MANSOUR ALAEDDINI,

Grievant,

v. **Docket No. 95-DEP-450/580**

DIVISION OF ENVIRONMENTAL PROTECTION/

OFFICE OF AIR QUALITY,

Respondent.

DECISION

On October 13, 1995, Grievant, Mansour Alaeddini, filed a grievance over his thirty-day suspension for multiple incidences of insubordination and non-professional work behavior. During the preparation for the Level IV hearing on this suspension, Division of Environmental Protection ("DEP") discovered evidence of mail and message tampering and terminated Grievant's employment. The statement of grievance and requested relief are as follows:

Statement of Grievance:

By his action of September 29, 1995, in which he indicated in writing that I was suspended for a period of thirty (30) calendar days without pay, and by his verbal statements of September 29, 1995 in which he indicated that I would be permanently removed from my position in the Office of Air Quality, Mr. Laidley E. McCoy, as Director of the Division of Environmental Protection, has violated my First Amendment Rights guaranteed by the United State Constitution and made applicable to the State of West Virginia through the Fourteenth Amendment to the United States Constitution, has violated the West Virginia Whistle-Blower Law, Chapter 6C, Article 1 of the West Virginia Code, and has violated the rules and policies of the West Virginia Division of Personnel. Such violations of the above identified constitutional provision, state statute, policy and rule constitute a substantial detriment to and interference with effective performance of my job, pose a substantial threat to my health, safety and professional advancement, and constitute harassment and reprisals as defined in the Grievance Procedure for State Employees, Chapter 29, Article 6A of the West Virginia Code.

Requested Relief:

That the written decision to suspend me without pay for a period of thirty (30) calendar days without pay be reversed;

That the verbal statements indicating that I would be removed from my position in the Office of Air Quality be reversed;

That both the decision to suspend and the decision to remove me from position in the Office of Air Quality be stayed immediately, and that I be allowed to return to my position in the West Virginia Office of Air Quality, until such time as a hearing shall be conducted and a decision pursuant to such hearing shall be issued by a hearing examiner.

That I be compensated for all lost wages, legal fees, and embarrassment incurred as a direct result of the actions of Mr. Laidley E. McCoy on September 29, 1995;

That any and all employees, representatives or other agents of the State of West Virginia, the Division of Environmental Protection, and the Office of Air Quality be enjoined and prohibited from engaging in any further harassment, reprisals or other violations of statute, policy, rule or regulation.

On December 27, 1997, Grievant filed a grievance over his termination, and these two grievances were consolidated before this Grievance Board. This Statement of Grievance regarding the termination and requested relief are as follows:
Statement of Grievance[:]

By his action of December 15, 1995, in which he indicated verbally that I was terminated as a civil service mining engineer II with the State of West Virginia Division of Environmental Protection (WVDEP), Office of Mining and Reclamation (M&R), (See footnote 1) and by his written statement dated December 15, 1995, the representative of elected Governor of state of West Virginia, Director of WVDEP, Laidley Eli McCoy, has violated my First Amendment Rights guaranteed by United State [sic] of America Constitution, has violated the West Virginia Whistle Blower Act and has violated the rules and policy of the state of West Virginia.

Without due consideration of my job performance, the representative of elected Governor of state [sic] of West Virginia, Director of WVDEP has engagedin an illicit and unfair labor practice by

discharging a civil service Moslem employee in retaliation for exercising a protected activity and by further discrimination, harassment and disparate treatment, Laidley Eli McCoy, has violated my Civil Rights.

The Office of Air Quality (OAQ) has permitted waste and mismanagement and unethical and otherwise improper behavior by OAQ employees to continue and has failed to take any appropriate measures to prevent its reoccurrence. The OAQ's action have [sic] resulted in substantial waste to WV taxpayers and have [sic] directly prevented public access to air quality documents and other information relating to proposed Mason County Pulp Mill.

Relief Sought:

1. That the verbal and written decision to terminate me from civil service position be reversed;

2. That I be compensated for all lost wages, legal fees, and embarrassment incurred as a direct result of retaliatory action of Director of WVDEP acting individually and as Director of WVDEP on December 15, 1995;

3. That the WVDEP compensate me for 185 hours of overtime that I worked to prepared [sic] detailed engineering evaluation and draft permit for proposed Mason County Pulp Mill. On September 26, 1995 I filled [sic] a grievance on [sic] this regard, but WVDEP Director has not held a hearing on the grievance; (See footnote 2)

4. That I be allowed to return to my position as air quality engineer with OAQ;

5. That any and all employees, representatives or other agents of the state of West Virginia, the DEP including Director be enjoined and prohibited from engaging in any further harassment, reprisals or other violations of statute, policy, rule or regulation;

6. That this hearing be open to public;

7. A written apology from WVDEP director as well as WV Chief of OAQ.

This grievance hearing was conducted on April 22, 1996; April 23, 1996; April 24, 1996; April 25, 1996; July 2, 1996; July 3, 1996; January 8, 1997; January 9, 1997 and April 8, 1997.

Additionally,the parties submitted the written testimony of two additional witnesses from Grievant's unemployment hearing. (See footnote 3) During the course of the grievance, multiple continuances were granted to both sides for good cause. (See footnote 4) This case became mature for decision on June 12, 1997, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 5)

Brief Background and Procedural History

On October 13, 1995, Grievant filed a grievance over his thirty-day suspension for insubordination, etc. This case was assigned to Administrative Law Judge Albert Dunn. The initial Level IV hearing was scheduled for November 29, 1995. Before that hearing, Respondent requested a continuance indicating that its investigation, in preparation for the suspension hearing, had revealed additional allegations of wrongdoing, and if these proved to be true, further disciplinary action would be considered. On December 15, 1995, DEP discharged Grievant for mail and message tampering.

By agreement of all parties, Grievant's suspension and termination were consolidated, and the initial hearing day for both grievances was April 22, 1996. At this hearing, the question of Grievant's employment status, both at the time of his suspension and at the time of his discharge, were discussed and argued. As the resolution of this issue would decide future procedural issues and requirements, the parties presented this issue first. This issue was resolved by Administrative Law Judge Dunn, and his decision was given to the parties orally on April 23, 1996. (Trans. Apr. 23, 1996 at 28.) As this issue is essential to the subsequent procedural requirements, such as the burden of proof, presentation of evidence, and the need for Grievant to make a prima facie case on the contravention of some substantial public policy, the facts and legal rationale for this decision are detailed below.

GRIEVANT'S EMPLOYMENT STATUS

Issue:

Whether Grievant was an at-will employee at the time of his suspension?

Issue:

Whether Grievant was an at-will employee at the time of his termination?

The undersigned Administrative Law Judge makes the following findings of fact about Grievant's employment status.

Findings of Fact

1. Grievant was employed as an Engineer I, a classified-exempt employee by the Office of Air Quality ("OAQ"), an agency in DEP, on March 16, 1994. (Resp. Exh. No. 1; Trans. Apr. 22, 1995, Sandra Kee, DEP Admin. Services Manager for Staffing, at 47-48, 50, 67-68.)

2. All employees of OAQ are classified-exempt pursuant to W. Va. Code 29-6-4(a). (Trans. Apr. 22, 1995, Kee at 47, 64.)

3. On September 28, 1995, Grievant, who was to be terminated for insubordination and other charges of misconduct, implored Dr. Eli McCoy, Director of DEP, to transfer him to another position instead of firing him. (See footnote 6) (Trans. July 3, 1996, McCoy at 48; Trans. Jan. 9, 1997, Scott at 80- 82.) 4. Dr. McCoy checked for vacancies, found one in the Office of Mining and Reclamation ("OMR") and discussed the possibility of transferring Grievant to this agency. The head of this agency, Mr. John Ailes, agreed he would accept Grievant if he met all the requirements and was accepted by the Division of Personnel ("DOP"). (Id.)

5. Dr. McCoy changed Grievant's termination to a thirty-day suspension. (Id.)

6. Employees of OMR are classified, civil service employees. The position Grievant would be transferred to was an Engineer II. (Trans. Apr. 22, 1995, Kee at 45.)

7. Grievant began his thirty-day suspension on September 29, 1995. While suspended, Grievant took the required civil service test and filled out the paperwork to be eligible to be an Engineer II. He was notified on November 2, 1995, that he met the qualifications to be an Engineer II. He was ranked thirteen on the register, and he was reallocated to an Engineer II. (Gr. Exh. No. 7; Trans. Apr. 22, 1995, Kee at 47-49.)

8. Upon his return from suspension, Grievant was temporarily assigned to the Logan office of OMR. (Trans. July 3, 1996, McCoy at 480-81).

9. The position in question was posted on October 17, 1995, and the deadline for submission of applications was November 1, 1995. Interviews were in the process of being conducted, when

DEP discovered Grievant's alleged mail and message tampering in late November 1995. (Gr. Exh. No. 8, Trans. Apr. 22, 1995, Kee at 49-50.)

10. At the time of Grievant's discharge on December 15, 1995, he was still an at-will DEP employee on temporary assignment to OMR. His hiring for the position of an Engineer II in the OMR had not yet been finalized by DEP or approved by DOP. (Trans. Apr. 22, 1995, Kee at 50.)

Conclusions of Law

1. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Authority, Docket No. 91-HHR-400 (June 30, 1992).

2. Grievant was an at-will employee at the time of his suspension pursuant to W. Va. Code §29-6-4(a).

3. Grievant remained an at-will employee at the time of his termination. Although he was in the process of becoming a civil service employee with OMR, he had not yet been hired into the position.

Effect of At-Will Status

In suspension or termination cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for suspending an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the suspension or dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). Indeed, an at-will employee is subject to disciplinary action for any reason which does not contravene some substantial public policy principle. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also Wilhelm v. Dept. of Tax and Revenue/Lottery Comm'n, Docket No. 94-L- 038 (Sept. 30, 1994) aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996). Grievant is employed by OAQ, and OAQ was created by the Legislature and specified asbeing "exempt from the classified service." W. Va. Code § 29-6-4(a). Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. Bellinger, supra. See W. Va.

Code § 29-6-2(g) (1992); Parker, supra. At-will employees may be terminated for good cause, bad cause, or no cause. Brown v. Williams, 190 W. Va. 202 (1993).

However, even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless, supra. Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 377, 424 S.E.2d 606, (1992), the Court identified sources of public policy as follows:

To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Courts have recognized such actions as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)); refusing to conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)); filing a workers' compensation claim (Powell v. Wyoming Cable Co., 184 W. Va. 700, 403 S.E.2d 717 (1991); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)); and attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)), as involving substantial public policy interests. See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994). Moreover, this Grievance Board has recognized that reporting alleged violations of the West Virginia GovernmentalEthics Act warrants application of a Harless-type analysis to dismissal of an at-will state employee. Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Here, Grievant alleges his suspension constitutes unlawful discrimination under W. Va. Code § 29-6A-2(d) in that other employees at OAQ who committed worse offenses were treated more leniently or not disciplined at all. Grievant further contends this discrimination was motivated by his

national origin and his religion, as he is an Iranian Moslem. Employers are prohibited from discriminating in terms and conditions of employment because of national origin or religious beliefs under the West Virginia Human Rights Act, W. Va. Code § 5-11-2. Additionally, W. Va. Code § 29-6A-2(d) prohibits discrimination on any basis which is unrelated to an employee's job responsibilities. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). Further, national origin-based and religion-based employment discrimination is prohibited under Title VII of the Federal Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2(a)(1). (See footnote 7) Grievant also alleges he was discharged because of his "whistle-blowing" activities and in violation of his First Amendment Right to free speech. See W. Va. Code § 6C-1-1 et seq. See Hendricks v. Dept. of Tax and Revenue, Docket No. 96-T&R-215, (Sept. 24, 1996).

If discrimination due to national origin and/or religion, retaliation for whistle-blowing, or violation of Grievant's free speech rights are proven, and if all or any of them were a motivating or substantial rationale for his suspension and discharge, these disciplinary actions would be prohibited,notwithstanding his at-will status. See Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992); Graley, supra.

To determine if Grievant's suspension and dismissal violated a substantial public policy, it is first necessary to examine the events leading up to Grievant's suspension and discharge, and the evidence presented by Grievant to demonstrate a prima facie case of discrimination and retaliation. It is also necessary to resolve issues of witnesses' credibility, as much of Grievant's testimony contradicts the testimony of multiple witnesses and exhibits. Indeed, some of Grievant's exhibits appear to contradict his testimony or to support Respondent's arguments. Additionally, at times, Grievant's testimony and Respondent's witnesses' testimony appear to agree, but Grievant's perception and interpretation of the events is very different.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing

the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the ALJ should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) theexistence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. Id.

Additionally, some witness statements are obviously hearsay, but relevant hearsay is admissible in administrative hearings. See W. Va. Code § 29-6A-6. The key questions are whether these statements are credible, and what weight, if any, to give this testimony.

In Borninkhof v. Department of Justice, 5 MSPB 150 (1981), the Merit Systems Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. Id.; Perdue, supra; Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dept., Docket No. 90-8-115 (June 8, 1990).

The charges against Grievant are stated in his suspension and termination letters. The September 29, 1995 suspension letter states as follows:

The purpose of this letter is to advise you of my decision to suspend you without pay for a period of thirty (30) calendar days from your position as Air Quality Engineer I with the West Virginia Division of Environmental Protection, Office of Air Quality ("Office"). Your suspension will be effective immediately. The specific reasons for this personnel action are your dishonesty and your continuing disruptive, inappropriate, insubordinate and unprofessional conduct in the workplace. Your behavior has progressively deteriorated over the course of your employment with the Office to the point that suspension is warranted.

On September 28, 1995, Mr. Mark A. Scott, Deputy Director of the Division of Environmental

Protection, and Sandra Kee, Administrative Services Manager II of the Division of Environmental Protection, held a meeting with you regarding your past and continuing misconduct. During this meeting, Mr. Scott and Ms. Kee informed you of your misconduct and explained that the Office was contemplating dismissing you. You were given the opportunity to respond to the charges in the meeting. Your response included the following:

Concerning the incident which occurred on June 13, 1995, involving the CD ROM, you admitted that the event outlined in this letter did occur. Concerning the incident which occurred on April 26 and 27, 1995, involving the “Bring Your Daughter to Work Day,” you admitted that the events outlined in this letter did occur. Concerning the statements you made on the Alternative Work Schedule form dated August 14, 1995, and your August 15, 1995, response to Mr. Leonard Womble's questionnaire, you admitted you made such statements.

With respect to the additional events and statements outlined in this letter, you either denied that such events occurred or you explained your reasons for your misconduct.

After considering your response, I have decided that this suspension is warranted. So that you may discern in retrospect the reasons for this personnel action, I wish to recount for you some of the more notable examples of your misconduct and unprofessional behavior during the past six months.

I. <u>Threats and Insubordination</u>

Your have continually opposed and threatened your supervisors and other supervisory personnel in the Office. Some specific examples of this misconduct are as follows:

1. On March 10, 1995, you confronted Bryant Newell, Permits Coordinator, on three separate occasions and informed him that his work with Richard Atkinson, on a Title V project assigned to them by G. Dale Farley, Chief of the Office, was reprehensible. You threatened him by stating that if he continued to work with Mr. Atkinson, you would do all that you could to undermine him. When Mr. Newell informed you that the assignment had been made by the Chief, you said that you did not care and that it was a poor decision. Personal threats and disrespect for authority have no place in this Office and are totally unacceptable.

2. On March 31, 1995, you refused to submit your leave slips to Bryant Newell, the person

assigned that duty by Mr. Farley. When Mr. Newell informed you that Mr. Farley had directed him to collect the leave slips, you implied that he was lying by saying that Mr. Farley had not made such an assignment. Your contradiction of Mr. Newell's statement was based purely on personal speculation and was completely unnecessary, confrontational, and highly unprofessional.

3. Also, on March 31, 1995, you approached Bryant Newell and told him to refrain from becoming involved in Title V matters and that, if he did not, you would “damage” him and do everything you could to discredit him. Your repeated threats made to another employee were unprofessional and cannot be tolerated.

4. On April 3, 1995, Mr. Farley reassured Mr. Newell that he was authorized to collect leave slips as he had earlier been instructed. The next day, April 4, 1995, you informed Mr. Newell that Mr. Farley had stated during a staff meeting on April 3, 995, that Mr. Newell was to have no part in processing leave slips. This was blatantly false. In addition, you told Mr. Newell that it was your intent to “destroy” and tear things down. You also told him that if he reported what he had said, you would deny it. Your false statements were totally inappropriate as they were designed solely to create confusion and conflict. Your intentions to destroy and tear the Office down were highly inappropriate and unprofessional.

5. On April 26, 1995, after you learned that Kathy Peet, Personnel Coordinator, had forbidden Anne White, Secretary, to bring her daughter or another child to work in conjunction with the “Bring Your Daughter to Work Day,” you spent most of a work day searching to find a young girl to bring to work even though you stated, in the presence of at least two other employees, including Bryant Newell, you had no real interest in doing so. Your search entailed several phone calls, including one or two calls to the Governor's Office and calls to two area schools. At some point later in the day on April 26, 1995, Chief Dale Farley, through Ms. Peet, informed employees that they could bring their “daughters” to work. On April 27, 1995, you brought a young girl to the Office located at 1615 Washington Street, East, for the express purpose of flaunting your disregard for Ms. Peet's previous management decision. This act of purposefully going out of your way to demonstrate your contempt and disrespect for management is a flagrant example of insubordination. No employer should have to suffer the behavior of an employee designed to undermine orderly operations in the workplace.

6. On May 15, 1995, and on several other occasions during this approximate timeframe, you

spoke to Leonard Womble, Emissions Inventory Supervisor, and told him you would oppose him if he was appointed to the position of Permit Program Manager. This is another instance of your lack of cooperation and threatening behavior.

7. On June 12, 1995, in the presence of several employees at the Office, including Bryant Newell, you made an issue of the assignments of Title V sources by Richard Atkinson. You stated that the list was constructed and finalized in one afternoon, providing insufficient time for individuals to comment. This statement was false, as the list was developed over a two-week period and Bryant Newell had placed the list and a request for any comments on the list on CC:MAIL and on the computer several days prior to finalization of the list. In fact, you had been given a separate copy to review and comment on by Bryant Newell. Finally, at least two other employees provided comments to Mr. Newell and Mr. Atkinson, and changeswere made in the list based upon those comments. False statements designed to create controversy and dissension among the staff are unprofessional and inappropriate.

8. On June 13, 1995, you confronted Mr. Robert Vaughan, the Office's Automation Coordinator, when he attempted to remove a CD- ROM [sic] from your computer and place it on a community work station, even though such action was authorized by management. You told Mr. Vaughan that if he removed the CD-ROM from your computer and placed it at the community work station, you would take it back and would keep taking it back. Mr. Vaughan informed you that if you disconnected the drive from the community work station, you would damage the drive. You responded you did not care and would do it anyway. When Mr. Vaughan requested that you discuss the matter with Mr. Richard Atkinson, Mr. Vaughan's supervisor, you refused. Mr. Vaughan then left the Annex office and immediately went to discuss this matter with the Chief, G. Dale Farley, in the main office. Mr. Farley called you on the telephone and informed you that Mr. Vaughan's actions were authorized by him. In spite of this telephone call from the Chief, and having been informed that your action could damage expensive equipment belonging to the Office, you removed the drive from the community work station. When Mr. Vaughan returned to the Annex office, he reattached the drive, whereupon you told him you would remove the drive again when you returned from a trip you were making. Your actions in this matter were completely unprofessional, insubordinate, [and] disruptive of the work environment and could have subjected the Office to substantial monetary loss.

9. On June 30, 1995, you refused to submit a leave slip to Bryant Newell. This was contrary to an office-wide directive from the Chief contained in a memorandum dated June 23, 1995 that employees must submit leave slips at the end of the month whether or not they take leave.

10. On July 26, 1995, you learned that Mr. Womble had been assigned the job of Permit Program Manager. You responded by closing Mr. Womble's future office door and putting a note on the door which said that no one could move in before August 1, 1995, unless they had authority from the Chief. John Benedict, Assistant Chief of the Office, removed the note, and you put up another one. After this cycle was repeated several times, you and Mr. Benedict confronted each other. Mr. Benedict told you to stop putting up notes. You said you would not stop and that you would put the refrigerator in front of the door to block entry if necessary. Mr. Benedict responded that he did not take to threats very well. This behavior was extremely unprofessional, disruptive of the work environment, and blatantly insubordinate.

11. On or about August 1, 1995, and again on September 5, 1995, you told Mr. Womble you “could have made his career,” if he had supported your efforts to remove Dale Farley from the Chief's position. These statements were subversive in nature.

12. On August 4, 1995, three days after Mr. Womble became Permit Program Manager, you wrote him a memorandum concerning his request to employees of the Permits Work Group for a weekly work plan report and his instruction that employees prepare for a meeting with the new supervisor by reviewing a questionnaire regarding the employee's previous training and responsibilities. Your memorandum was highly confrontational, threatening, and characterized the questionnaire as a “hate questionnaire” and a “secret police style questionnaire.” You asked Mr. Womble for his legal authority to request such information and asked many other questions demonstrating insubordination and a complete lack of cooperation. Such remarks were unprofessional. (Your August 4, 1995 memorandum is attached as Exhibit No. 1.)

13. On September 6, 1995, you wrote a memorandum to Mr. Womble, responding to a memorandum Mr. Womble wrote to you on September 5, 1995. Mr. Womble's memorandum informed you that your continued confrontational behavior with other employees would be considered insubordination and would not be tolerated. In your memorandum (a copy of which is attached as Exhibit No. 2), you responded in a threatening and disrespectful manner, implying Mr. Womble

should not be disciplining you because of past conversations between him and yourself. You further implied that Mr. Womble was lying by your characterization of his September 5, 1995, memorandum as an “untruth memo.” Such threatening and insubordinate behavior will not be tolerated in this Office.

14. Also, on September 6, 1995, you discussed two memoranda you had received from Mr. Womble (dated September 5, 1995 and September 6, 1995) with Mr. John Benedict, Mr. Womble's supervisor and Assistant Chief of the Office. In that conversation, you made a number of statements to Mr. Benedict, including the following:

-You stated that of all the things you had done recently you were amazed the only thing the Office could “get you on was insubordination.”

-You said that you found it ironic that a “Muslim with broken English has the ability to destroy a person with twenty-five (25) years experience.”

-You said that you did not wish to discuss the memos with “that fuck- up Leonard Womble.”

-You stated that Mr. Benedict was on the wrong side with [sic] your on-going personal fight with Chief Farley because Farley was a “liar” and “did not have a backbone.”
-You said that there was going to be a change in the management of the Office of Air Quality and warned Mr. Benedict that he should not try to defend Dale.

-You said that when the Shah was kicked out of Iran, the head of the secret police, who had committed numerous atrocities during the rein of the Shah, was stripped, locked in a cage for public display, and publicly executed.

-You stated that the sole purpose of your filing grievances was “to destroy Dale” and you believe you had succeeded.

-You stated that if the Apple Grove “dream team” continued to meet to review your work on the permit thus causing delays, you would “chain yourself to Governor Caperton's desk” until the permit is issued.

-You said that you have more evidence of Dale's “fuck-ups” and will take them to the news media and you intend to expose other people in the Office of Air Quality.

-You stated that when you are in charge of Permitting after the new administration is installed, you will create three sections in Permitting and Mr. Womble will be in charge of emissions inventory because that is the only air program area he is capable of managing.

The statements you made to Mr. Benedict were inflammatory, threatening, defamatory and unprofessional. Your statements about the Shah of Iran were particularly serious since Mr. Benedict perceived them as a threat to his physical safety.

II. Dishonesty and Fraud

In addition to your threatening behavior and direct opposition to persons in management, you have made a number of misrepresentations and distorted the truth when it suited your personal objectives. In addition to specific instances mentioned elsewhere in this letter, and based upon statements you made in the presence of at least Bryant Newell on May 24, 1995 and subsequent occasions, you lied about submitting an application to the Office of Air Quality for an Environmental Resources Program Manager I (ERPM I) position on May 12, 1995. The truth is, you did not submit an application to the Office but only pretended to in front of other employees in the Office. Although Office representatives stated they had not received an application from you, you stated the Office intentionally lost your application and did not want to consider you for the position because you are of a different race and national origin. Your claims of discrimination by the Office (which you continue to make both verbally and in writing) are patently andknowingly false and have been contrived by you in order to embarrass, humiliate, and denigrate the Office and its supervisors. See Section III below. Such actions are dishonest. It is evident you will go to great lengths to accomplish your oft-stated objective of “tearing the Office down.”

III. Disparaging and Defamatory Remarks

In addition to the above instances of misconduct, you have embarrassed and humiliated other employees in the Office and your supervisors with disparaging remarks and other forms of abuse, including unsubstantiated allegations of unprofessional and unethical behavior. Some examples of

your profane and disparaging remarks are as follows:

On August 14, 1995, you submitted an Alternative Work Schedule (AWS) form to Mr. Womble. On this form, you made comments regarding the Chief, including an allegation that he has historically discriminated against persons based on race and national origin. Such statements were recklessly and falsely made without any substantiation, and only served to undermine confidence in the Office. (A copy of your AWS form is attached as Exhibit No. 3.)

On August 15, 1995, you submitted your response to Assignments No. 1 and 2 from the pre-interview questionnaire to Mr. Womble. In that response, you stated you think the Chief should be removed and that he was “like a mad man with authority to chase business out of state.” You also made other derogatory remarks, and implied the Chief was incompetent and dishonest and directly stated the Chief was a “racist.” Your remarks were totally unsubstantiated, recklessly made, and undermined confidence in the Office. (A copy of your response is attached as Exhibit No. 4.)

On September 7, 1995, in a memorandum you wrote to Mr. Farley regarding internal combustion engines, you implied he was lying by characterizing his previous memo of August 24, 1995, as an “untruth memo.” You stated that Mr. Farley's behavior was “unprofessional, provocative, and inflammatory.” Your further remarks implied Mr. Farley was a “racist.” (A copy of your memorandum is attached as Exhibit No. 5.)

On September 13, 1995, you wrote a memorandum to Kathy Peet, Personnel Coordinator, which stated that Ms. Peet had held onto your application for a lateral transfer “due to anger toward my national root.” Also, in this memorandum you asked a myriad of questions which clearly imply that you believed the Office and Ms. Peet discriminated against you because of your religion and national origin. This is yet another example of your disparaging and untruthful remarks. (A copy of your memorandum is attached as Exhibit No. 6.)

The above statements were made recklessly by you without any regard for the truth and were designed to humiliate and even intimidate the persons involved. Suchdisparaging statements have the potential to damage other employees' professional reputations and cannot be tolerated by this Office.

IV. Failure to Exercise Interpersonal Skills and Cooperation

Another reason for this personnel decision is your complete failure to exercise an acceptable level of interpersonal skills and cooperation with other employees, supervisors, and the public. Although Chief Farley has discussed this subject with you several times throughout your employment with the Office, your behavior in this regard remains unchanged. Just a few of the more notable examples of this behavior are as follows:

1. On several occasions during January and February of 1995, representatives of U. S. Steel Mining Co. contacted you by telephone to ascertain the status of a modification request previously submitted to the Office. Although you were the Permits Engineer assigned to this facility, your manner of responding to the company was very rude with statements to the effect of “Stop bothering me,” “I'm too busy to talk with you,” and “Quit calling.”

2. On May 18, 1995, you told Anne White that Karen Watson, Attorney for the Office, had been rifling through Mrs. White's desk when in fact, Karen had only been searching for a “Draft” impression stamp. The inflammatory statements you made regarding Mrs. White's desk appeared to be designed to cause interpersonal problems between Karen Watson and Anne White and to damage their working relationship. This statement confirms your intention to destroy and tear down your Work Group as you told Bryant Newell on April 4, 1995. Your attempts to cause internal strife and chaos and to damage interpersonal relationships is both inappropriate and unprofessional.

3. On June 9, 1995, in front of several other employees in the Permits Work Group, you criticized another employee, Lisa McClung, and stated that she was intentionally delaying issuance of a permit to R. H. Armstrong because the application was prepared by Karl Dettinger, a former employee against whom you alleged Ms. McClung held a grudge. You stated that the permit should be taken away from Ms. McClung. Such disparaging remarks about another employee are highly unprofessional and inappropriate in the workplace.

4. On several occasions during June and July of 1995, you disrupted the work environment with your confrontational behavior concerning the office's thermostat setting. On June 21, 1995, you physically removed the thermostat knob and threatened various members of the Work Group when they asked you if you had taken [sic] the knob. When asked directly by Bryant Newell if you had taken

the knob, you unequivocally stated “No.” The next day, June 22, 1995, John Benedict, Assistant Chief, discussed the matter with you at your work cubicle and you gave him the thermostat knob, having lied about it the previous day. On at least one otheroccasion in July 1995, you confronted another employee, Beverly McKeone, about the thermostat setting.

5. Throughout the period from March 10, 1995 to August 1, 1995, you refused to attend most of the Permits Work Group staff meetings which were held every Monday at 1:30 p.m., even though all Permits Work Group employees had notice of the meetings. When you were asked by Bryant Newell to attend the meetings, you commonly responded that since Mr. Newell was not your supervisor, he could not compel your attendance at such meetings. This is clear evidence of your lack of cooperation and failure to follow a “team approach” in the performance of your job at the Office.

V. <u>Harm to Public Interest</u>

Beyond your failure to exercise an acceptable level of interpersonal skills, you have abused the public trust and potentially harmed the public interest in several instances. One example is your decision to inform AT&T that it was required to obtain permits for its emergency generators. Your motivation for taking this position with AT&T was not due to an objective regulatory analysis on your part, but rather due to your personal objective of undermining Richard Atkinson's efforts to develop a sound Title V Program. When you found out that Mr. Atkinson had informed AT&T that its generators were not subject to permitting requirements, you wished to portray him as incompetent to run the Title V Program and attempted to discredit him by taking a contrary position. Your conduct was subversive and undermined a position previously taken by the Office for a purely personal reason. Such a cavalier attitude regarding issues vital to the public interest cannot be tolerated.

Furthermore, in a Permits Work Group staff meeting on August 21, 1995, you claimed that Mr. Farley had never asked you to use AP-42 or an equivalent guideline to determine the emission factors for certain generators, when in fact, Mr. Farley had instructed you on or about July 28, 1995 to do so. Your conduct in this regard was uncooperative, insubordinate, and had the potential to harm the public interest.

Another example of how you have harmed the public interest is evident in your dealings regarding the proposed Apple Grove Pulp Mill. When you were first assigned the Apple Grove permit

application, in the spring of 1995, you stated to various employees, including Bryant Newell, that the permit should be denied due to many problems with the application. However, in approximately June of 1995, following a trip with Chief Dale Farley to visit another Parsons and Whittemore pulp facility, you stated to other employees that the permit should be issued because there were no problems with the application. When asked by Mr. Newell why you changed your position on this issue, you responded that Parsons and Whittemore might have a job for you. You further stated to Mr. Newell (on several occasions after the middle of June 1995) that if you supported issuance of this permit, and claimed Mr. Farley was delaying permit issuance, it would help you realize your objective of removing Mr. Farley from the Chief's position.

On August 22, 1995, your supervisor, Leonard Womble, informed you in a memorandum that the Office was establishing a permit review team to complete work on the Apple Grove permit application. After you received this memorandum, you spoke with Mr. Womble and told him you did not agree with the team review concept and you intended to recommend to the Director and “others,” that the permit be issued. Your threat to prematurely recommend action before the permits review team completes its work has the potential of jeopardizing the Office's review of this application and, based on your previous statements, was done to further your personal objectives of obtaining employment with Parsons and Whittemore and of removing Dale Farley from the Chief's position.

On August 29, 1995, you criticized and disparaged the permit review team (which you labeled the “dream team” and the “AGPPC Delay Team”) and threatened and demanded that if the Office did not publish a legal ad in the newspaper by September 11, 1995 on the Apple Grove permit, you would do so. Then, in a meeting with Mr. Womble and Mr. Benedict on September 4, 1995, you demanded that Mr. Womble evaluate your work within five (5) days or you would take the permit to the Director for his signature. On September 5, 1995, Mr. Womble issued a memorandum which warned you not to make such threats, and also warned you about your confrontational behavior. On September 6, 1995, Mr. Womble issued you another memorandum warning you not to place any legal ads in the newspaper without his prior approval.

On September 18, 1995, you told Leonard Womble you believe someone in the Office, and implied someone in management, had inappropriately removed documents from the Apple Grove file sometime during the period the documents were being indexed. You said you had copies of the

documents which had been removed, but when Mr. Womble asked you for a copy of these documents so the Office could respond to a recent Freedom of Information Act request, you said "No," you would not release the documents. Because of your refusal to provide the requested materials, you jeopardized the Office's statutory obligation to provide records to the public.

Also, on the next day, September 19, 1995, in a meeting you requested with the Chief, John Benedict and Leonard Womble, you angrily stated that someone was taking documents out of the file and you specifically mentioned two documents.

On September 26, 1995, you spoke with John Benedict, Assistant Chief of the office, in Mr. Benedict's office. You were apparently upset about a schedule Mr. Womble had prepared concerning the Apple Grove Pulp and Paper Mill permit application. You said that Mr. David White, Inspector of the Office, is a close friend of Mr. Ken Ward, Jr., a reporter at the Charleston Gazette, and that Mr. White knows about the modeling and fugitive emissions issues pertaining to the Apple Grove permit application. Mr. Benedict was perplexed and said he thought David White was against the facility but that you were for it. When Mr. Benedict asked you why you were telling him this, you responded you "hate that mother-fucker," referring toChief Dale Farley and you can "play the Apple Grove issue both ways." You further stated that the Apple Grove permit is "just a tool." You also said you would deny it if Mr. Benedict ever quoted this conversation _ that you hoped you were speaking "man-to-man."

Your intentional use of a permit application to further your own personal goals is unprofessional and unethical. As a result of your unprofessional and unethical behavior, the Office has lost confidence in your honesty and trustworthiness. Since the position of Engineer I requires you to work on issues of vital importance to the public interest, this suspension is necessary.

VI. Conclusion

Your insubordinate and threatening conduct makes it difficult for management in general, and your supervisors in particular, to carry out leadership responsibilities while you are at the work place. Your blatant and flagrant insubordination, as well as your disruption of the orderly governmental processes, warrant your suspension. Your repeated repudiation of management's authority disrupts and undermines the employee/employer relationship and eliminates any likelihood that a lesser penalty would cause you to change your conduct and behavior.

An employer has the basic responsibility for maintaining order and protecting employees from continual psychological abuse. Your behavior has disrupted our operations and good labor relations. Not only has your behavior been destructive to the morale of the employees working in your vicinity, but it has created a hostile working environment as well, making it difficult for supervisory staff to exert leadership while you are present at work.

An employer is required to ensure the safety and welfare of all employees and the general public. Additionally, it is management's obligation to maintain good employee/employer relations within the workplace. If an employer were to permit behavior such as that which you have exhibited, it would create a source of mistrust of management's willingness to take appropriate action to ensure continued good labor relations. Not only does your behavior distract from effectively and efficiently accomplishing the mission of the Office, it is demoralizing to others who are responsible for enforcing and observing policies and rules.

The State of West Virginia and its agencies have reason to expect their employees to 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' capabilities in discharging their duties and responsibilities. This is especially important for an employee who is in frequent contact with the public and is therefore in a position to cause substantial harm to the public interest. I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Office of Air Quality. Asa result of your actions, I have lost confidence in your ability to satisfactorily perform your duties as Air Quality Engineer I with the Office of Air Quality.

Your position at the Office of Air Quality is a classified-exempt at-will position. Although an exempt, at-will employee may be disciplined, which includes dismissal or suspension for any reason or for no reason, this letter provides you with the reasons for this personnel action.

The suspension letter ended with an explanation of Grievant's appeal rights.

Grievant's dismissal letter was dated December 15, 1995, and contained the following information and allegations:

During an interview with you on November 30, 1995, at the West Virginia Employees Grievance

Board, and again on December 6, 1995, at my office in Nitro, West Virginia, you were informed that evidence had recently come to light supporting an allegation that, over a period of several months, you improperly disposed of mail and telephone messages addressed to an employee of the Office of Air Quality. During the interview on November 30, 1995, you verbally responded to the allegations, such response including an admission that you did dispose of some pieces of mail not addressed to you. You were informed during that interview that you could further respond to the allegations in writing or in person in my office on Tuesday, December 5, 1995 at 4:00 p.m. You chose not to make a written response or appear in my office on that date. On Wednesday, December 6, 1995, I called you into my office to again inform you of the mail tampering allegations and solicit your response. You chose not to make any response at that time as well. Subsequently, at the same meeting, I informed you that I would make a decision on Monday, December 11, 1995, whether to impose discipline for the alleged misconduct and informed you that I would consider any written response submitted by you before such decision was made. On Monday, December 11, 1995, I received a letter and typed addendum from your attorney referencing this matter. Based upon my review of your response at the November 30, 1995 interview, a close study of your attorney's submission on December 11, 1995, and after further examination of the evidence supporting the allegation of misconduct, I am hereby informing you of my decision to dismiss you from your at-will employment as Engineer II with the West Virginia Division of Environmental Protection Office of Mining and Reclamation. The dismissal will be effective close of business December 30, 1995.

The specific facts giving rise to your dismissal are:

1.

Over a period of several months, beginning approximately in December 1994, and extending roughly through August 1995, you engaged in a pattern of conduct in which, approximately two times per week, you took mail addressed to Rick Atkinson, an employee of the Office of Air Quality, from theoffice of Anne White, secretary in the Office of Air Quality annex, and placed such mail in the garbage receptacle in Ms. White's office;

2.

The mail which you took consisted, at least in part, of letters from corporations pertaining to the Title V program, correspondence pertaining to Regulation 27 permitting issues, notices of conferences and seminars, and information from

environmental consultants;

3.

Over this same period of time, approximately two times per week, you also took telephone messages, which were addressed to Rick Atkinson from the desk of Anne White and placed such messages in the garbage receptacle in Anne White's office;

4.

At no time were you given permission by Rick Atkinson to discard mail or telephone messages addressed to him.

Under no circumstances is an employee justified in obstructing the delivery of, or impermissibly disposing of, mail or telephone messages addressed to another agency employee. The fact that you misappropriated properties for the use and carrying out of State business and/or the personal use of another employee is sufficient to cause me to conclude that you are untrustworthy, thus warranting your dismissal from employment.

I find that your dishonest behavior warrants your dismissal as the State of West Virginia has the right to expect its employees to observe a standard of conduct and behavior which will not discredit their abilities and integrity or create suspicion regarding an employee's capacity to perform their duties and responsibilities. The facts of your case cause me to conclude that you are no longer able to carry out your duties in a trustworthy fashion. Further, this instance is the most egregious example of misconduct in a long pattern of misconduct which was referenced in my letter to you of September 29, 1995. It is management's obligation to maintain good employee/employer relations within the workplace and foster the efficient and honest operation of its offices. If any employer were to permit behavior such as you exhibited, it would create a source of mistrust of management's willingness to take appropriate action to ensure continued good labor relations. Your behavior cannot be tolerated as it seriously diminishes management's ability to exert leadership, maintain good labor relations and harms the public trust, and thus warrants your dismissal.

This letter also ended with an explanation of Grievant's appeal rights.

Keeping the guidelines on credibility and hearsay in mind, the following findings of fact are drawn

from the record in its entirety. Because of the voluminous amount of testimony taken during the hearing and submitted from the unemployment hearing, as well as the numerous exhibits submitted by both sides, it is not possible, nor is it necessary, to detail specifically the statements of each and every witness. Accordingly, I make the following findings of facts in a summarized form with the source of the data identified after each finding. Additionally, it must be noted that, although not necessary when suspending and discharging an at-will employee, Respondent has proven the vast majority of the charges stated in the suspension letter as well as proving, during the hearing, additional examples of insubordination, unprofessional and uncooperative conduct, and threatening and inappropriate behavior. (See footnote 8) The charges in the dismissal letter were proven in their entirety.

Findings of Fact

1. Shortly after Grievant began his employment with OAQ, he became dissatisfied with the work assigned to him and, in essence, transferred himself to the Permitting Section. This action was not challenged by the Director of OAQ Dale Farley. (Trans. Apr. 23, 1996, Grievant at 41.)

2. At that time the Permitting Section was headed by Karl Dettinger. Grievant assisted Mr. Dettinger with the Apple Grove Permit ("AGP"), and after Mr. Dettinger left in Spring 1995, Grievant inherited the project from Mr. Dettinger. Grievant and Mr. Dettinger continued to work on the project at Grievant's house in the evenings. (Trans. Nov. 23, 1996, Grievant at 50; Trans, July 2, 1996, Farley at 114). 3. While Mr. Dettinger was Grievant's supervisor, Grievant took mail and phone messages intended for Rick Atkinson, Manager of the Title V Section and threw them in the trash. Mr. Dettinger was aware that Grievant was engaging in this behavior but did not stop him. (Trans. Jan. 8, 1997, Bryant Newell at 26-32; Trans. July 3, 1996, McCoy at 438, 458; Trans. Unemployment Hgs. Mar. 1, 1996 and Mar. 18, 1996, Ann White, Administrative Assistant, at 20- 45; and 26-32 respectively.)

4. On approximately May 15, 1995, Grievant completed a draft of his report on the AGP and sent his summary and report to Mr. Farley for review. Grievant, who had initially been against the proposal, was now in favor of approving AG's permit. (Trans. Apr. 23, 1996, Grievant at 54, 76; Trans. Apr. 24, 1995, Grievant at 75.)

5. Much to Grievant's chagrin, Mr. Farley did not respond to Grievant's report even though

Grievant repeatedly asked Mr. Farley for a response. Grievant became very irritated and perceived Mr. Farley's lack of response as a sign of incompetence and mismanagement. (Trans. Apr. 23, 1996, Grievant at 54; Trans. July 3, 1997, McCoy at 407.)

6. After Mr. Dettinger left, Mr. Farley appointed Bryant Newell as Acting Director of the Permitting Section. Grievant was angry about this appointment. He frequently challenged Mr. Newell's authority and threatened to cause him trouble if he tried to make any changes or give Grievant any work. (Trans. Jan. 8, 1997, Newell at 14, 39-47, 48-49.)

7. Grievant refused to come to the meetings Mr. Newell scheduled unless he knew Mr. Farley was going to attend, and refused to submit his time and leave slips to Mr. Newell. (Trans. Jan. 8, 1997, Newell at 61-62, 64-65, 73-75.)

8. In approximately April or May, 1995, Grievant and a co-worker had frequent verbal confrontations about the temperature of the office. One day Grievant turned the temperature down,took the knob off the control mechanism, and lied when asked if he had the knob. Mr. John Benedict, who was in charge of the building, and was later Grievant's second level supervisor, heard about this problem, confronted Grievant, and obtained the knob from him. After a study, a set temperature was adopted and a new thermometer was installed. After this resolution, Grievant turned the temperature down again, past the agreed-to level. (Trans. Jan. 8, 1997, Newell at 69-72; Benedict at 251.)

9. On June 12, 1995, Mr. Bob Vaughan, Assistant Support Specialist I and the individual in charge of software and computers at OAQ, removed the CD-ROM on Grievant's computer containing EPA regulations, to place it on a community computer accessible to all employees. Grievant became incensed at this action and threatened to remove the CD-ROM from the community computer and replace it on his computer. Mr. Vaughan attempted to get Grievant to go with him to discuss the situation with Mr. Vaughan's supervisor, Mr. Richard Atkinson. Mr. Vaughan was fearful Grievant could damage the computer if he changed the CD-ROM. Grievant refused. Mr. Vaughan completed the transfer and went directly to Mr. Farley's office to lodge a formal complaint against Grievant. Mr. Farley called Grievant and directed him to leave the CD- ROM on the community computer. After this phone conversation, Grievant removed the CD-ROM from the community computer and reinstalled it on his own computer. Mr. Vaughan returned and undid the transfer. Grievant's response was he would change it back when he returned from his business trip. Grievant did not change the CD-ROM

again. (Trans. Jan. 8, 1997, Newell at 82-83; Trans. Jan. 9, 1997, Vaughan at 7-9; Resp. Exh. No. 13.)

10. In July 1995, Grievant stated he was applying for the Permitting Coordinator Position ("ERPM I") vacated by Mr. Dettinger. He xeroxed his application in front of several employees and stated aloud that he knew Ms. Kathy Peet, in OAQ's Personnel section, would lose his applicationbecause of her racial and religious prejudices. Mr. Newell advised Grievant to hand-carry his application. Grievant refused. (Trans. Jan. 8, 1997, Newell at 23; Resp. Exh. No. 12.)

Later, Ms. Peet did not have Grievant's application, and Grievant accused her of purposely losing his application. Mr. Peet said she had not received it. Grievant was not interviewed for the position (See footnote 9) , but several other employees and non-employees were interviewed. Some of the interviewees were of color and were not of a Christian religious background. Mr. Farley knew of Grievant's interest in the position, but elected not to interview him because of Grievant's difficulty in interpersonal relationships. (Jan. 9, 1997, Drema Miller, EEO Counselor, at Tape 2, Mark 1560-1790; Resp. Exh. No. 23.) (See footnote 10)

After Grievant accused Ms. Peet of purposely losing his application, Grievant told Mr. Newell, on May 12, 1995, that he had never sent her his application, and had used this situation to "set-up" Ms. Peet, as no one would ever be able to prove he had not submitted his application. (Trans. Jan. 8, 1997, Newell at 23; Resp. Exh. No. 12.)

11. Grievant filed an informal complaint (See footnote 11) with Ms. Drema Miller, who is DEP's EEO counselor, stating he was not interviewed for the position because of his national origin. Ms. Miller conducted an investigation, interviewed approximately fourteen witnesses, hand picked by Grievant, and found no discrimination or violations in the selection process. She reported these findings toDr. McCoy on August 10, 1995. (See footnote 12) (Jan. 9, 1997, Miller at Tape 2, Mark 1560-1790; Resp. Exhs. Nos. 22 and 23.)

12. Grievant did not send an application to Ms. Peet for the ERPM I position.

13. After receiving the EEO report, Grievant filed a grievance on this issue on July 23, 1995, alleging religious and national origin discrimination in the hiring of Mr. Leonard Womble to fill the position. This grievance was denied at Level II and was not appealed. (See footnote 13)

14. On several occasions, Grievant made hostile, demeaning, inappropriate, or unprofessional remarks to female employees. (Trans. Apr. 24, 1996, David White at 186; Trans. Jan. 8, 1997,

Newell at 50, 90; Jan. 9, 1997, Peet at Tape 1, Mark 3290, Tape 2, Mark 910; Resp. Exhs. Nos. 20 and 21.) 15. Mr. Womble, an employee in the Emission Inventory Section, was chosen as the Director of Permitting. He had little experience in actual permitting, but had had many years of experience in managing. He met the qualifications required in the posting. Mr. Womble was to start in his new position on August 1, 1995.

16. Grievant was angry about Mr. Womble's selection and believed Mr. Womble to be incompetent and incapable of performing the duties of the position. In late July 1995, he placed a notice on the door to Mr. Womble's future office saying no one could move in until August 1, 1995. Mr. Benedict found the note and removed it. Grievant replaced the note and after several rounds of replacing and removing, Mr. Benedict asked who was putting up the notes. Grievant confessed. Mr. Benedict told him not to do it again as DEP would decide when Mr. Womble would move, and Grievant responded he would replace the note and even move a refrigerator in front of the door, if necessary. Mr. Benedict perceived Grievant's actions as a threat and told Grievant he did not “take to threats”. (Trans. Jan. 8, 1997, Benedict at 248; Newell at 91-92.)

17. Mr. Womble began as the Manager of the Permitting Section on August 1, 1995. One of the changes he instituted or policies he enforced when he came on board, was the completion of time slips and compliance with the Alternative Work Schedule Options (“AWS”). (See footnote 14) He also sent out a questionnaire requesting basic data from employees. (See, Finding of Fact 29, infra.)

18. On August 4, 1995, Grievant wrote a memo to Mr. Womble about his memo and questionnaire which stated:

Please provide me copy of DEP policy concerning weekly work plan request. Please, also provide me information concerning which section of OAQ currently request such plan. Does enforcement section has [sic] such a policy? Please, alsoprovide me legal interpretation of your secret police style questionnaire. For 19 years of my life, I had to fill out such hate questionnaire on daily bases. Legal scholar has told me that your request is unconstitutional. Please, verify such statement. Please, also provide me all your technical policy concerning how a permit and evaluation should be look like [sic]. I request that all your answer be in written [sic]. All your request will be answer [sic] when you response [sic] me in written [sic].

(Exh. No. 1 with Statement of Grievance.)

19. Sometime during the first weeks of August 1995, DEP began an investigation into multiple

complaints received and concerns raised by Grievant's behavior. (Trans. Jan. 9, 1997, Watson at 29-30.)

20. On August 14, 1995, Grievant completed an AWS option form and included in the comments the following statement: “I sincerely hope Chief makes a decision regardless [of] employees race or national origin--Historically, all decision[s] been [sic] made, if any, based on employees race/national origin--THIS WOULD BE REALLY VIOLATION of my constitutional rights. (Exh. No. 5, with Statement of Grievance.) Grievant's requested schedule was approved by Mr. Womble on August 25, 1995. (Id.)

21. On September 6, 1995, and September 12, 1995, Grievant requested leave for “stress” for three and a half and one and a half hours, respectively. On the September 6, 1995 form he included this comment: “As result of tremendous harassment by Mr. L. Whomble's [sic] [illegible word] after my revealing facts in paper, I have to take some time off 'stress'. (See footnote 15) This may be a violation of Whistle Blow [sic] Law.” Mr. Womble refused to sign these forms unless Grievant changed his comments. (Resp. Exh. No. 6, Attachment.)

22. On September 28, 1995, Grievant completed his monthly Application for Leave form (“ALF”). This very messy form indicated Grievant had taken two hours of annual leave onSeptember 4, 1995. No request for this leave was submitted into evidence. Additionally, the leave for September 5, 1995 and September 12, 1995 were not indicated on this form. (Id.)

23. On September 28, 1995, Grievant asked Mr. Benedict to ask Mr. Womble to give him a “signed copy of my leave slips for September 5, 12 [sic].” That same day Grievant made the same request to Mr. Farley. In this request Grievant stated “Mr. Womble signes [sic] white engineer's leave slip except mine.” (Resp. Exh. 5, Attachment.)

24. On September 29, 1995, Mr. Womble wrote Ms. Peet, OAQ Personnel Coordinator, indicating he had asked Grievant to correct his ALF and Grievant refused. Mr. Womble also indicated he would not sign the September 6, 1995 and September 12, 1995 leave forms until Grievant submitted them “excluding the self-diagnosed condition of stress”, and that Grievant had refused to change them. Mr. Womble also indicated he believed Grievant was seeking overtime for the AGP, and that Grievant had neither requested nor had he received approval for this overtime. (Resp. Exh. 6.)

25. On August 4, 1997, Grievant filed a grievance stating he did not have a competent

permitting section supervisor. Grievant complained Mr. Womble, his newly selected supervisor, was not qualified for the position, and Mr. Womble's lack of experience hindered his performance because his supervisor could not provide him with technical experience. Grievant's requested relief was to be provided with another supervisor "whom [sic] is technically, managerially competent." (Trans. Jan. 9, 1997, Mark Scott at 63-66; Resp. Exh. 12A.)

26. In that same grievance, Grievant requested 1) permission to call Governor Caperton on his weekly radio show to "tell him how Mr. Farley chases business and how he wants taxpayers['] money"; 2) the "[r]emoval of Chief Farley from his position. [sic] Because of lack of ability to makea right decision"; and 3) to be provided with "three copies of Mr. Leonard Womble [sic] engineering evaluation and permits." (Id.)

27. This grievance was denied at Level II as Mr. Womble met the minimum, civil service requirements for the ERPM I position, and because there had been insufficient time to conclude Mr. Womble could not perform the duties of the position. (See footnote 16) This grievance was not appealed. (Trans. Jan. 9, 1997, Mark Scott at 63-66; Resp. Exh. 12A.)

28. On August 11, 1995, Mr. Womble wrote a memo to Grievant indicating DEP had received a Freedom of Information Act ("FOIA") request. This memo states:

Director McCoy has requested that all files relevant to the above permit application be collected in one location by 11:00 A.M. today, August 11, 1995. Therefore, as the permit engineer for this application, it shall be your responsibility to collect and assemble all of the subject files in the 3rd floor conference room at 1615 Washington Street, East. All correspondence is to be assembled in chronological order with the most recent item being on top. Any and all information which the applicant deems to be business proprietary is to be removed from the material to be examined by a representative(s) of the requesting entity. Any and all such proprietary material shall be placed in a file(s) and delivered to me prior to any examination of the material by the requesting party. During your collection process, please do not forget to check the main office.

You mentioned to me two days ago that you had some of the Apple Grove material at your residence. Hopefully, you have since returned this material to this office. In the future, you nor any other person assigned to the permit work group shall remove from this office any original file material.

(Resp. Exh. 4.)

29. On that same day, Grievant filed a grievance stating:

Since I have stated to DEP official that Office of Air Quality (OAQ) Chief, Mr. dale [sic] Farley, based on his personal baseless and nonsense views is opposed to construction of 1.2 billion dollar pulp mill and is hindering issuing permit forApple Grove Paper and Mill Company (AGPPC). Chief Farley decided to remove all supporting document regarding this permit out of my possession so he can censer [sic] all supporting document. I don [sic] not see Chief removing other permits file from other engineer (s) [sic].

The requested relief was return of "an uncensured [sic] file back ASAP." (See footnote 17) (Resp. Exh. 12A.)

30. At the time the file was removed from Grievant, it was not organized, pieces and reports relating to the file were not in the file, but were in various places at DEP, and the file was not in chronological order. (Resp. Exh. 4.)

31. By the time of the Level II conference on this grievance, the organized file had been returned to a central location which was easily accessible to Grievant. (Trans. Jan. 9, 1997, Scott at 68; Resp. Exh. No. 12A.)

32. During his first couple of weeks as Manager, Mr. Womble sent a memo to his supervisees requesting them to define two problem areas which hindered them from getting their job done and to state actions which would cure the problem. If the problem concerned another OAQ employee, the employee was not to use that individual's name.

33. On August 15, 1995, Grievant responded to these questions and stated:

I believe, two problems, hindering [sic] my advancement in OAQ:

1. Lack of having a competent, honest, productive Chief.

Solution:

1. I believe, it is in interest of State both as far as employee productivity and business expansion that DEP terminates Chief. Chief is like a mad man with authority to chase business out of state.

I believe, a majority of OAQ employees are highly productive and has [sic] lot [sic] to offer, but due to lack of direction from top, our efficiency is as low as are in [sic] Haitian Army, waste are [sic] high.

2. My national origin and religion. It is difficult to prove discrimination, but I am certain [,] at one point [,] I will prove to DEP that Chief Farley is not only as effective as a [sic] ice cube in recovery boiler, but also a racist.

Solution

People including Chief should accept me as I am.

(Grievant's attachment to suspension grievance, labeled Exh. 4.)

34. On August 15, 1995, Grievant filed a grievance alleging he had written a letter to U.S. Steel Mining Company for Mr. Farley's signature on January 23, 1995, and Grievant had never received a response, causing embarrassment to OAQ. At the Level II conference, both Mr. Farley and Grievant agreed responsibility for this issue had been reassigned by Mr. Farley to another employee in March 1995, thus, considering there was no requested relief on the statement of grievance, the Grievance Evaluator felt no response was required. (Resp. Exh. 12A.) This grievance decision was not appealed.

35. While Mr. Newell was Acting Manager of the Permitting Section, he had taken detailed notes of Grievant's various activities that he saw as problematic, inappropriate, and unprofessional. After he was not selected for the position, he collected only the notes and incidences for which he had personal knowledge or documentation, typed them, and sent a copy to Mr. Womble in two separate memos. The memo of August 18, 1995, detailed how Grievant had told Mr. Newell on May 24, 1995 at 4:10 p.m. as they were leaving work, that he had never submitted his application for the ERPM I position to Ms. Peet as required by the posting, but had only pretended to do so. He had completed the application, and had sent a copy to Sandy Kee, DEP Personnel Director, as proof that he had applied. He was pleased with this plan and believed he had Ms. Peet in a “tightsituation”. Grievant discussed this action several times with Mr. Newell. (Resp. Exh. 12; See Finding of Facts 10 and 36.)

36. As the new head of the Permitting Section, Mr. Womble decided to institute a variety of changes within his work group to facilitate the planning and progression of the workload. He sent a memo on August 17, 1995, explaining these changes, especially his plan for large permits to be completed by groups, and asking for feedback. Shortly thereafter, on August 22, 1995, he appointed an AGP team to complete the work on this project. Grievant was a member of this team, and as the

individual with the prior working knowledge on the engineering side of the project, he was asked, at a subsequently scheduled meeting, to discuss the project, explain his progress thus far, and clarify the permit's status and further needs. (Resp. Exhs. No. 2 and 3.)

37. On August 29, 1995, Mr. Newell sent a second memo to Mr. Womble. This memo detailed, with specificity, thirty-one examples of Grievant's non-cooperative, hostile, unprofessional, and threatening behavior from March 16, 1995 through July 26, 1995, while Mr. Newell was acting manager. These examples detailed Grievant's failure to attend meetings, refusal to turn in leave slips to Mr. Newell, threats to Mr. Newell, attempts to discredit Mr. Atkinson, Manager at Title V, refusal to accept work assignments, attempts to create hostility among co-workers, the Bring Your Daughter to Work episode, the CD-ROM episode, the thermostat episode, and the door sealing episode. Much of the data in this memo ended up in the suspension letter. (Resp. Exh. 13.; Trans. Jan. 8, 1997, Newell's Test.) (See footnote 18) Mr. Newell also stated he had difficulty controlling Grievant's behavior in the workplace, and that one of the reasons Mr. Womble was selected for the ERPM I position was because of his extensive supervisory experience. (Trans. Jan. 8, 1997, Newell at 194.) 38. On August 29, 1995, Grievant filed another grievance alleging Mr. Farley was intentionally delaying the AGP because he “would like to see the State of West Virginia turned into one big national forest (not a realistic idea), because he does not want to face the negative comments which will surely result from publication of Air Quality's intent to issue this permit or because he is cruising to retirement and does not want anything to jeopardize his employment.” No relief was requested. Grievant withdrew this grievance on September 6, 1995, apparently after Mr. Mark Scott, Deputy Director of DEP, had discussed the grievance with him. Grievant's rationale was “[i]t was [sic] issue that I wanted to bring up and I did.” He indicated Mr. Scott should “not waste [his] time on [it].” (Resp. Exhs. Nos. 16 and 17; Trans. Jan. 9, 1997, Scott at 69, 142-149.)

39. On August 30, 1995, the “Charleston Gazette” published an article about the AGP in which Grievant is quoted as saying, “There is absolutely no harm to the public as a result of this pulp mill.” Grievant accused Mr. Farley of “stalling” and indicated all requirements for the permit were met. Mr. Farley's response was also given, and he indicated the permit was not ready, AG had been frequently slow to respond to OAQ inquiries, (See footnote 19) and Grievant's displeasure was the result of appointment of a team to complete the project. (Gr. Exh. No. 11.)

40. On August 31, 1995, another article appeared in the “Gazette” in which Mr. Farley

indicated the “dioxin emission issue” was not yet resolved, and the permit was not ready. At that time the records, which had previously been opened to the press, were sealed by court order. (Gr. Exhs. Nos. 12 and 13.) 41. Grievant was angered by the changes instituted by Mr. Womble and did not wish to complete the AGP with the group he had dubbed as the “Dream Team”. Grievant was non- cooperative with Mr. Womble, and on September 5, 1995, Mr. Womble sent a memo stating, in part:

In addition to the above, your continued display of confrontational behavior when dealing with those OAQ related issues and/or employees with which or whom you don't necessarily agree [sic]. This conduct is disruptive to the orderly flow of business within the PWG. I think that the time has come for you to recognize the fact that, in addition to you having certain rights guaranteed by the Constitution, you also have certain responsibilities. Within the work environment of OAQ and the PWG [Permit Work Group] in particular, you are, as is everyone else, expected to do your job in a professional fashion, demonstrate an acceptable degree of cooperation when dealing with other OAQ staff members, and treat OAQ's customers in a positive and respectful manner. Anything less than this is not acceptable.

(Gr. Exh. No. 23.)

42. On September 6, 1997, Grievant responded to Mr. Womble's memo in the following manner:

With Exception of Apple Grove Project which was published in paper[,] and I express what I think was true evident [sic] of that permit, Please [sic] state in writing what other incident you observed. Just keep in mind that you used tell to me how this agency is mismanaged and how you encouraged me in [sic] many occasion[s] to contact previous Dir. When was the last time you said this agency needs a Chief that can get off of his . . . and do so work. Did you forget how you used to plot against other employees?

Thank you and looking forward to see your response.

(Gr. Exh. No. 23.)

43. Also on September 6, 1997, Grievant engaged in a lengthy conversation with Mr. Benedict. (See footnote 20) The summarization of this conversation is restated in full in the suspension letter (see pages 16-17, supra). The undersigned Administrative Law Judge specifically finds this

conversationoccurred, and Grievant made the statements credited to him. (Resp. Exh. No. 14; Trans. Jan. 8, 1997, Benedict at 228-239.)

44. On September 7, 1995, Grievant sent the following memo to Mr. Farley:

Re: Your untruth memo dated August 24, 1995 regarding I. C. Engine

At present [sic] of Mr. W. L. Whomble [sic] at 2:30 P.M. August 25, 1995 I called Mr. Bryant Nowell [sic] (Bryant was sick that day) regarding all issues surround I. C. engines. Bryant told us on speaker phone his side of story which is 100% different than your story. On Monday August 28, 1995 in our staff meeting, I asked you to give me a time to discuss I. C. engine issues, but as usual you said we will have a meeting. In two occasions, I tried to make an appointment with you to discuss the issue, but Tammy has said that she will talk to you and she will call me. That never happened. Today at 3:50 P.M. I asked you at present [sic] of Mr. Bob Vaughan since Bryant's last day is Friday Sept. 8, 1995, if you have a time, we need to discuss I. C. engine memo. I said since Bryant is leaving, if we do not talk to him today, we should call him back sometimes [sic] to come here. You responded WE SHOULD and you continued your conversation that you are real busy today and you walked away. **I found your behavior unprofessional, provocative and inflammatory.** You should not behave in such a manner. I expect you act more professional as a CHIEF since you are representing an elected non-racist, liberal, democrat[ic] Governor. I request a meeting with you to resolve this non-compliance issue that you have knowingly ignored since April of 1994. Sometimes [sic] in May of 1995, I stared [sic] this the issue of I. C. engine, but you blocked all my effort.

(Gr. Exh. No. 24.)

45. Sometime in December of 1994 or January 1995, Ms. Peet complained to Mr. Farley about some individuals abusing their time. On January 25, 1995, Mr. Farley sent a memo to all OAQ employees setting out rules about work hours and schedules. (Trans. July 2, 1996, Farley at 191-200, 228-229.) On February 1, 1995, Grievant responded to this memo stating only three people abuse their work schedule, so not all should be punished. (See footnote 21) He then named four people plus an unidentified Office Assistant who abused their work schedule. Grievant stated Mr. Farley should discipline the offenders and not punish the other employees. (Gr. Exh. No. 16.) 46. On September 7, 1995, Grievant sent a memo to Mary Hunt, Chief DEP Administrator, to report Karen Watson for ninety-eight hours of leave abuse that he had personally documented

since January 1995. He accused Ms. Watson of “double billing” and “embezzling”. (Gr. Exh. No. 25 and Resp. Exh. No. 8.) Attached to this memo was a list compiled by Grievant which indicated the times he believed Ms. Watson had not maintained the proper work schedule. This sheet runs from April 5, 1995, to May 12, 1995. Although arrival and lunch times were usually indicated, Grievant's list did not indicate when Ms. Watson left work, and Grievant testified Ms. Watson was in the office at times when he left to go home. (Resp. Exh. No. 10; Trans. Apr. 24, 1997, Grievant at 45-56.)

47. Ms. Watson frequently went to other offices and meetings before she came to her OAQ office. She also, at times, had working lunches, which lasted longer than a half hour. She usually left work between 5:00 p.m. and 6:00 p.m. and took work home. (Trans. Jan. 9, 1997, Watson at 29-32; Scott at 155-156.)

48. Ms. Hunt responded to Grievant's memo on September 20, 1995, and indicated Ms. Kee would be in touch with him about his complaint. (Gr. Exh. 28.) At some point in time, Grievant requested a meeting with Dr. McCoy. Grievant first met with Mr. Scott, Deputy Director of DEP and subsequently with Dr. McCoy. (See footnote 22) Grievant accomplished his purposes for this meeting, which were to report Ms. Watson's time abuse and Mr. Farley's incompetence for his failure to respond to Grievant's AGP draft and general inability to manage. Dr. McCoy assigned Mr. Scott to investigate the time abuse matter and also directed Mr. Farley, by memo dated November 1, 1995, to check out the time abuse complaint. (Resp. Exh. No. 11.) Neither Mr. Scott nor Mr. Farley foundany indication that Ms. Watson had abused her leave or had not worked the required number of hours. (Trans. July 2, 1996, Farley at 282-284; Trans. July 3, 1996, McCoy at 423-428; Trans. Jan. 9, 1997, Watson at 29, Scott at 151-156.)

49. Although Dr. McCoy and Ms. Watson are long-time professional acquaintances, and Dr. McCoy trusts her professional opinion and advice, they are not friends and do not engage in social activities outside the office. (Trans. July 3, 1996, McCoy at 478.)

50. The undersigned Administrative Law Judge specifically finds that Grievant's allegations were investigated, no evidence was found of leave abuse by Ms. Watson, and Dr. McCoy did not fire Grievant for complaining or Whistle-Blowing about Ms. Watson's leave usage.

51. On September 18, 1995, Grievant sent the following memo to Mr. Womble:

On many circumstance [sic] I brought up to your attention the issues that impeded my ability to render my duties. These issues ranges [sic] from misrepresentation of facts by you and Benedict to

seeking technical assistance. But, I believe John Benedict feels his only job is to imitate Chief's failure policy of ignoring issues for personal gain. I would highly urge that OAQ which has been ravaged by lack of management/ direction no longer ignores the issues.

(Gr. Ex. No. 27.)

52. Grievant sent another memo to Mr. Farley on September 25, 1995, and informed him of the work he had done over the weekend on the AGP in order to answer the questions asked him by the team. He again asked for a response on the permit he had submitted in Spring 1995. Grievant also indicated the AGP team did not receive adequate guidance from Mr. Womble or Mr. Benedict, and that Mr. Womble did not receive adequate supervision from Mr. Farley. (Gr. Exh. No. 29.)

53. On September 26, 1995, Grievant again talked to Mr. Benedict about his frustration and anger over recent events. Again, Mr. Benedict summarized the conversation after Grievant left, and this summary is included in the suspension letter (see page 22, supra). The undersigned Administrative Law Judge specifically finds Grievant made these statements, especially as they aresupported by the testimony of Mr. Newell. (Resp's Exh. No. 15; Trans. Jan. 8, 1997, Benedict at 245-247; Newell at 68-69.)

54. The behavior of Grievant was directed toward his goal to destroy or root out the incompetence he believed existed in OAQ. He believed most employees of OAQ were incompetent. (Trans. Apr. 24, 1997, Grievant at 32.) Through his actions, Grievant sought the removal of Mr. Farley as Chief, Mr. Womble as his supervisor, discipline for Ms. Watson, and the termination of the employment of Mr. Atkinson and Ms. Peet. Toward the end of his employment, he also believed Mr. Benedict should be either terminated or placed in a non-supervisory role.

Discussion

I. Credibility

In assessing the credibility of the multiple witnesses in this case, I found the majority of them to appear forthright, honest, and truthful. At times, the data given in regard to exact dates, wording of statements, and other recollections did not match, as is typical with recollection, especially after so long a time. I specifically find the testimony of Dr. McCoy, Mr. Womble, Mr. Benedict, Mr. Newell, Mr. Vaughan, Ms. Watson, Ms. Miller, Ms. Kee and Mr. Scott to be credible. The undersigned

Administrative Law Judge had an opportunity to observe the demeanor of these witnesses and saw no evidence of discomfort or evasiveness. Additionally, their information was plausible, internally consistent, consistent with the testimony of others, with the slight variations discussed above, and usually supported by the documentary evidence submitted by both sides.

The undersigned Administrative Law Judge did not observe Ms. White, as her testimony was submitted from the unemployment hearing. Except for an insignificant misstatement about signing the affidavit in front of the notary, her testimony was internally consistent, consistent with what she told Dr. McCoy, and consistent with other witnesses, specifically the testimony of Mr. Newell, onthe key issues of the mail and messages. Additionally, as soon as Ms. White realized she had misspoken she reported it to the DEP attorney, and the DEP attorney informed the Unemployment Administrative Law Judge. Grievant's counsel was then allowed to cross examine Ms. White in- depth on this issue. Thus, the undersigned Administrative Law Judge also finds Ms. White to be a credible witness.

As previously stated, Grievant admitted some of the events happened as described, such as the CD-ROM incident, but stated his defense to these charges was that his employer was wrong to do what it did. Other charges Grievant either denied, perceived differently, or again he stated the employer was incorrect and his idea, or decision was the correct one. Much documentary evidence, especially the administrative notes maintained by Mr. Newell and Mr. Benedict, was damaging to Grievant's case. Further, several memos sent by Grievant proved insubordination and threatening behavior. The key here is not whether Grievant meant to be insubordinate, nor does it matter if he was correct, had a better idea or method of doing things, or his supervisors were not the most competent humans in all aspects of their positions. None of these circumstances gives an employee the right to challenge management decisions in an insubordinate, threatening, or rude manner. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. See Nagel v. Dept. of Health and Human Resources, 707 F.2d 1384 (Fed. Cir. 1983). An employer can take into account negative reactions of co-workers to an employee who continually reports their minor transgressions. Duran v. MSPB, 707 F.2d 1174 (10th Cir. 1983). See Ball v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-141 (July 31, 1997); Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

On the issue of when Ms. Watson knew Grievant was keeping track of her time there appears to be a clear conflict in the testimony of credible witnesses. A review of the testimony indicates

Ms.Watson knew Grievant, and perhaps Ms. White were keeping track of her time, but Ms. Watson may not have known Grievant reported his beliefs to Dr. McCoy as a whistle-blowing complaint until September 1995.

In essence, it does not matter whether or when Ms. Watson knew of Grievant's complaints about her time. It is not a conflict of interest, as alleged by Grievant, for DEP's attorney to assist in the investigation of the behavior of an employee at the direction of her employer. The fact that an employee may have complained about her is of no moment. Ms. Watson, along with several other employees, were charged with investigating the complaints about Grievant. They completed the investigation and found sufficient evidence to support the findings in the suspension letter. Additionally, this testimony indicates the investigation into the mail issue was conducted by Mr. Matthew Crum, another DEP attorney, as well as Dr. McCoy.

Further, it must be noted, that Grievant, even though he gave up his right to remain silent and testified at length, did not rebut or even speak to many of the charges identified in the suspension letter. As previously stated, Grievant's frequent response to the allegations was he was right, almost everyone else at OAQ was wrong and incompetent, and it was his responsibility to destroy the agency so it could “rise from the ashes like the phoenix” to be what he thought it should be. (See Grievant's comments to Mr. Newell and Mr. Benedict.)

II. Prima Facie Case

As previously stated, Grievant, as an at-will employee, must make a prima facie case to support his allegations that his suspension and discharge were in contravention of some substantial public policy. Since Grievant has alleged multiple substantial public policies were violated, and since each of these issues has different elements, or requirements of proof, they will be examined and discussed separately.A. Discrimination (See footnote 23)

1. Discrimination due to National Origin and Religious Beliefs

Grievant is a nationalized, United States citizen from Iran. He also professes to be of the Moslem religion. He alleges he was discriminated against and treated differently because of his national origin and religion.

An at-will employee seeking to establish that his suspension or termination was motivated by unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), by demonstrating the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Bellinger, supra. See Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). See also Graley, supra. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the suspension. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley, supra. (See footnote 24) Grievant did not meet his burden of proof and demonstrate he was the victim of discrimination due to his national origin or religion. Grievant's evidence in this regard was that he had heard Mr. Farley and Mr. Benedict, during the time he worked at OAQ, make several (two or three) negative remarks about black people and welfare. He also stated someone told him that Ms. Peet made a remark about an applicant, from perhaps India, with the last name of Patel. He took this remark as racial.

Grievant also stated Mr. Vaughan, a co-worker, had called him a “camel jockey” and a “sand nigger”, and had told him a story about some “fuckin' Iranians” that were aboard his submarine when he was in the service. Mr. Vaughan agreed he had called Grievant a “camel jockey”, but denied he had ever called him a “sand nigger”. He also admitted he had told Grievant the story about the “fuckin' Iranians” and stated they had left the hatch open when the submarine submerged causing lots of problems. Mr. Vaughan recounted that he and Grievant had several exchanges, and that they both “gave as good as they got.” Grievant states he complained about Mr. Vaughan's behavior to his supervisor. Grievant gave no examples of any of his supervisors, either in his presence or at any other time, making negative comments about his national origin or religion. In fact, the testimony reveals that Grievant was at one time friends with Mr. Farley, to the point of going camping and drinking beer with him. Grievant was also apparently comfortable with Mr. Newell, Mr. Womble, Mr. Benedict, and Ms. White at one time, because he confided in them his various concerns and plans.

While such comments are offensive, as well as unwise, they do not prove that the suspension and dismissal were motivated by discriminatory factors. The comments were few, isolated, and certainly

not directed at Grievant. Comments made by supervisors were not even directed to Grievant's national origin or religion. The comments by co-workers cannot show that Dr. McCoy'sdecisions to suspend and dismiss Grievant were based on Grievant's national origin or religion. This type of interaction does not support claims of discrimination or evidence that Grievant was discriminated against.

Grievant cited as another example of racism, the fact he was the only individual not interviewed for the Permitting Manager Position. He stated all white applicants were interviewed. Even though not required by DEP policy, all other applicants for the position were interviewed, and three of these applicants were of non-American origin and of a non-Christian religion. Ms. Miller's EEO investigation confirmed this data, and she testified Mr. Farley had not interviewed Grievant for this supervisory position because of his poor interpersonal relationship abilities. She found no evidence of discrimination or an EEOC violation.

Grievant also alleged Mr. Womble's failure to sign his leave slips was racially motivated. The evidence does not support this contention. See Findings of Fact 19-22. Mr. Womble would not sign Grievant's leave slips either because they were incorrect or included information he thought was inappropriate. Additionally, there was no evidence submitted that he did not sign Ms. Renu Charbarty's leave slips and according to the parties she is of Indian descent. Further, there was no evidence Mr. Womble signed leave slips for white employees when they were incorrectly completed. Additionally, Ms. Charbarty was one of two engineers placed in charge of the AGP by Mr. Womble. This does not comport with Grievant's allegations that only “WASP's” were treated favorably.

Although Grievant has made multiple complaints, he has failed to present a set of facts sufficient to make a prima facie case. A grievant “may not rest his case on mere allegations or denials.” See Shah v. Stroud, 13 F.2d 791, 798 (4th Cir. 1994); Moore v. Reece, 817 F.Supp. 240), 290 n.12 (D.Md. 1983). Grievant has not demonstrated that he was treated differently because of his national origin or religion. Accordingly, Grievant has not demonstrated that his suspension or termination was related to unlawful discrimination due to his national origin or religion, thus no violation or contravention of a substantial public policy has occurred in this regard.

2. Discrimination in general

Grievant had additionally alleged he was treated differently than other employees in that they engaged in similar or worse offenses and they were not discharged or suspended. The raised issues

were:

a) Rick Atkinson - Grievant alleged Mr. Atkinson engaged in sexual harassment of female employees. Mr. Farley agreed this had occurred in 1994, Mr. Atkinson received an oral warning and counseling, and he had not had any further complaints since that time. Mr. Farley also conceded that with the new training, emphasis, and education on this area in recent years that a penalty today would probably be more severe.

b) Kathy Peet - Grievant alleged Ms. Peet lost his application for the position intentionally due to her prejudice against his “national root.” This accusation was not proven. In fact the undersigned Administrative Law Judge specifically found Grievant did not submit his application for this position to Ms. Peet, but used this situation to “set up” Ms. Peet and to get her in trouble. See Finding of Fact 12.

c) Karen Watson - Grievant alleges Ms. Watson consistently did not work the required number of hours per week. Grievant believes this to be true because he checked when she came in and how long she took for lunch on a daily basis. Grievant has failed to prove that Ms. Watson committed any wrongdoing.

By his own testimony, Grievant did not know where Ms. Watson was each time she arrived “late” in the morning or took a “long” lunch. He attempted to obtain this information by callingvarious offices and having Ms. Watson's secretary or Ms. White “track her down”. Also it is clear Grievant had no idea when Ms. Watson left, as his carefully detailed notes do not contain this important data. (Resp. Exh. No. 9 Attachment.) The data Grievant “collected” on Ms. Watson only goes from March to April 1995.

Further, Ms. Watson testified credibly about her time and this testimony was supported by Mr. Scott. She indicated she sometimes had other meetings or business to attend to before she went to her office at OAQ, and, at times, had business lunches. She also indicated she usually left work between 5:00 p.m. and 6:00 p.m. and took work home. Additionally, investigations directed by Dr. McCoy and conducted by Mr. Farley and Mr. Scott revealed no wrongdoing on the part of Ms. Watson.

d) Ann White - Grievant alleges Ms. White engaged in false swearing and perjury at his unemployment hearing and has not been punished. At that hearing, Ms. White stated she signed the affidavit relating to Grievant's mail tampering in front of the notary. During a break in her testimony,

she informed DEP's counsel that this statement was incorrect, and that she had signed the statement first, and it was taken elsewhere later to be notarized. She stated she made this incorrect statement for two reasons: 1) at first, she did not remember how the paper got notarized; and 2) she is a notary herself and did not want to get the other woman in trouble. She confirmed, under oath, that her notarized statement was true. As soon as DEP's counsel was made aware of this problem, he informed the judge at the unemployment hearing, and Grievant's counsel was allowed to question Ms. White about this incident in-depth. Dr. McCoy and Mr. Farley indicated they do not plan to discipline Ms. White for this error.

The undersigned has examined each of the allegations made by Grievant and finds them either to be unproven or not of the level of severity of his on-going behavior. Although, it could besaid that he was similarly situated to other employees in that they all worked for OAQ, that is where the comparison ends. He has been treated differently from these other employees because of his continuous hostile and non-cooperative behavior. Grievant did not point to any other OAQ or DEP employees whose behavior was similar to his and were not punished.

B. Whistle-Blowing

A "'Whistle-blower' means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." W. Va. Code § 6C-1-2(g). Information helpful in clarifying this definition is:

"Wrongdoing" means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer. W. Va. Code § 6C-1-2(h).

"Waste" means an employer or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources. W. Va. Code § 6C-1- 2(f).

"Good faith report" means a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true. W. Va. Code § 6C-1-2(d).

"Appropriate authority" means a federal, state, county or municipal government body, agency or

organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste. W. Va. Code § 6C-1-2(a).

An employer may not retaliate against a Whistle-blower in any way and any such act would be seen as an act of reprisal. W. Va. Code § 6C-1-3. W. Va. Code § 6C-1-4 states that: "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." This Code section further identifies that "[i]t shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts."

Grievant contends his reporting of Ms. Watson's leave abuse was an act of whistle-blowing, and the real reason he was suspended and then terminated. In essence, Grievant argues Dr. McCoy retaliated against him because of Dr. McCoy's close friendship with Ms. Watson. Additionally, Grievant appears to argue that his comments to the "Charleston Gazette" about Mr. Farley's incompetence and delay were also acts of whistle-blowing and resulted in his suspension and subsequent termination. It does not appear, from remarks made by Grievant's counsel, (See footnote 25) that Grievant sees the additional statements he made to Dr. McCoy in his meeting with him about Mr. Farley, as either acts of whistle-blowing or acts that resulted in the disciplinary actions. Although, again not clearly argued when asked to clarify the issues Grievant was alleging, it would appear that Grievant may also be alleging retaliation for his "whistle-blowing" statements to his supervisor that during the indexing of the AGP file, certain files and reports had been intentionally removed to speed the progress of the permit. Each of these allegations will be discussed separately.

1. Reporting Karen Watson's alleged leave abuse.

In this instance, Grievant reported the alleged abuse to appropriate authorities, Mr. Farley and Dr. McCoy. Whether Grievant's allegations of Ms. Watson's leave abuse rise to the level of "wrongdoing" or "waste" as defined by the statute is another matter. Grievant had calculated that from January 1,

1995 through September 7, 1995, Ms. Watson had “shorted” this State ninety-eight hours. If this allegation proved to be true, it would translate into a shortage of approximately 2.6 hours a week or 6.5% each week. The “wrongdoing” complained of under the Whistle-Blower Statute cannot be “of a merely technical or minimal nature” and “waste” relates to “substantial abuse, misuse, destruction or loss of funds or resources.” Even accepting Grievant's allegations of leave abuse at face value, they do not appear to be the type of wrongdoing or waste contemplated by the statute.

But, even if this element is considered met, Grievant does not meet the requirement of good faith. The Whistle-Blower must have “reasonable cause to believe [his report] is true.” Even though Grievant apparently spent a considerable amount of time tracking Ms. Watson's movements, he was still unable to say that when Ms. Watson was out of the office, she was not engaged in work-related activity. Additionally, it is clear he did not know when she left, as that is not included in his report. Without knowing a person's whereabouts, or the time they leave the office in the evening, Grievant would have no way of possessing the knowledge necessary to make a “good faith” report of wrongdoing of work schedule or leave abuse.

Although not necessary because Grievant did not meet the requirements necessary to be covered under the “whistle-blower act” on this issue, it may be helpful to note that even if he had, his suspension and termination were not related to his report on Ms. Watson's leave abuse. The testimony is clear, Dr. McCoy delegated Mr. Scott to examine the complaint and also directed Mr. Farley to check into the matter. No leave abuse was found. Although Grievant alleged Dr. McCoy fired him because of Dr. McCoy's “close friendship” with Ms. Watson, such allegations were never proven, and indeed Dr. McCoy said they were professional acquaintances, only, and not friends. No evidence of any kind to support Grievant's beliefs was submitted.

Accordingly, Grievant has not demonstrated: 1) he met the requirements to be considered a “whistle-blower” under the Act; or 2) that his allegations played a part in his suspension and termination.

2. Reports to various reporters, including the Charleston Gazette.

Grievant's argument that his reports to the Charleston Gazette about the intentional delay of the AGP are covered under the “Whistle-Blower Act” must fail. A newspaper, or its reporters, are not appropriate authorities under the statute. W. Va. Code § 6C-1-2(a).

3. Alleged Removal of Documents from the Apple Grove Permit file.

Upon the return of the AG file after indexing, Grievant alleged certain documents relating to modeling tests for dioxin were missing. (See footnote 26) Grievant informed Mr. Womble, Mr. Benedict, and Mr. Farley of these allegations. Mr. Womble asked Grievant if he had the documents and when he replied he did, Mr. Womble asked him for them so they could be placed in the file. Grievant refused. (See footnote 27)

Grievant's allegations in this regard are very confusing and contradict his testimony at hearing and his statements to the paper. In late August 1995, Grievant stated Mr. Farley wasdragging his feet on the AG project, the permit was ready to go, and there was no danger to the public. In that same article, Mr. Farley said the permit was not ready, Grievant had limited experience in permitting, the dioxin issue was unresolved, and the permit could not be issued until this issue was settled. At this same time, Grievant was telling others Mr. Farley wanted to chase business out of the state and intended to “drag his feet” and never issue the permit.

Then later, Grievant accused Mr. Womble, Mr. Benedict, and Mr. Farley of hiding the dioxin modeling reports in order to speed an unsafe project along. (See footnote 28) These comments contradict Grievant's prior position, and do not meet the good faith requirement of the whistle-blower statute, but do match the statements Grievant made to Mr. Benedict (See footnote 29), that Grievant sought “to play” the AG permit in whatever way would help his cause to bring the agency and Mr. Farley down. Further, it makes no sense that Mr. Farley would tell the newspaper there were problems with the potential dioxin levels, and that was the reason the permit had not been issued, and then would remove these same documents, verifying his statements, from the file.

It must be noted that both Mr. Womble and Mr. Benedict believe Grievant removed documents from the AGP file to create problems for the agency. This belief is based on the fact that there was no reason for these particular documents to be removed, and the fact that copies of these documents were found in Grievant's desk after his suspension.

Grievant's testimony about which reports were missing from the file, and how he knew they were missing is also very confusing. On questioning Grievant stated: 1) he had little time with thefile; 2) the file contained at least 100 documents; 3) eight to twelve documents were missing and still were as the date of the July 3, 1997 hearing; 4) all missing documents were about modeling; 5) two of the missing documents were not about modeling; 6) the file was in a mess; 7) the file was in order when he had it; and 8) upon its return he did not check the entire file, but could tell from a brief flip through

parts of it that these documents were missing because he knew the file by heart. Further, the file was returned to Grievant's area in mid-August, and Grievant made his allegation on August 17, 1995.

Mr. Womble testified the file was in a mess when he got it from Grievant, but he thought that all the necessary pieces were in the file. This assumption turned out to be false and multiple witnesses testified to the fact that there were pieces of the file throughout the office, because it had passed through many hands during its long tenure in the agency, and because multiple sections at OAQ were working on the project.

Accordingly, the undersigned Administrative Law Judge finds Grievant is not covered by the "Whistle-Blower" statute for his complaints to his supervisors, as these were not made in good faith and with "reasonable cause to believe [his statements were] true". W. Va. Code § 6C-1-2(d). This case is somewhat similar to Coster v. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996). In Coster the grievant told everyone he met, both at work and in the community, of what he saw as wrongdoing. Mr. Coster engaged in profane and disparaging remarks when he discussed this issue. Two separate investigations revealed no wrongdoing. Grievant was eventually suspended. Administrative Law Judge Swartz found grievant's conduct was "not protected activity" and he was "'afforded no protection under the 'Whistle-Blower Law' for such behavior. Discipline imposed upon an employee who has reported wrongdoing to the authorities, but who is also grossly insubordinate and provocative toward his superiors, is non-retaliatory under these circumstances.' Church v. Dept. of Army, 6 MSPB 615 (1981), citing Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979)." Id. at 16.

Thus, on a review of the evidence, or lack thereof, on the issue that Grievant's suspension and termination were the result of retaliation for whistle-blowing, Grievant has failed to make a prima facie case and has failed to meet the requirements identified in the statute.

C. Violations to Grievant's Right to Free Speech.

"[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983) (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .". Orr at 601. Three general restrictions on a public employee's right to free speech were identified in Pickering. First, for this speech to be

protected it "must be made with regard to a matter of public concern." Second, statements made "'with the knowledge [that they] . . . were false or with reckless disregard to whether [they were] . . . false or not' are not protected." Orr at 602 (citing Pickering at 569). Third, statements made "about persons with whom [the speaker has] close personal contact which would disrupt 'discipline . . . or harmony among co-workers' or destroy 'personal loyalty and confidence' may not be protected." Id. Additionally, the West Virginia Supreme Court in Committee on Legal Ethics v. Douglas, 370 S.E.2d 326 (W. Va. 1988) has said, in the context of a lawyer criticizing a judge, that "statements that are outside of any community concern, and aremerely designed to ridicule or exhibit contumacy (See footnote 30) toward the legal system, may not enjoy First Amendment protection." Id. at 332.

The burden of proof is on a grievant to demonstrate by a preponderance of the evidence that his conduct is constitutionally protected, and that this conduct was "a substantial factor" in the employer's decision to discipline him. Orr at 62 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). "The employer may defeat the claim by showing that the same decision would have been reached even in the absence of the protected conduct." Orr, Syl. Pt. 4, in part. In Mt. Healthy, the high Court noted the conduct must be of a substantial nature; to rule otherwise would be to:

place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing . . .. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct . . .. [An employee] ought not to be able to, by engaging in such conduct, prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 286.

"The fact that the government may have considered an employee's protected speech or conduct in reaching an adverse decision does not necessarily render that decision constitutionally infirm." Mazaleski v. Trensdell, 562 F.2d 701, 715 (D. C. Cir. 1977). In making that decision, the key is "to consider the employee's job performance in its entirety." Id. An employee's frequent bickering and disagreements with his superiors and co-workers is not the kind of speech protected by the First Amendment, and it may be considered in terminating an employee. Chitwood v. Feaster, 468 F.2d

359 (4th Cir. 1972). “[An employer] has a right to expect [an employee] to followinstructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.” Id. at 360-61. See also English v. Powell, 592 F.2d 727 (4th Cir. 1979).

Grievant argues that a substantial motivating factor in his suspension and subsequent termination was his out-spokenness to the press on August 30, 1995, about Mr. Farley's actions in delaying the AGP. The parties agree that OAQ employees were frequently allowed to discuss issues with the press. Since a public employee may not be terminated for exercising his protect free speech rights, the first issue to resolve is whether Grievant's speech is covered under Pickering's three- prong, balancing test.

The first test requirement is that Grievant's statement must be made with regard to matters of public concern. Clearly, granting or denying the AGP is an area of public concern.

The second requirement is that Grievant cannot make his statements to the press with either the knowledge they were false or with a reckless disregard for whether they were false or not, or they are not protected. A review of this evidence and testimony indicates, first, that Grievant knew the permit was not ready to be issued as the serious issue of dioxin was unresolved; second, that the AG Company has frequently caused delays in the permitting process by their failure to respond to OAQ's questions; third, that the report he prepared for Mr. Farley's review was a draft only and would need additional input from others (See footnote 31) ; fourth, that the AG Company had only responded to certain questionsposed in early July 1995 on August 16, 1995, and these responses had not been included in his report; fifth, the AG team was appointed to speed the permit process along because of the complex issues involved in the permit; and sixth, Grievant did not know why Mr. Farley had not responded to the draft he had sent him in May 1995. A review of these facts, supported by the evidence, indicates Grievant's statements were either false or made with a reckless disregard for the truth. Thus, a key requirement of the Pickering test is not met.

The third requirement of the Pickering test is also not met. Grievant made the statements about Mr. Farley because he disagreed (See footnote 32) with his management approach and viewed him as incompetent. His desire was to get Mr. Farley and his minions dismissed (See footnote 33) and himself placed in a position of authority. He wished to cause disharmony and to destroy loyalty to and

confidence in Mr. Farley and his mid-level managers.

Another issue in this regard that must be addressed is, assuming arguendo, Grievant's statements to the press were protected, whether these statements were a substantial, motivating factor in his suspension and discharge. The investigation into Grievant's behavior was well under way by the time Grievant made these statements on August 30, 1995. Mr. Womble had received some information from Mr. Newell by then, Mr. Vaughan had filed a written complaint over the CD-ROM incident, Mr. Benedict had problems with Grievant over the temperature controls and Mr. Womble's office, and Mr. Womble had had multiple problems with Grievant over his confrontational behavior, lack of cooperation, and refusal to follow directions. Given these problems, it would not appear that Grievant's discussions with the press were a substantial motivating factor. After the newspaper article, Grievant continued on his self-destructive course and engaged in additional contumacious behavior including insubordination over leave slips, the AG team, and the requests for information. DEP considered Grievant's "job performance in its entirety" (See footnote 34) as required by Mazaleski, supra. Although DEP surely did not appreciate Grievant's discussion with the press, his remarks were not a substantial, motivating factor in his suspension. DEP had multiple reasons to suspend Grievant both before and after these remarks. They did not suspend him until its investigation was complete on September 29, 1995. Additionally, it is clear Grievant's newspaper statements had nothing to do with his termination, as they were made prior to the suspension. Grievant was dismissed for tampering with another employee's mail and messages.

Accordingly, the undersigned Administrative Law Judge finds Grievant's statements to the press, due to either their falsity or reckless disregard for the truth, and/or their purpose to create strife at OAQ, are not protected by the First Amendment. Additionally, even if this Administrative Law Judge had found the statements to be protected, they were not a substantial motivating factor in Grievant's suspension and did not play a part at all in his discharge. As clearly revealed by the suspension letter, Grievant's actions for the last nine months of his employment were reviewed, and the decision to suspend was based on multiple actions of insubordination and misconduct. Thus, Grievant's rights to free speech have not been violated.

5. Due Process Violations

Grievant argues his due process rights were violated when he did not receive the eight-day notice prior to his suspension required by the Division of Personnel ("DOP") regulations. (See footnote 35) As

an at-will employee, Grievant could be suspended or discharged at any time, with or without cause. Brown v. Williams, Syl. Pt. 4, 190 W. Va. 202 (1993). Additionally, Grievant, as an at-will employee, is not owed a duty of good faith and fair dealing. Id. at Syl. Pt. 6. The above-cited DOP rule does not apply to Grievant. “The consequences of one's being [at-will] are that one cannot put on the panoply of protection available to those in the 'competitive' service when threatened by adverse action for cause.” Id. (citing Fiorentino v. United States, 221 Ct. Cl. 543, 607 F.2d 963 (1979) cert. denied 444 U.S. 1083 (1980)).

However, the due process afforded Grievant was sufficient for a thirty-day suspension even if he had been a civil service employee as “a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.” Waite v. Civil Service Comm'n, 241 S.E.2d 164 (W. Va. 1978) (citing North v. Bd. of Regents, 233 S.E.2d 411 (W. Va. 1977)). Prior to a thirty-day suspension Waite, a civil service employee, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Grievant, a classified-exempt, at-will employee, received the same notice. Further, the West Virginia Supreme Court of Appeals has recognized that “due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case.” Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W. Va. 1985) (citing Clark v. W. Va. Bd.of Regents, 279 S.E.2d 169, 175 (W. Va. 1981)). Post-termination procedural safeguards may be relied upon “where there is a continuing danger to persons or property or to the orderly conduct of the affairs of the agency . . .”. Waite, supra at Syl. Pt. 7, in part; See also Clarke, supra; North, supra.

In this case, Grievant, an at-will employee, was informed on September 28, 1995, that Dr. McCoy was planning on terminating his employment. Mr. Scott and Ms. Sandy Kee discussed the charges with Grievant and gave him a chance to respond. He even agreed he had committed some of the identified acts. On September 29, 1995, Grievant was called to discuss the same charges with Dr. McCoy, and at that time pleaded with Dr. McCoy to be allowed to remain with the agency in some manner. Dr. McCoy listened to Grievant and decided to reduce the termination to a thirty-day suspension. Clearly, the meeting with Dr. McCoy was not one designed merely to appear to give Grievant another opportunity to respond, because Dr. McCoy decreased the disciplinary action. Additionally, given Grievant's recent behavior and actions, it was reasonable to believe Grievant's

suspension should begin immediately to give Grievant a chance to calm down and rethink his recent behavior. It is also reasonable to believe that suspending Grievant immediately would contribute to promoting "the orderly conduct of the affairs of the agency." Waite, supra.

Accordingly, the undersigned Administrative Law Judge finds no procedural due process violation in the manner in which Grievant's suspension was performed. Indeed, Grievant, as at-will employee, received more due process than was required. See also Logan v. W. Va. Regional Jail and Correctional Facility Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). Wilhelm v. Dept. of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994); aff'd sub nom Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996) (per curiam). After reviewing the issues and allegations raised by Grievant to establish that Respondent contravened a substantial public policy, both when he was suspended and again when he was terminated, the undersigned Administrative Law Judge finds Grievant has not met his burden of proof and established by a preponderance of the evidence that his national origin and religion played a role in his dismissal, that his disciplinary action was the result of any whistle-blowing activities, or that Grievant's exercising his First Amendment rights played a substantial role in his discharge.

Additionally, DEP has proven almost every charge written in the letter of September 29, 1995; some issues were not addressed. In most cases before this Grievance Board, employees have been disciplined for one or two acts, thus a grievance with this many charges is unusual. This case is also somewhat unusual since many of the charges against Grievant were unrebutted. In fact, Grievant admitted some of the events occurred, such as the CD-ROM incident, and his responses to Mr. Womble's memos. Further, there was much documentary evidence submitted, such as memos written by Grievant, which supported the charges. On other issues, Grievant agreed they occurred, but he did not perceive his actions as insubordinate, threatening, disruptive, or dishonest. Inherent in Grievant's behavior before discharge and his explanations and testimony at hearing, is the belief that if he viewed his supervisors and co-workers as incompetent, or disagreed with their views and decisions, it was acceptable and even appropriate for him to make his views known in whatever way he saw fit.

III. Merits of the Suspension and Discharge

Even though not essential because Grievant is an at-will employee and failed to demonstrate a prima facie case, given the number of days of hearing and the voluminous record, the undersigned

Administrative Law Judge will rule on the merits of the case, and examine whether Grievant's suspension and discharge would have been upheld if he had been a classified employee. Thisrequires determination of whether Respondent proved facts upon which the suspension and dismissal were based.

In disciplinary matters involving classified employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer and the standard of proof is by a preponderance of the evidence. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Where, as here, the existence or nonexistence of contested material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Pine v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-066 (May 12, 1995). E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). 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., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). (See footnote 36)

In Grievant's suspension letter, he was charged with insubordination, threatening behavior, dishonesty and fraud, failure to exercise interpersonal skills and to cooperate, as well as harming the public interest and making disparaging and defamatory remarks. 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. Given the focus of the letter, the key or main charges leveled against Grievant are insubordination and threatening behavior. Of course, most threatening behavior can be seen as a subcategory of insubordination.

Grievant's termination letter states he was discharged for the admitted improper disposal of another employee's mail and telephone messages. These acts were viewed as dishonest, as a lack of trustworthy behavior necessary in an employee, and acts which would prevent management from maintaining “good employee/employer relations within the workplace and foster[ing] the efficient and honest operation of its offices.” (Discharge letter.) Thus, the charge here was mail and message tampering. The charges in the suspension letter will be discussed first, followed by a discussion of the

mail and message issue.

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 employees' belief that management's decisions are incorrect or the result of incompetence, 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., 82 L.A. 1228 (Feb. 2, 1984)). 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 the insubordination, is that the employee was given 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 37)

Threatening behavior toward supervisors and co-workers is unacceptable in the work place. See Kessler v. W. Va. Dept. of Transp., Docket No. 94-DOH-490 (June 30, 1997); Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995); Payne v. W. Va. Dept.of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). Threats may be covert or overt and include remarks threatening physical, mental, and reputational damage. Profane and threatening statements toward supervisors are seen to constitute insubordination and "tend to undermine the authority of a supervisor [when] made in apparent defiance of prior directives . . .". Grueser, supra.

DEP, through the testimony of multiple witnesses and documentary evidence, has proven the charges of insubordination and threatening behavior. Additionally, Grievant's own testimony supported several of the charges, such as admitting the CD-ROM incident and the "Bring Your Daughter to Work incident", and several of his responses to Mr. Womble's memos. (See footnote 38)

Most telling is Grievant's remark to Mr. Benedict that he was amazed that of all the things he had done, the only thing OAQ could get him on was insubordination. This statement indicates Grievant knew he was insubordinate.

B. Dishonesty and Fraud

DEP also charged Grievant with dishonesty and fraud. Clearly, an employer has the right to expect an employee to perform his duties in an honest and forthright manner. See Coster, supra. Additionally, an employer can expect its employees to interact with their co-workers and supervisors in a truthful manner and not to devise schemes to "set up" fellow employees or make claims of discrimination based on an intentional lie.

The main issue in this charge was Grievant's statement he had sent in an application for the ERPM I position when in fact he had not. What he did do was make "a big show" of submitting his application, state aloud to anyone who would listen that Ms. Peet would lose it because she was prejudiced against him, and then not send in his application. He then accused Ms. Peet of losing theapplication for discriminatory reasons and filed an EEO complaint and a grievance over the issue. This type of behavior is egregious.

C. Disparaging and Defamatory Remarks

The third charge against Grievant is “disparaging and defamatory remarks”. When these remarks are directed at supervisors they can be seen as insubordination. Grueser, supra. Unfounded remarks are closely aligned with the same rationale discussed in the above section on “Dishonesty”. DEP has proven Grievant frequently made disparaging remarks to his supervisor, about his superiors to his co-workers, and about his co-workers. Much of the data to support this finding are by Grievant's own hand. The remarks he made in the memos to Mr. Womble and Ms. Peet are insolent, belittling, and derisive. As an example, in his August 15, 1995 response to Mr. Womble, Grievant stated Mr. Farley was “like a mad man with authority to chase business out of the state”, and that he was a “racist”. Grievant also told Mr. Benedict, Mr. Farley was a “fuck-up”, and a liar without a backbone, Mr. Womble was a “fuck-up”, and that his goal was to destroy Mr. Farley and he believed he had. In his August 4, 1995 response to Mr. Womble, Grievant referred to his “secret police questionnaire” and to his “hate questionnaire”. In his September 7, 1995 memo to Mr. Farley, Grievant told Mr. Farley he found his “ **behavior unprofessional, provocative and inflammatory**”. Clearly, Grievant's reckless communication, both in written and oral forms, indicates he frequently made inappropriate remarks about and to his supervisors. (See footnote 39) This charge is proven.

D. Failure to Exercise Interpersonal Skills and Cooperation

This issue had been discussed with Grievant several times by numerous people; Mr. Farley, Mr. Womble, Mr. Newell. The majority of these specific charges were proven. (See footnote 40) Additionally, as the letter suggests, these incidences were some of the more notable examples, and through the normal course of the nine days of hearing several more incidences were identified and discussed. Grievant admits there was great difficulty over the temperature of his area and Ms. White, Mr. Newell, and Mr. Benedict all testified to Grievant's behavior and inability to “get along”. The other incidences, such as trying to create trouble between co-workers, making disparaging remarks about Ms. McClung in front of others, and refusing to attend Permit meetings because Grievant did not respect or approve of Mr. Newell's position as Acting Permit Manager, are proven.

E. Harm to Public Interest

This section basically discusses and refers to specific examples of how Grievant used the work setting to either create problems for others he did not like or approve of, or further his own ends and goals. This section is more amorphous in its charges, but sufficient to say, DEP has proven Grievant intentionally attempted in many instances to create problems for Mr. Atkinson and to demonstrate he

was incompetent. Additionally, it is clear Grievant attempted to use the AG permitting process to further his own goals to create havoc for OAQ in general, and Mr. Womble and Mr. Farley, in particular. This type of behavior clearly does not support the public interest or the public good. Accordingly, after a detailed review of all the evidence presented, DEP has proven the vast majority of the charges identified in the suspension letter of September 29, 1995, and Grievant's suspension would have been upheld even if he were viewed as a classified employee.

F. Termination Letter

Grievant was terminated for “tampering” with Mr. Atkinson's mail and messages. As noted above, this termination occurred after Grievant was suspended for multiple charges. The mail tampering charge was “the straw that broke the camel's back,” and when this allegation came to light, was investigated and subsequently proven to DEP's satisfaction, Grievant was dismissed.

Grievant testified at hearing he did not interfere with Mr. Atkinson's mail in any way. He also says he may have thrown “Inspire” brochures away if they remained on a community table too long.

Mr. Newell and Ms. White testified Grievant regularly took Mr. Atkinson's mail and put it in the trash. Ms. White told Mr. Dettinger, Grievant's then supervisor, about it several times, but he did nothing. Ms. White would retrieve the mail from the trash. Ms. White also stated that Grievant frequently helped her answer the phone, and when Mr. Atkinson was not in Grievant would inform the caller he would give Mr. Atkinson a message, but he would not. (See footnote 41)

Mr. Newell also testified he saw Grievant perform these actions, and when he became Acting Manager, he and Ms. White devised a plan to keep the mail from Grievant. This information was supported by an affidavit from the mail runner, Ed Toliver, filed by Respondent. This informationwas further supported by hearsay testimony. Dr. McCoy testified that upon hearing these additional charges, he called Mr. Dettinger and asked him if they were true. Mr. Dettinger agreed that they were, but that he chose to do nothing about it because he was “a short-timer”. This hearsay is deemed admissible and given substantial weight as it was consistent with other information and other witnesses. (See footnote 42)

Ms. Tuesdy Berry was hired later and took over the mail in approximately June or July, and she never saw Grievant take any mail. She also stated the mail comes only to her, and she delivers it. Although there is some inconsistency about dates among the witnesses, this does not change the testimony that during the first four to five months of 1995, three people saw Grievant take Mr.

Atkinson's mail and messages and dispose of them inappropriately. The fact that Ms. Berry did not see these incidences it is of no moment because she was not present during the majority of the time in question, and she started work after Mr. Newell's plan had been instituted. Accordingly, Respondent has proved its charge of mail and message tampering by a preponderance of the evidence. These charges, because of the enormity of the multiple problems it could cause a public employee, in particular, and DEP, in general, are sufficient to support Grievant's termination.

The following conclusions of law are made to support the above discussion.

Conclusions of Law

1. In suspension and discharge cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for suspending or dismissing an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involvingthe suspension or termination of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94- RJA-225 (Nov. 29, 1994).

2. Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. Bellinger v. W. Va. Dept. of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995). See W. Va. Code § 29-6-2(g) (1992); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

3. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Bellinger, supra; Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. The prohibition against "discrimination" set forth in W. Va. Code § 29-6A-2(d) does not necessarily limit or restrict the right of a public employer to decide which at-will employee it wishes to dismiss. In other words, a discharged, at-will state employee cannot challenge his dismissal on the basis of discrimination under the grievance procedure, unless that discrimination rises to the level of a "substantial contravention of public policy." Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-

038 (Sept. 30, 1994), aff'd sub nom Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996).

5. When a grievant sets forth a specific allegation of national origin or religion-based discrimination which, if true, would violate the state Human Rights Act, W. Va. Code §§ 5-11-1, et seq., and Title VII of the federal Civil Rights Act, 42 U.S.C. § 2000e, as well as the discrimination provision of the grievance procedure, W. Va. Code § 29-6A-2(d), such grievant has articulated asubstantial public policy interest, and is entitled to a hearing on the question of the employer's actual motivation in suspending or dismissing him or her from employment. See Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 424 S.E.2d 606 (1992); Bellinger, supra; Graley, supra.

6. A terminated or suspended at-will employee alleging a violation of a substantial public policy must establish by a preponderance of the evidence that the employer's controlling motivation in his or her suspension or termination was a factor protected by such substantial public policy. Bellinger, supra. See Graley, supra.

7. A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

8. Unless an at-will employee alleges a "substantial contravention of public policy," such as exercising certain constitutional rights, his termination cannot be challenged through the grievance procedure.

9. An employer may rebut a grievant's prima facie case by demonstrating that a legitimate, non-discriminatory reason was the controlling motivation in the suspension or termination decision. See Frank's Shoe Store v. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley, supra.

10. At-will, public employees are not owed a duty of good faith and fair dealing. Imposing such a duty would be contrary to the long standing principle that grants the appointingauthority an

unfettered right to terminate an at-will employee. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775, 781 (1993).

11. Grievant did not establish a prima facie case of national origin or religion-based discrimination in regard to his suspension and termination from employment by DEP.

12. Grievant, as an at-will employee, cannot challenge his dismissal on the grounds of "discrimination" under W. Va. Code § 29-6A-2(d), by attempting to show other employees who engaged in substantially similar misconduct were not disciplined or were not disciplined so severely as he. Wilhelm, supra. However, even if the general terms of the statutory definition of discrimination were utilized to examine Grievant's claims, he failed to establish a prima facie case of discrimination in the disciplinary actions taken by Respondent.

13. Grievant's allegations that his suspension and termination were in retaliation for his reporting alleged wrongdoing to the authorities and was in violation of the "Whistle-Blower Law", W. Va. Code §§ 6C-1-1, et seq., if proven, would represent a violation of a substantial public policy.

14. An allegation of unlawful retaliation under W. Va. Code §§ 6C-1-1, et seq., is properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. Barber v. Div. of Highways, Docket No. 94-H-267 (Feb. 28, 1995). Coddington v. W. Va. Dept. of Health and Human Resources/Weston State Hosp., Docket Nos. 93-HHR-265, 266, 267 (May 19, 1994); Graley, supra. See also Coster v. W. Va. Dept. of Corrections, Docket No. 94- CORR-600 (Aug. 12, 1996).

15. W. Va. Code § 6C-1-3 provides that:

(a) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste. . . .

16. W. Va. Code § 6C-1-4 provides that:

(a) A person who alleges that he is a victim of a violation of this article may bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within one hundred eighty days after the occurrence of the alleged violation.

(b) An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the

direction of the employee, had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.

(c) It shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts. . . .

See also, Coster, supra, Barber, supra.

17. Grievant has proven by a preponderance of the evidence that, prior to the imposition of the suspension, he had reported instances of wrongdoing to his employer and the appropriate authorities on the issue of time abuse and removal of files, but the reports were not made in good faith as Grievant did not have reasonable cause to believe they were true. Thus, he did not make a prima facie case of whistle-blowing.

18. Grievant's allegation of reprisal for whistle-blowing to the “Charleston Gazette” about delay of the AGP did not meet the statutory requirements as “The Gazette” is not an “appropriate authority”.

19. Respondent presented a legitimate, non-retaliatory reason for suspending and terminating Grievant that did not involve his whistle-blowing actions.

20. Discipline imposed upon an employee who has reported unsubstantiated wrongdoing to the authorities, but who is also grossly insubordinate and provocative toward his superiors, is non-retaliatory under these circumstances. Coster, supra. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. See Duran v.MSPB, 707 F.2d 1174 (10th Cir. 1983); Church v. Dept. of Army, 6 MSPB 615 (1981) (citing Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979)).

21. “[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights.” Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983) (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)). However, this right is not absolute, and an employee's “interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .”. Orr at 601.

22. Three general restrictions on a public employee's right to free speech were identified in Pickering. First, for this speech to be protected it “must be made with regard to matters of public concern.” Second, statements made “'with the knowledge [that they] . . . were false or with reckless disregard of whether [they were] . . . false or not' are not protected.” Orr at 602 (citing Pickering at

569). Third, “statements made about persons with whom [the speaker has] close personal contact which would disrupt 'discipline . . . or harmony among co-workers' or destroy 'personal loyalty and confidence' may not be protected”. Id.

23. The burden of proof is on a grievant to demonstrate by a preponderance of the evidence that his conduct is constitutionally protected, and that this conduct was “a substantial factor” in the employer's decision to discipline him. Orr at 62 (citing Mt. Healthy County Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

24. “The employer may defeat the claim by showing that the same decision would have been reached even in the absence of the protected conduct.” Orr, Syl. Pt. 4, in part.

25. In terminating an employee “the key is to consider the employee's job performance in its entirety.” Id. An employee's frequent bickering and disagreement with his supervisors andco-workers is not the kind of speech protected by the First Amendment, and it may be considered in terminating an employee. Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

26. “[An employer] has a right to expect [an employee] to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.” Id. at 360-61. See also English v. Powell, 592 F.2d 727 (4th Cir. 1979).

27. Grievant's statements were not protected by the First Amendment Right to Free Speech as they did not meet the three prong test outlined in Pickering, supra. Grievant knew his statements were either false, or made with a reckless disregard for the truth, they were made about people with whom he had close personal contact, and he intended they would “disrupt 'discipline . . . or harmony among co-workers' or destroy 'personal loyalty and confidence.'” Orr, supra.

28. Grievant, not being in the classified service, did not have a property right in his continued state employment, and thus, was not entitled to any procedural due process protection. See Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1977). Grievant was granted more due process than required for an at-will employee, both in his suspension and his termination. See Waite, supra.

29. “Under W. Va. Code § 29-6A-6 the 'formal rules of evidence shall not be applied' in . . . grievance proceedings and hearsay evidence is generally admitted. The weight that should be

accorded the hearsay evidence depends on several factors." Seddon v. W. Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). The hearsay evidence in this case is entitled to substantial weight as it was supported and consistent with the testimony of others. 30. An Administrative Law Judge is responsible for determining the credibility of the testimony before her. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1994). The fact that this testimony is offered in written form does not alter this responsibility. Determinations of credibility in this case were based on consistency of prior statements and documentary evidence, corroboration of testimony, responsiveness to questions, plausibility of the witnesses' testimony, and admissions of untruthfulness.

31. Dismissal of a civil service employee must be for "good cause, which means misconduct of a substantial nature affecting 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." Oakes v. W. Va. Dept. of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

32. 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).

33. 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).

34. "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).

35. 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)).

36. 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).

37. A grievant's belief that his supervisor's management decisions are incorrect is not a license for insubordination and are not grievable, unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety. W. Va. Code § 29-6A-2(i). See Ball v. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997). See also Parker v. W. Va. Dept. of Health and Human Resources/Div. of Health/Welch Emergency Hosp., Docket No. 97-HHR-042A (Sept. 15, 1997).

38. Having proven by a preponderance of the evidence that Grievant committed, insubordination, engaged in unprofessional behavior, and tampered with mail and messages, DEP demonstrated good cause for Grievant's suspension and dismissal. Such disciplinary action would have been appropriate even for an employee entitled to Civil Service protection. See Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W. Va. 1985).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 28, 1998

Footnote: 1

At the time of his termination, Grievant was assigned to the Office of Mining and Reclamation.

Footnote: 2

As Grievant presented no evidence on this issue, and Respondent did present evidence indicating Grievant had no prior approval for overtime work, this issue was not considered by the undersigned Administrative Law Judge. (See Finding of Fact No. 22.)

Footnote: 3

During the course of this grievance, the case was reassigned to the undersigned for administrative reasons.

Footnote: 4

At the July 3, 1996 hearing, Grievant requested his case be held in abeyance until November 1996. This request was granted.

Footnote: 5

On January 7, 1998, Grievant wrote the undersigned Administrative Law Judge requesting that this Decision be held at least until January 31, 1998 as negotiations were currently under way which would resolve the grievances and return him to employment at OAQ. The undersigned Administrative Law Judge wrote Respondent's counsel for confirmation of these statements. By letter dated January 9, 1998, counsel indicated no negotiations were under way to return Grievant to employment, and DEP/OAQ opposed any delay in the release of this Decision.

Footnote: 6

Grievant testified he never asked Dr. McCoy for a decreased penalty, and Dr. McCoy decreased the disciplinary action because he realized this discharge was retaliatory. (Trans. Apr. 22, 1996, Grievant at 121). The undersigned Administrative Law Judge finds this statement to be false.

Footnote: 7

Due to the broader definition of "discrimination" contained in W. Va. Code § 29-6A-2(d), it is not necessary to analyze Grievant's claim of national origin or religious discrimination under either the Human Rights Act or Title VII, as such claims are subsumed by the § 29-6A-2(d) claim. See Vest, supra. However, it is noted that these are statutes under which Grievant works as defined in the grievance procedure for state employees. W. Va. Code § 29-6A-2(i). See generally Hendricks v. Dept. of Tax and Revenue, Docket No. 96-T&R-214, (Sept. 24, 1996); Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

Footnote: 8

This supplementation of the charges was used to prove the statement in the suspension letter which indicates the September 29, 1995 letter recounted "the more notable examples of your misconduct and unprofessional behavior during the past six months." These additional examples were identified in response to Grievant's cross-examination of Mr. Newell. These additional examples were only considered to prove the above-identified quote.

Footnote: 9

Ms. Peet stated she called Grievant to set up an appointment, and Grievant hung up on her. Grievant stated Ms. Peet never called him.

Footnote: 10

The undersigned Administrative Law Judge is aware that the placement of this mark would vary from machine to machine and would be affected by the type of tape utilized.

Footnote: 11

Initially, Grievant filed a formal complaint, but after discussion and explanation, he withdrew his request and instead filed an informal complaint. (Resp. Exh. No. 22.)

Footnote: 12

Grievant attempted to subpoena these informal notes at hearing. It must be noted that these notes were not signed witness statements, but Ms. Miller's own summary of these statements and Ms. Miller had promised each employee that the statement would be confidential. Ms. Miller refused to turn the summaries over to either Grievant's counsel or DEP's counsel. She also had not allowed Dr. McCoy or anyone, at any time, to review these materials. Grievant's request was denied. Additionally, Grievant stated he knew who was interviewed and could obtain releases from these individuals to obtain their statements. Respondent also suggested Grievant call these employees to testify at the hearing. Grievant elected to neither call the witnesses nor to obtain releases. Given this state of affairs, the confidentiality of the EEOC material was maintained, especially since statement summaries, unseen by anyone, and showing no discrimination in the selection process for the ERPM I position could not have a bearing on Grievant's suspension and discharge. See 29 CFR Section 1610.17; See also Equal Employment Opportunity Comm'n v. Assoc. Dry Goods Corp., 449 U.S. 590 (1981).

In addition to her brief finding of no discrimination as it related to Grievant, Ms. Miller did notify Dr. McCoy there were some problems she wished to discuss with him that she had seen during her investigation. These matters related to the way in which Ms. Peet kept applicant files. Ms. Miller did later discuss this matter with Dr. McCoy, and Grievant's counsel was allowed to cross- examine her, in depth, on this conversation. This discussion with Dr. McCoy did not relate in any way to Grievant's EEOC complaint. (Jan. 9, 1997, Miller at Tape 2, Mark 2734.)

Footnote: 13

Because Grievant's grievances alleged multiple wrongdoing by Mr. Farley, Mr. Farley did not involve himself in their resolution. (Trans. July 2, 1996, Farley at 261; Trans. July 3, 1996, McCoy at 414-416.)

Footnote: 14

This conflict relating to time sheets will be presented chronologically in the Finding of Facts. Although other events were also occurring during this six week time period, they will be presented chronologically after Finding of Facts 17-24.

Footnote: 15

It is unclear from the leave forms what kind of leave, sick or annual, Grievant was requesting.

Footnote: 16

Apparently during the Level II hearing, Grievant agreed Mr. Womble met DOP's minimum qualifications for the position, but Grievant disagreed with those stated qualifications and thought they were insufficient. Mr. Womble's position is also classified-exempt.

Footnote: 17

Both at the previous Level II conference in this August 11, 1995 grievance and at the Level IV hearings in this matter, Grievant testified the file was well organized, and Grievant believed the reason the file was taken from him was to remove information from the files.

Footnote: 18

The undersigned Administrative Law Judge specifically finds the data contained in Mr. Newell's two memos to be true. Not only was Mr. Newell a credible witness, but this memo was taken from contemporaneous notes, and supported by multiple witnesses in many incidences.

Footnote: 19

A review of the multiple indexes of the work on the AG project demonstrates this statement by Mr. Farley is true. (Gr. Exhs. Nos. 35-39.)

Footnote: 20

After Grievant left, Mr. Benedict made detailed notes of the conversation. Later he typed them up and gave them to Ms. Karen Watson, DEP attorney, and Ms. Kee, who were by then investigating multiple complaints against Grievant.

Footnote: 21

It was unclear what punishment Grievant was referring to, given the context of Mr. Farley's memo.

Footnote: 22

The parties were very unclear when these meetings took place, and it appears it was probably sometime in July 1995.

Footnote: 23

At one point Grievant made some comment that he was discriminated against because he was dark-skinned. He later stated he was Caucasian. As no other data on this issue was raised or discussed in anyway, this issue is considered waived. To the extent the comment might have raised a race-related issue, it is effectively subsumed by Grievant's national origin allegation.

Footnote: 24

This test and its burden shifting approach is in keeping with that stated by the West Virginia Supreme Court in Page v. Columbia National Resources, Inc., 198 W. Va. 378, 480 S.E.2d 817 (1996). In Page the Court held, "that once the plaintiff in an action for wrongful discharge based upon the contravention of a substantial public policy has established the

existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of unlawful motive." Id. Syl. Pt. 5.

Footnote: 25

On July 3, 1996, the undersigned Administrative Law Judge requested the parties to clarify their positions and theories of the case.

Footnote: 26

The number and type of the documents varied during his testimony.

Footnote: 27

The testimony at this point is somewhat confusing, as Respondent says Grievant refused to turn the documents over, but Grievant says he refused to turn the documents over, but gave Respondent a copy of them.

Footnote: 28

The undersigned Administrative Law Judge specifically finds no evidence that the modeling documents were intentionally removed from the AG file. The indexes placed into evidence by Grievant demonstrates the majority of the modeling documents were listed in the first index and Mr. Samar Joshi testified that when he found one missing, he told Mr. Benedict, and this document is listed on subsequent indexes. (Gr. Exhs. Nos. 35, 36, 37, and 38.)

Footnote: 29

See Finding of Fact 46 and Respondent's Exhibit Number 15.

Footnote: 30

Contumacy is defined as obstinate or contemptuous resistance to authority, stubborn rebelliousness; insolent or insubordinate behavior.

Footnote: 31

Indeed Grievant's Exhibit No. 29 indicates Grievant felt a definite need to have Mr. Farley's substantial expertise applied to his work. Further, it must be noted that Grievant has difficulty with the English language, especially in written form. (Grievant's test., Mr. David White's test., various exhibits, supra.)

Footnote: 32

The testimony indicated that Grievant had been on both sides of the AGP issue.

Footnote: 33

See Finding of Fact 24 dealing with a grievance filed requesting Mr. Farley's removal.

Footnote: 34

Grievant places much reliance on his evaluations (Gr. Exhs. Nos. 2 and 3) which rated the Grievant as very good. This reliance is misplaced. Job performance includes not only ability to perform the technical aspects of a position, it also includes the ability work with others, follow directions of superiors, and conform to the expectations of a work environment. It also requires that an employee be honest in his dealings with his employer, and to not engage in self-serving, destructive actions. See Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Scarberry v. Bureau of Employment Programs/Fiscal and Admin. Management Div., Docket No. 94-BEP-625 (Jan. 31, 1995). These evaluations were not signed by management, but, as there was no objections by Respondent, they were accepted as valid.

Footnote: 35

Grievant was given a fifteen-day notice prior to his termination. Additionally, it must be noted that Grievant, as an at-will employee, has no property interest in continued employment.

Footnote: 36

The West Virginia Supreme Court of Appeals has also stated that "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 (emphasis added). See Blake v. Civil Service Comm'n, 310 S.E.2d 472 (W. Va. 1983); Serrino v. W. Va. Civil Service Comm'n, 285 S.E.2d 899 (W. Va. 1982). Since Grievant was only employed for a year and a half, this factor need not be considered.

Footnote: 37

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

Footnote: 38

Not only did Grievant's testimony support these charges, but memos, written by Grievant were submitted by both sides which clearly demonstrated threatening and insubordination behavior.

Footnote: 39

Although not spoken to here in the suspension letter, the next section dealing with interpersonal relations identifies examples of disparaging remarks made to and about co-workers.

Footnote: 40

The first identified charge of nine in the "Interpersonal Skills" section, relating to U.S. Steel, was not proven, as there was no evidence presented at hearing on this issue. As this was just one example of many, it does not affect the outcome of the decision on this issue.

Footnote: 41

Grievant's attorney frequently misrepresented Ms. White's testimony during the hearings. As this testimony came from the unemployment hearings and was not submitted until later, the undersigned Administrative Law Judge did not review it

until later. Ms. White's testimony is clear; she saw Grievant throw away multiple pieces of mail and take several phone calls. She does not remember who the mail was from except in one or two instances, because she did not open it_only delivered it.

Footnote: 42

It is interesting to note that on April 24, 1996, Grievant promised to call Mr. Dettinger as a witness. Dr. McCoy's testimony was given on July 3, 1996, and Mr. Dettinger was not called.