for about thirty minutes and he was very informative and seemed to know a great deal about the family. During the course of the conversation Mr. Adkins told me that he is not supposed to have any contact with the H.'s per his supervisor's orders and also did not want me to mention his name to the H.'s He stated that he considered the H.['s] to be good friends and he didn't want them to feel betrayed. I didn't question him any further about this.**
>
> **On February 26, 1998 another Pressley Ridge employee and myself went to D.'s home to begin the in-home services. D. was not home from school yet but we spent about thirty minutes talking to his stepmother. We spoke about many topics and the recent incident involving D. being cited for driving without a license and speeding in a school zone was one of them. I knew about this incident because I had spoken with Tom Scarpelini, earlier in the week. However, I had no knowledge of who the car owner was. Mrs. H. stated to me that on Saturday or Sunday afternoon (February 21 or 22) D. went to his friend's house and apparently called David Adkins from there to come and asked him to come and get them. To her knowledge, Mr. Adkins did that and then drove the boys to Lincoln County. She said that Mr. Adkins allowed the (sic) D and his friend to drive the car but they were only supposed to go "up the road" and back. She thinks that the boys decided not to come back and in essence stranded Mr. Adkins. On Monday, D. was pulled over by the police and given a fine to pay. She stated that when herhusband confronted Mr. Adkin (sic) about the incident, Mr. Adkins told him that he had driven D. home on two occasions but D. refused to get out of the car so the (sic) drove away. Mrs. H. found this odd and even asked "who is the adult here?" She finally commented that her husband gave the citation to Mr. Adkins to pay because it was his fault in the first place. We continued to discuss other areas but this subject basically ended there.**

**29. After Ms. Burton consulted with the Regional Director, and informed him of all the information in her possession, it was agreed that this situation would be turned over to HHR Investigator James Crowder.**

**30. On March 27, 1998, Ms. Burton wrote a memo to Grievant stating:**

> **The purpose of this memorandum is to provide a written directive to you regarding the J.H. family.**
>
> **In our conference of January 23, 1998, you signed an agreement stating you agreed that you would make no home visits nor transport clients after hours**

**without supervisory approval. At that time you were also instructed to have no further contact with the H. family and agreed that the case file would be transferred to the Kanawha District office as the family now resides in Kanawha County. You were again instructed in our conference of February 24, 1998 to have no contact with the J.H. family. You were provided with written instruction on February 25, 1998.**

**You are now directed that one more contact with any member of the J.H. family could lead to your immediate dismissal. You are to comply with this directive and may grieve the issue at a later date.**

**31. Mr. Crowder interviewed Ms. H on March 30, 1998, and obtained the following sworn statement.**

**I am giving this statement concerning David Adkins. Sometime before Christmas 1997 we lived in Lincoln County. D.H. is my stepson. He is 13 years old. David Adkins was his worker through the Lincoln [C]ounty Department of Health and Human Resources. David started calling D. and asking him if he wanted to go to ball games and stuff with him. Johnny, my husband, said it was O.K. They started going to ball games and stuff together. I think D. started taking advantage of David. Just before Christmas we had to move. We were evicted. David gave us close to $1,000 to help us move to our place in Kanawha County w[h]ere we now live. David told us if we needed help to let him know. He went to the bank andgot us the money. He said not to worry about it. We didn't have to pay it back. David from the beginning was buying D. gifts. David has bought D. clothes, Nike shoes, etc. My other kids thought D. was being rewarded for being bad. I told David finally if he had to buy D. things he had to get the rest of my kids things too because they thought being bad would get you gifts. David took my other kids out and bought them clothes. David used his credit card. He has bought shoes, shirts, stereos, Nintendo, a TV and gives D. money. He buys him cartons of cigarettes and gives him $20 to $80 at a time. I haven't talked to David for about a month. I think he was told not to be hanging around D. He told D. he couldn't be around him any more and was crying. He said he really liked D. D. calls David collect and then he drives up to the church below the house and they still meet there. He still comes and gets D. and brings him things. I haven't seen D. since last Thursday. He went to Allum (sic) Creek with his sister. He ended up with some friends. I think Friday sometime D. was with David again. (See footnote 5) His sister J. told me she saw them together and David had given him $80. I don't know where D. is now. He is probably with David. David also gave T., D's sister about $200 and her boyfriend M. money to go see her. That was when she was in a home and David was her worker too. He bought her a stroller also that was about $150. David paid my car off for me too, that was $150. He did that about two months ago. I have told David not to give D. money because he uses it to get high. He buys pot and other drugs with the money.**

**32. Grievant was also interviewed 0n March 30, 1998, and gave the following sworn statement.** (See footnote 6)

**I'm a Social Service Worker III. I work primarily with foster care. I've been with the Agency since June 1, 1984. I'm giving this statement concerning my involvement with D.H. and his family. T.H. has been in DHHR custody off and on for several years. She was in my caseload. Around 1996 DHHR got involved with her. T. talked to a Judge about her brother D. in summer '96. That's when the family came to Lincoln County. CPS workers had worked the case off and on. In September 1996 D. was picked up by a Deputy. He was drunk. DHHR got law enforcement custody. He was about 12 at that time. That's the first time I worked with him. He was placed in a shelter for about 10 days. He went back home on October 1, 1996. CPS started having occasional contact with the family. Social Services offered familyservices through local mental health but I believe they were refused in Oct '96 before Bridge Day. I started checking with the family on D. He was not an active client. I liked the kid. In October I took him to Bridge Day at Fayetteville. I took him to several Marshall University football games until December 1996.**

**I had no contact with D. from December 21, 1996 until October 20, 1997. In December DHHR has a Christmas party for needy families. That family was invited. It was at the Senior Citizens Building in Hamlin. T. was still in my caseload on December 1996. I still had contact with her and her Dad. T. ran away from foster care in Dec 96, and she was picked-up and starting on August 1997 I had put her in Foster care. I initiated my contact with J. the father of D. again. I could understand J. [Mr. H.]. We communicate well. J. told me D. was disappointed that I had stopped coming around to see him. On August 1997 T. was placed in Foster care in Wheeling. On October 20, 1997 I saw D. walking along the road and I picked him up. I reinstated our friendship at that time. During that time I found out D. had been kicked out of school basically since August. That angered me. D. is a nice kid he just has an attitude sometimes. D. called me if he needed a ride or whatever. J. told me they wanted to move from Griffithsville and I wanted D. out of Duval High School. I told him I would help them. In November he found a place in Kanawha County. I considered them my friends. I helped with moving. I gave him money for the rental truck. I gave him about $50 for that. I loaned him other money. I have no idea how much. It was about $300 to help pay off bills or whatever I didn't expect them to pay me back. I wasn't spending time with J. I was spending time with D.**

**In October and November I would visit D. once or twice a week. It was mostly weekends. At that time I wasn't spending much time with D. By the first of December they had moved to Charleston D. kept calling me after they moved. Our contacts actually increased. If he wouldn't get a ride home he would call me and I would give him rides. He called me through the weekdays and weekends. He would call me collect if he wanted to see me. D. had become like family. I would give him rides and we would run around. I would buy D. what he wanted. I bought clothes, food, tapes, etc. for him. We went to South Ridge Mall a lot. We even drove back to Hamlin for Pizza from Charleston on at least one occasion. I would pick him up and take him to a pool hall in Sod and he would call me to take him home afterwards. I took most of December 1997 off for vacation. D. spent a lot of time with me then. I provided him transportation probably 3 or 4 times a week in December.**

**I took T. and her boyfriend shopping around December 22. I used my money.**

**I spent about $200 on her and another $170 on the baby. OnDecember 26, 1997 I transported her back to Wheeling in my capacity as her worker on agency time and expense. D. went with us. D. rode up and back with me. T. also called me at home some[times] collect. Whenever D. was with me I would give him money and feed him if he wanted to eat. I have bought D. several pairs of good pants, shirts, several pairs of good shoes, school supplies, a television, six months of cable with HBO, a Nintendo and games, a TV stand, a radio CD player, etc.**

**I would give D. $20 to go to the pool room if he wanted it. When I saw D. and he asked for money I gave it to him. I like D. I've spent probably over $2000 on D. since 1996. I have also bought for the other children who are in that family[,] clothes. They asked me to take them shopping so I did. I was spending money on D. and not on them so I took them shopping to be fare (sic). I spent about $500 on them. I put about all of my purchases on a credit card. I used my master card.**

**In January this year I was told by my CSM to stop my contacts with the H. family. She gave me a directive to that effect. T. was in Detention in Mercer county. She continued calling me here at the office. I would talk to her. This was after the directive that I was not to have contact with the family.**

**I took a Saturday on March on my own time and transported T.'s boyfriend, the baby, the great aunt and D. to the Juvenile Detention Center in Princeton. I used my car and my money. When we got there I was wearing my agency I.D. and presented myself as an employee of the Agency. The Detention Center had talked to me a number of times. I was not there as any official capacity, however, in any way. The boyfriend was not allowed to go into see T. We were at the center about 3 hours. We did not visit that long since they had only one visitors room. When we got back I took the Aunt and the Boyfriend and baby home.**

**D. stayed with me all evening and he spent the night with me. On Sunday I took D. with me and I picked out and purchased a new car. I drove him to Charleston to take him home. He didn't want to go home. He wanted to ride around. About 9:00 PM we were at Allum (sic) Creek to see his friend Dy. Dy is 18 years old. D. asked to drive the car down the road. I got out let him have the car. D. didn't bring the car back. He was pulled over the next day by the Deputies. I spent the night with these strangers waiting for D. to bring me the car. The 911 dispatch called me there. I got a ride to where my car was, but they said there was a hold on it. I got another ride to the Court House. This was on Monday morning. I told the Deputy that I had given D. the keys to the car and told him he could drive the car down the hollow and back. He didn't bring the car back. Jerry Bowman was the Deputy I talked to. I'm sure I told the Deputy I gave permission for D. todrive my car. I have let D. drive my car on a gravel road on Coal [word illegible] before. I let him drive before on the Mall lot in 1996. D. and I are very close. I paid D.'s fine. It was $72.00 it cost me around $36 to get my car back.**

> **On Tuesday I was back at work. The CSM and Ruth Wade my supervisor discussed this with me. I was told that I was to stay in the office and have no client contacts. This was about February 24th that we had that meeting. I was told again not to have any other contact with the H. Family. I continued to get calls but I wouldn't answer the telephone. I cut my ties with hm. At least once after that I did talk to D. and I picked him up at the church. I've lied. I will tell you the truth. Last Thursday somebody brought D. to my home. He wanted $100. I gave it to him. I drove him back to Allen Creek and left him at D.'s house.**
>
> **I have bought D. cigarettes. I buy them by the carton. I've bought D. several cartons of cigarettes and given them to him. I've bought other kids cigarettes. I did this knowing I was violating my directive to have no further contact with him. D. has stayed at my house on several occasions. Until January he had stayed at least 5 or 6 times. We would be out until early morning and other times we would go back to my house and he would crash there on the couch. He would not go home. Mrs. H. knows I gave D. money. J., his dad, told me D. smoked pot. I have continued to give him money.**
>
> **I have not had sexual contact with D. I am not exploiting him sexually or in any other way. I just have a bond with him as a friend. I have smoked pot with D. He would sometimes have pot with him or after I gave him money and left him at the pool hall and pick him up later he would have pot. I have smoked pot with D. about three times. I knew but couldn't swear to he was using part of the money I gave him to buy marijuana on occasion. I didn't see him buy the pot or encourage him to but it. I knew that giving a minor cigarettes and smoking marijuana were both illegal.**

**33. After Grievant gave this statement to Mr. Crowder, he asked what would be done with it, and whether he would be dismissed. Mr. Crowder informed him disciplinary action could be taken, but that was not his decision.**

**34. Grievant's signed statement was given willingly and without coercion.**

**35. HHR was unaware of many of the actions Grievant admitted to in his statement. The Department was concerned about Grievant's poor judgement, and foundGrievant's illegal activities, such as buying cigarettes and smoking marijuana with a minor, particularly distressing. HHR saw Grievant's action as insubordination and gross misconduct.**

**36. HHR follows a pattern of progressive discipline when appropriate. This policy speaks to dismissals and states:**

> **Dismissal - Separation from employment may be issued when (1)**

**infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or (2) if an employee commits a singular offense of such severity warranting dismissal.**

**37. Section 1.06 of the Social Worker Code of Ethics deals with conflicts of interest and states in pertinent part:**

**(a) Social workers should be alert to and avoid conflicts of interest that interfere with the exercise of professional discretion and impartial judgment. Social workers should inform clients when a real or potential conflict of interest arises and take reasonable steps to resolve the issue in a manner that makes the clients' interests primary and protects clients' interests to the greatest extent possible. In some cases, protecting clients' interests may require termination of the professional relationship with proper referral of the client.**

**(b) Social workers should not take unfair advantage of any professional relationship or exploit others to further their personal, religious, political, or business interests.**

**(c) Social workers should not engage in dual or multiple relationships with clients or former clients in which there is a risk of exploitation or potential harm to the client. In instances when dual or multiple relationships are unavoidable, social workers should take steps to protect clients and are responsible for setting clear, appropriate, and culturally sensitive boundaries. (Dual or multiple relationships occur when social workers relate to clients in more than one relationship, whether professional, social or business. Dual or multiple relationships can occur simultaneously or consecutively.)**

**(d) When social workers provide services to two or more people who have a relationship with each other (for example, couples, family members), social workers should clarify with all parties which individuals will be considered clients and the nature of social workers' professional obligations to thevarious individuals who are receiving services. Social workers who anticipate a conflict of interest among the individuals receiving services or who anticipate having to perform in potentially conflicting roles (for example, when a social worker is asked to testify in a child custody dispute or divorce proceedings involving clients) should clarify their role with the parties involved and take appropriate action to minimize any conflict of interest.**

**38. HHR has formulated a Code of Conduct that applies to all employees. The pertinent parts are set out below.**

**I. PURPOSE**

**The Department of Health and Human Resources expects professional behavior from employees. In fairness to the employees, this policy was developed to provide general guidelines concerning the nature of behavior expected of Department of Health and Human Resources employees.**

**III.**
**GENERAL POLICY STATEMENT**

**The Department of Health and Human Resources provides a wide variety of services and programs which are necessary to promote and protect the basic health and welfare of the citizens of the State of West Virginia. . . . In order to fulfill its statutory obligations, the Agency expects its employees to conduct themselves in a professional manner at all times . . . .**

**VII.**
**RESPONSIBILITY**

**It is the responsibility of Commissioners, Office Directors, Administrators, and all supervisory personnel to ensure that: employees conduct themselves appropriately; those employees who do not conduct themselves appropriately are disciplined; and, employees who are model employees are given encouragement and recognition whenever possible. Department of Health and Human Resources Policy Memorandum 2104, Section III, regarding Progressive Discipline, emphasizes the seriousness that the Department attaches to improper conduct. It is each supervisor's responsibility to ensure that each employee receives a copy and makes written acknowledgment of receipt of this policy memorandum.**

**VIII.**
**POLICY AND PROCEDURES**

**Employees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all applicable State and Federal Regulations governing their field of employment; follow directives of their superiors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public; respect the property of residents/patients/clients, fellow employees and the State; be accurate when completing Agency records; maintain the confidentiality of all Agency records including personnel,**

**resident/patient/client records; use State vehicles, telephones and equipment only as authorized; exercise standard client management techniques; avoid physical abuse, harassment or intimidation of residents/patients/clients or fellow employees; exercise safety precautions; and be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.**

**Employees are expected to: refrain from illegal or immoral acts while on State property or while engaged in activities related to their employment; refrain from disrupting the normal operations of the Agency; refrain from profane, threatening or abusive language towards others; refrain from possession of fire arms or any lethal weapon on State property; refrain from the possession of or consumption of alcohol or illegal substances on State property; refrain from making unwanted or inappropriate sexual advances; refrain from making unwanted or inappropriate verbal or physical contacts; and refrain from any type of exploitation of residents/patients/clients or their families, including but not limited to, intimate, personal, financial, emotional, sexual or business exploitations.**

**Employees are expected to avoid conflicts of interest between their personal life and their employment. Employees shall not provide services to or make decisions concerning eligibility for Agency programs for spouses, relatives, friends, neighbors, present or former co-workers, or club or church acquaintances. Requests for services and questions regarding eligibility in these potentially conflicting situations should be referred to supervisors for reassignment. Employees should not solicit or accept any monetary gain for their services to residents/patients/clients, other than their salary and benefits paid by the Department. Further, an employee's receipt of any benefit from the Agency must be based solely upon eligibility to receive those benefits. Employees whose behavior conflicts with their employment are subject to discipline.**

**While off the job conduct of employees is generally not subject to the Department's scrutiny, it should not reflect adversely upon an employee's ability to perform theirjob, nor should it impair the efficient operation of the Department. In those instances, disciplinary actions might be appropriate.**

**39. After consideration of the report submitted by Mr. Crowder and a review of Grievant's statement, and after a review of the policies of HHR and discussions with others in HHR and the Division of Personnel, Mr. Gunnoe decided to terminate Grievant's employment with the Department.**

## Discussion

**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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.**

**State employees who are in the classified service can only be dismissed for "good cause", meaning "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., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil serviceemployee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (W. Va. 1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (W. Va. 1982). This grievance requires a determination of whether Respondent proved facts upon which the dismissal was based.**

**In Grievant's dismissal letter, he was charged with insubordination, inappropriate behavior, and gross misconduct, as well as harming the public interest. Many of these charges can be seen as overlapping, and frequently the same set of facts can be applied to prove more than one charge. The first issue to address is whether Grievant's behavior constitutes insubordination.**

**A. Insubordination**

**This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been**

**shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.**

**This view of insubordination is consistent with the treatment accorded to insubordination by arbitrators in the private sector. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1984) (Holley, Arb.). There, Arbitrator Holley noted:In general, if an employee refused to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management.**

**Burton, supra, at 1234 (citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974)).**

**An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). "Employees 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. 374 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., supra). There are few defenses to the charge of insubordination. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997); See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, what an employer must demonstrate to substantiate insubordination, is that the employee wasgiven an order, directive, or rule, which did not entail unnecessary physical risk to himself or other employees, and the employee failed to comply. Hundley, supra.** (See footnote 7)

**HHR, through documentary evidence and the testimony of multiple witnesses, has proven**

**the charge of insubordination. Indeed, Grievant's own testimony supports the charge. Grievant was told to cease all interaction with the H family as they were clients of HHR. These directives were clear, and Grievant agreed to these limitations. Later, he chose to disregard these directives, and asked others to not inform his employer of his actions.**

**B. Gross Misconduct**

**Grievant was also charged with gross misconduct. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk, supra); Blake, supra. The West Virginia Supreme Court of Appeals when discussing off-duty behavior has stated "[i]t is not our intention to establish any general rule which will serve to define what is or is not gross misconduct justifying discipline, suspension or dismissal. Each case must be determined upon the facts and circumstances which are peculiar to that case. We have no desire to establish any rule which would exact from State employees such perfection of conduct as to create an intolerable burden. We would protect the employee against frivolous, trivial and inconsequential charges; or charges based on conduct whichhas no rational nexus with the duties to be performed or the rights and interests of the public." Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976). See, Guine, supra; Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970); Kidd v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-127 (Dec. 17, 1991).**

**The Thurmond Court went further and stated, "[i]f, however, the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the circumstances of the case." Thurmond, supra.**

**HHR has proven Grievant's behavior was egregious and constituted gross misconduct. Grievant was to serve as a role model, and his behavior showed a complete disregard for the minimal standards of performance and competency expected of those individuals employed**

**within the field of Social Work.**

**This finding is supported by the Social Workers' Code of Ethics which states, "the primary mission of the social work profession is to enhance the human well being and help meet the basic human needs of all people with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty." Grt. Ex. 1 at 1. "Professional ethics are at the core of social work." Id. at 2. "Social Workers are to treat each person in a caring and respectful fashion . . . . Social workers seek to enhance clients' capacity and opportunity to change and to address their own needs." Id.at 5-6. It is clear from the testimony that Grievant did not seek to address DH's behavior problems; indeed he appears to have enabled DH to continue in these behaviors.**

**The question as to whether Grievant's conduct could be classified as gross misconduct is not a close one. By the very nature of Grievant's actions, he demonstrated a contempt for his position and for the authority and responsibility which his position is intended to convey to those he serves. Grievant demonstrated an inability to follow the specific directions of his supervisor, and still does not understand the seriousness and inappropriateness of his actions. HHR has proven Grievant engaged in misconduct of a substantial nature justifying his dismissal, and its decision to dismiss him did not violate any rules, regulations, policies, or statutes. Grievant provided money for DH to purchase cigarettes and drugs, and he allowed DH to spend the night at his house and to drive his car. Grievant's failure to follow numerous Department rules and regulations and intentional pursuit of an inappropriate relationship with a minor child which encouraged illegal behavior constitutes gross misconduct. See Graley supra.**

**Grievant's continued inappropriate conduct with the H family, in general, and DH, in particular, demonstrated "a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." See Graley, supra.**

**The fact that many, but not all of these acts occurred during Grievant's non-work time does not matter as Grievant's actions meet the test set out in Thurmond, and adversely reflected on the employer and the employee's ability to perform his job. Additionally, HHR demonstrated the necessary rational nexus between the dutiesperformed and the non-work**

**behavior and the rights and interests of the public. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981).**

**Grievant's other arguments and issues will be discussed next.**

**C. Use of signed statement**

**Grievant states he did not know the statement would or could be used as a basis for disciplinary action as he was relying on the letter on March 27, 1998, and asserts he had no further interaction with the H family. There are two problems with this argument. First, Grievant says in his statement that he had lied when he said he had not had contact with DH. He notes he saw DH the Sunday previous to his statement on March 28, 1998, after receipt of the letter. He also notes he gave DH money and drove around with him.**

**The second problem with this argument is that Grievant did not ask how the statement would be used until after he had freely given his statement. There is no evidence to suggest Grievant was forced to give this statement, and until Grievant gave this statement, HHR was not aware of the enormity of Grievant's illegal acts with a minor client entrusted to his care. Thus, the March 27,1998 letter is based on the information in HHR's possession at the time it was written. The letter presents the position of Ms. Burton at that time, and does not represent an informed decision on the part of HHR or promise further action would not be taken if additional information was discovered. See Alaeddini v. Div. of Envntl. Protection, Docket No. 95-DEP-450/580 (Jan. 28, 1998). HHR's use of the statement was appropriate.**

**D. Appropriateness of the penalty**

**The undersigned may mitigate the discipline if the imposed penalty is clearly excessive or disproportionate to the offense. Grievant asked the undersignedAdministrative Law Judge to note the stipulation of the parties that he was a good worker and the length of his tenure with the Department. In assessing whether the decision was excessive or disproportionate, the undersigned Administrative Law Judge must look at the totality of the circumstances. Some factors to be considered in the mitigation analysis include the employee's past disciplinary record, whether the employee was warned about the conduct, the clarity of notice to the employee of the rule violated, and other mitigating circumstances. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91- ABCC-137 (Sept. 19, 1991). As stated previously, “the work record of a long-term civil service employee is a factor to be considered**

**in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra. See Blake, supra; Serreno, supra.**

**The appropriateness of a penalty is not a merely a factual determination. Douglass v. Veterans Admin., 5 M.S.P.B. 280 (1981) Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Id. (citing Kulkin v. Bergland, 626 F.2d 181, 185 (1st. Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974)); See Overbee v. W. Va. Dept. of Health and Human Resources, 96-HHR-183 (Oct. 3, 1996). Because the imposition of a penalty results from an employer's administrative exercise of discretion, the action could be the result of arbitrary and capricious decision- making, or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984).**

**Respondent has demonstrated it had "good cause" to dismiss Grievant, and that Grievant's continuing unacceptable patterns of behavior constituted "misconduct of asubstantial 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, supra; Guine, supra. See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The discipline imposed here was not clearly excessive. See e.g., English v. Div. of Corrections, Docket No. 98-CORR-082 ( June 29, 1998); Hammer v. Div. Of Corrections, Docket No. 94- CORR-1084 (June 11, 1997).**

**The above-discussion will be supplemented by the following Conclusions of Law.**

## 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. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 Resources, Docket No. 92-HHR-486 (May 17, 1993).**

**2. "If the employing authority dismisses or otherwise disciplines a Civil Service**

**protected employee for gross misconduct occurring off the job and not involving State property, such misconduct must be substantial and not frivolous, trivial or inconsequential, and it must be shown that such misconduct reflects adversely upon the employee's ability to perform his job, impairs the efficient operation of the employing authority and bears a substantial relationship to duties directly affecting the rights and interests of the public." Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976). 3. State employees who are in the classified service can only be dismissed for "good cause", meaning "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., 164 W. Va. 461, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).**

**4. HHR may terminate an employee when (1) infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or (2) if an employee commits a singular offense of such severity warranting dismissal.**

**5. The offense of insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).**

**6. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).**

**7. "Employees 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). 8. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2,**

**1984)).**

**9. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).**

**10. Respondent has proven Grievant was insubordinate when he failed to follow clearly delineated guidelines for his conduct with the H family.**

**11. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).**

**12. Respondent has met its burden and established Grievant was guilty of gross misconduct.**

**13. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public.**

**14. The use of Grievant's sworn statement was appropriate.**

**15. Grievant failed to demonstrate the penalty imposed was clearly excessive given the seriousness of the proven charges.**

**Accordingly, this grievance is DENIED.**

**Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.**

---

**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: October 30, 1998**

---

***Footnote: 1***

***Grievant was represented by Attorney Charles Hatcher, and Respondent was represented by Assistant Attorney General B. Allen Campbell.***

---

***Footnote: 2***

***TH is DH's natural sister.***

---

***Footnote: 3***

***There was some confusion where each of these members lived at various points in time, but these were the key members of the family unit.***

---

***Footnote: 4***

***This contact would have been after the signing of the January 23, 1998 agreement.***

---

***Footnote: 5***

***That Friday would be March 27, 1998, the day Grievant received the memo referred to in Finding of Fact 30.***

---

***Footnote: 6***

***Although written as one long paragraph, this statement has been placed in shorter paragraphs for ease of reading.***

---

***Footnote: 7***

***If an employee wishes to question the legality of that order he must do so after compliance. See Surber, supra.***