RONALD MARKLEY,

Grievant,

v v.

Docket No. 01-RS-087

WEST VIRGINIA DIVISION OF

REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, Ronald Markley, was employed by the West Virginia Division of Rehabilitation Services ("DRS") as a Recreation Specialist before his termination on November 2, 2000. It is unclear from the record exactly when Grievant filed his grievance at Level I. His Statement of Grievance reads:

> Dismissal from position without a written plan for improvement or use of proper techniques to assist and account for a disability clearly apparent to the employer, which disability impacted grievant's work[.]
>
> Relief Sought: Reinstatement to position, back pay, fees[,] and costs associated with pursuing this grievance.

Although not included in the record, this grievance was denied at Level II. The Level III Decision was issued by the Hearing Examiner, Katherine Dooley, and adopted by the Interim Executive Director, Janice Holland, on February 26, 2001. Grievant appealedto Level IV on March 5, 2001. A Level IV hearing was held on June 25, and July 25, 2001. This case became mature for decision on August 13, 2001. (See footnote 1)

Issues and Arguments

Respondent asserts Grievant had difficulty organizing and planning activities, completing paperwork, and documenting his activities from the time he began full-time employment with DRS in

October 1997. Multiple attempts were made to assist Grievant in correcting these problems. Grievant's response to information that his work was unsatisfactory, and these attempts to assist him was, "I know how to do it, and why it is important, I just need to do it." Grievant also indicated paperwork was not important to him. Respondent asserted the lack of planning resulted in a decrease of services to clients, and the lack of documentation resulted in incomplete reports of the services offered to and received by clients. Much of the funding for rehabilitation services is provided by state and federal sources, including grants. All of these awards of money require detailed reporting and confirmation of the use of the funds. Respondent also alleged Grievant mishandled grant funds. Respondent notes it followed progressive discipline without any change in Grievant's behavior, starting with oral counseling and continuing through a written reprimand and a fifteen-day suspension. Finally, Grievant was terminated.

Grievant's argument has changed somewhat over the course of the grievance procedure. The issue of an Improvement Plan was not addressed at either Level III or Level IV and is deemed abandoned. Grievant's main focus continued to be the failure ofRespondent to assist him with and accommodate him for a known mental or cognitive disability which prevented him from planning, organizing, and performing the required duties of his position. Grievant avers this disability hindered him in completing the required paperwork and documentation. Grievant repeatedly stated he was not asserting an ADA claim, as this would not be the proper forum. Additionally, Grievant alleged at Level IV that Respondent gave Grievant too much work to do when it assigned him the responsibility for the wheelchair athletics program, (See footnote 2) and this assignment was made with the knowledge that Grievant would be unable to complete his assignments with the addition of this responsibility. Grievant also alleged his second-level supervisor, Ann Parsons, carried a grudge because of the manner in which he was hired in 1997, and these negative feelings caused her to "push" Grievant into failure.

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

Findings of Fact

1. Grievant's first interaction with DRS was in the mid-eighties as a client for services relating to his Cerebral Palsy.

2. At that time, he successfully completed a program in electronics with grades of mostly A's and B's. As is done with many DRS clients, various learning strategies were used to enable Grievant to complete the program in a successful manner. 3. During Grievant's rehabilitation at DRS, a psychologist's report authored by master's level psychologist, Robert Dotson, dated June 29, 1984, reported Grievant's results on the Wechsler Adult Intelligence Scale-Revised and indicated Grievant was functioning within the average intellectual scale. This report then discussed the findings of the subtests. One subtest indicated Grievant scored in "the lower part of the average range in ability to analyze, organize and synthesize new material." (See footnote 3) (Emphasis Added.) Additionally, Mr. Dotson reported "no organic brain damage" and "[a] bipolar disorder with deep depression." "Prognosis was reasonablely good for successful rehabilitation. . . ." (See footnote 4) Grt. Ex. No. 5, at Level IV.

4. Grievant enrolled in West Virginia State College with the help of DRS and took courses to become a Recreation Specialist. He has successfully completed approximately 75 percent of this course work with a passing grade. As a part of this course work, he successfully completed an internship where he was expected to document the actions he engaged in with clients. (See footnote 5) 5. In approximately 1992, Grievant was hired by DRS, on a contract basis, as a Recreation Assistant.

6. A Recreation Assistant is not responsible for the organizing and planning of programs. A Recreation Assistant is required to complete some paperwork, including daily or nightly reports and other routine paperwork.

7. During the time he was a Recreation Assistant, Grievant frequently did not complete his paperwork, or the paperwork was turned in late. Grievant frequently had to be reminded of what papers to fill out, and that they were past due.

8. After several applications for full-time employment, Grievant was hired as a Recreation Specialist in October 1997. To ensure his employment, Grievant asked for and received the assistance of one of the physicians on staff.

9. Contrary to Grievant's belief, Ms. Ann Parsons, Director of Recreational Services, did not "hold a grudge" about Grievant's hiring.

10. Mr. Roger Crookshanks was Grievant's direct supervisor after Grievant was employed as a full-time Recreational Specialist.

11. The duties of a Recreational Specialist are to "perform recreation planning." Resp. Ex. No. 30, at Level II (Class Specification). Additionally, a Recreational Specialist is to "[p]lan weekly and monthly activities to provide structural group or individual recreation for patients or clients"; and "[d]ocument patient or client participation and behavior." Id.

12. From the beginning of his full-time employment, Grievant had difficulty with the planning, organization, paperwork, and documentation required for the successful completion of the duties of Recreation Specialist.

13. Grievant's paperwork was frequently incomplete, late, or not turned in at all. These deficiencies were noted repeatedly on his quarterly and yearly evaluations. These problems with planning, organization, paperwork, and documentation were discussed frequently with Grievant, and numerous attempts were made to assist him with these areas. At times, Grievant's planning, organization, and paperwork were completed in a satisfactory and timely manner.

14. In May 1999, certain duties on the Medical Services Unit, which required fairly extensive documentation, were removed from Grievant due to his failure to complete the required paperwork. This action was taken to assist Grievant, and to ensure the required paperwork was completed in a timely fashion.

15. No improvement in Grievant's planning, organization, paperwork, and documentation resulted from this change in assignment.

16. Grievant's failure to complete the required paperwork frequently resulted in others completing his paperwork or in reports of others being late.

17. To assist him with the planning, organization, paperwork, and documentation, Grievant was sent to a time management class.

18. No improvement in Grievant's planning, organization, paperwork, and documentation resulted from this training.

19. There were few complaints about Grievant's interaction with clients, and this portion of Grievant's job performance was seen as a strength. His failure to plan and organize resulted in clients not receiving the services to which they were entitled. For example, because Grievant would not post the activities he had planned or would postthem late, DRS clients would frequently be unable to take advantage of the activity or would not know it was even taking place.

20. Another of Grievant's strengths was his ability to work with wheelchair athletics. Mike

Smith, then an Assistant Director, asked Grievant to be in charge of the wheelchair athletics program, and Grievant was pleased to accept. Ms. Parsons had some reservations about this assignment, but recognized this assignment had been made by the Assistant Director.

21. New athletic wheelchairs were received for this program. Grievant was directed to inventory the new equipment, and did so with the help of Mr. Crookshanks.

22. This program is most active from January to July of each year. During this time period, Grievant was allowed to teach wheelchair athletics in place of his regular classes.

23. There were some problems in monitoring the use of the special wheelchairs for this program. This assignment increased Grievant's duties in this area. Grievant did not complain about his inability to handle this program, nor did he ask that this duty be removed from him because he was unable to complete required tasks. Grievant did ask for training in wheelchair repair, but this request was denied due to insufficient funding. Grievant was instructed to seek assistance in this area from in-house staff who maintained regular wheelchairs for DRS clients.

24. In 2000, Grievant was directed to complete another inventory of the wheelchairs and to obtain a list of needed parts for repairs. Grievant still had not completed this assignment at the time of his discharge. 25. Grievant's failure to complete necessary paperwork and documentation created problems. Late fees for some activities were required, and at times Grievant paid for supplies he could have had on hand if he had only submitted the paperwork for the activity on time. For example, one of Grievant's job duties was to plan the monthly birthday party for clients. This required a notice on the proper units and ordering the cake from the kitchen in advance. On at least one occasion, Grievant ended up buying the cake himself because he had not ordered it in advance. Additionally, Grievant's failure to plan in advance resulted in a decreased turnout. For example, there were nine clients in attendance for the July 2000 birthday party, when another staff member planned the event in advance; the following month there was only one client in attendance when Grievant failed to organize and plan the event in advance. (See footnote 6)

26. Grievant received multiple oral counselings without a change in his behavior.

27. Grievant's supervisors continually informed Grievant at quarterly and yearly reviews that his performance must improve.

28. Grievant was asked by his supervisors how they could help him, and they received the response that he knew what to do; he just needed to do it. Mr. Crookshanks and Ms. Parsons

continued to remind Grievant, on almost a daily basis, of what plan or paperwork was due or past due. 29. On January 13, 2000, Grievant received a negative evaluation with six of the nineteen rated areas identified as "No or Minimum Progress." The rest of the nineteen rated areas were identified as "Adequate Progress." The deficient areas dealt with Grievant's failure to plan, organize, complete paperwork, and document.

30. On February 28, 2000, Grievant received a written reprimand. This written reprimand noted Grievant's last evaluation, and then detailed the problems Grievant was continuing to have with planning, organization, paperwork, and documentation. This reprimand noted that on the very day of the last evaluation, Grievant had failed to complete his required paperwork. The written reprimand also noted his supervisors' attempts to assist Grievant, and his response as stated above. Areas in which Grievant had failed to plan, organize, complete paperwork, and document were identified in detail. The written reprimand went on to state that if these areas did not improve, further disciplinary action "will be taken which may include suspension or dismissal from [his] position." Resp. Ex. No. 7, at Level II.

31. Grievant did not grieve this written reprimand.

32. At some point after the written reprimand, Respondent assigned a part-time employee to assist Grievant in the completion of his paperwork and documentation.

33. Grievant's problems with planning, organization, paperwork, and documentation continued. Respondent also identified additional problems with the handling of money, and insubordination in terms of not obeying direct orders, including clear directions to document his work and to submit reports for planned activities. These continued difficulties were documented in Grievant's April 20, 2000 performanceevaluation, in which Grievant received a negative evaluation in ten of the eighteen rated areas with his performance identified as "No or Minimum Progress." The rest of the eighteen rated areas were identified as "Adequate Progress." The deficient areas dealt with Grievant's failure to plan, organize, complete paperwork, and document, and Grievant's failure to carry out some of his assigned programs.

34. At the time of the April 20, 2000 evaluation, Grievant's failure to follow the guidelines for the use of grant monies was noted. Grievant's supervisors reported Grievant had been less than truthful about money "left over" from money he had received to carry out various activities. At first, Grievant did not turn it in, and when questioned several times, finally stated he had put a portion of it

in his own bank account. Contrary to Grievant's testimony, the placement of grant money in an employee's personal account is not an acceptable practice, and employees are expected to keep a running account of the money they use during the time period. "Left over" money is to be placed in the safe at work with the corresponding receipts.

35. In a letter dated June 12, 2000, Grievant was informed he would be suspended for fifteen days beginning June 21, 2000. This letter detailed Grievant's difficulties in performing the duties of his position, his insubordination in failing to follow his supervisors' orders to complete his paperwork and to plan and organize his activities, and failure to follow guidelines for the use of grant monies. The multiple attempts to assist Grievant were noted, and the effect his failure to complete his duties had on other employees was addressed in detail. It was noted that other employees frequently had to complete his work. 36. Grievant did not grieve this suspension.

37. Grievant returned to work on July 17, 2000, and on July 21, 2000, Mr. Crookshanks and Ms. Parsons gave Grievant a memorandum specifying, in detail, what was expected of him in order to perform the duties of his position.

38. On July 26, 2000, Mr. Crookshanks completed a yearly performance evaluation on Grievant. This performance evaluation noted Grievant's continued failure in the areas of planning, organization, paperwork, and documentation. Grievant was still not completing the necessary paperwork. Grievant's overall rating was a 1.7, which indicates a "Major Weakness." (See footnote 7)

39. On September 18, 2000, Grievant submitted a "Declaration of Disability under Internal Affirmative Action Plan" form to DRS's Manager of Human Resources. On this form Grievant listed his disability as "Cerebral Palsy, Bipolar, Manic Depressive[,] scissors gait [with] a lower than average ability to plan, organize." (See footnote 8) No medical information was attached to this form. No action was taken as the result of Grievant filling out this form, and there was no indication or evidence by the parties as to what action should be taken when this form is submitted to an employer. (See footnote 9) 40. On October 31, 2000, Grievant received a quarterly evaluation. Grievant received a negative evaluation in seven of the fourteen rated areas. His performance was identified as "No or Minimum Progress." The rest of the fourteen rated areas were identified as "Adequate Progress." The deficient areas dealt with Grievant's failure to plan, organize, complete paperwork, and document, as well as Grievant's failure to carry out some of his assigned programs. Basically, no improvement was seen in Grievant's performance. For example, Grievant did not

complete any cost surveys for September, and his recreation trip lists and recreation reports continued to be incomplete.

41. By a letter dated November 2, 2000, Grievant's employment with DRS was terminated. Much of the previous data was reviewed, and the attempts of management to assist Grievant were again listed. Again, it was noted that Grievant, as late as October 31, 2000, had stated "I know what I'm supposed to do. I understand how to do it, but I just have problems following through to get the work done."

42. This letter also noted Grievant was insubordinate in his failure to carry out the clear directions of his supervisors and his failure to follow the Policies and Guidelines of the Agency. (See footnote 10)

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't ofHealth, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

A. Unsatisfactory performance

Respondent has demonstrated Grievant failed to perform the required duties of the position to which he was assigned. Although it is true Grievant successfully completed some of the duties of the position, this is insufficient. The duties of planning, organizing, completing paperwork, and documenting are key to the position of a Recreation Specialist. The classes and activities must be planned in advance and coordinated with other staff to prevent overlapping of these activities. Each event must be organized so that the activity, will be offered to as many clients as possible, and each client will have a successful outcome. The completion of paperwork, both before and after the activity is a major part of the task. A bus or cake must be ordered in advance, so that the necessary tools or transportation are available as needed. After the activity, who attended, the results of the activity, and need for further intervention must be documented so that each client can proceed through the

program with a productive outcome. (See footnote 11) Respondent has clearly demonstrated Grievant failed to perform the essential duties of his position. The next issue to address is Respondent's allegation that Grievant was insubordinate.

B. Insubordination

Insubordination involves the "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). This Grievance Board has previously recognized that 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)). 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). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

An employee's belief that management's decisions or directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and HumanResources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). An employee may not disregard a direct order or the directions of a supervisor based upon his belief that the order is unreasonable or without merit. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

Respondent has met its burden of proof and demonstrated Grievant was insubordinate through his repeated failure to follow the direct orders of his supervisors. The fact that he never directly

refused to follow these directions is immaterial. Insubordi nation "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, supra. Grievant's repeated failure to plan, organize, complete paperwork, and document his activities are acts of insubordination.

C. Failure to accommodate Grievant's disability

While Grievant has stated this is not an ADA claim, he has continued to argue that Respondent did not "assist and account for a disability clearly apparent to the employer," and this "disability impacted grievant's work." (Statement of Grievance). This argument is based on the statement contained in the report authored in 1984, which stated Grievant scored, at that time, in "the lower part of the average range in ability to analyze, organize and synthesize new material." (Emphasis Added.) Grievant argued this cognitive ormental disability was caused by his Cerebral Palsy. Several issues are raised by this argument that must be addressed.

First, the report did not say Grievant had a disability. It said Grievant scored in the lower part of the "average range" in his ability to handle "new material." Neither the report nor the specific phrases indicate a cognitive disability. Lower than average is still within the average range. Accordingly, Grievant has not proven he has a disability which affected his ability to plan, organize, and to complete paperwork and documentation.

Second, the report does not tie the subtest score with Grievant's Cerebral Palsy. There was no expert testimony to support Grievant's theory that Cerebral Palsy caused a mental and/or cognitive difficulty. (See footnote 12) It could be that it does, but there was no evidence to support this notion, and without further information the undersigned Administrative Law Judge cannot reach such a conclusion.

Third, even if these phrases were accepted at face value, it still would not support Grievant's argument for accommodation. The subtest score says this difficulty occurs with "new material." The paperwork and documentation Grievant was required to complete, and with which he had difficulty, was not new material; most of it was routine, the same forms Grievant had been expected to fill out for many years.

Fourth and last, it must be noted Respondent did attempt to accommodate Grievant in his failure to plan, organize, complete paperwork, and document. Certain of hisassignments were changed to decrease the amount of paperwork he had to complete. He was sent to a Time Management class to

increase his organizational and planning skills. He was assigned a part-time worker to assist him with his duties. All these accommodations were made, and there was no improvement in Grievant's performance.

Additionally, Grievant did not ask for a specific accommodation with his planning, organization, paperwork, and documentation. He did state he knew what to do.

D. Discrimination because of disability

It has previously been held that this Grievance Board does not have jurisdiction to determine whether the ADA or the Human Rights Act have been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 193 W.Va. 222,455 S.E.2d 781 (1995). See Prince v. Bd. of Trustees/W. Va. Univers., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995). In Vest, the Court determined the Grievance Board's jurisdiction in discrimination-based claims extends only to “discrimination” as it is defined by the Board's authorizing legislation, in W. Va. Code § 18-29-2. Vest, 455 S.E.2d at 784. The Grievance Board noted it did not have jurisdiction over handicap-based discrimination claims under Vest in Curry v. West Virginia Department of Transportation, Docket No. 95-DOH-579 (Aug. 6, 1996), which was upheld specifically on that point by the Harrison County Circuit Court on July 22, 1997.

While this Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act, which would include a claim of handicap discrimination, the Grievance Board does have authority to provide relief toemployees for “discrimination," “favoritism," and “harassment," as those terms are defined in W. Va. Code § 29-6A-2; and thus, has jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest, supra.

W. Va. Code § 29-6A-2(d) defines "discrimination" as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

In order to establish a claim of discrimination under W. Va. Code § 29-6A-2(d), an employee must

establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, a grievant must show:

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

Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); See Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Hendricks, supra; See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Grievant has failed to make a prima facie case under the standard set forth above for establishing a claim of discrimination under W. Va. Code § 29-6A-2(d). Grievant has failed to identify any other employee, either probationary or disabled, who was treated differently than he was in similar circumstances. See Keatley, supra. Additionally, it was the failure of Grievant to carry out the "actual job responsibilities" of his position that resulted in his termination.

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

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient

that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Respondent has met its burden of proof and demonstrated Grievant's work performance was unsatisfactory.

3. Insubordination involves the "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). Insubordination "encompasses more thanan 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)).

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

5. An employee's belief that management's decisions or directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). 6. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). An employee may not disregard a direct order or the directions of asupervisor based upon his belief that the order is unreasonable or without merit. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

7. Respondent has met its burden of proof and demonstrated Grievant was insubordinate.

8. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

9. This Grievance Board has determined that 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. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

10. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax& Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

11. Grievant has not met his burden of proof and established a prima facie case of discrimination. Grievant did not demonstrate he was "similarly situated, in a pertinent way, to one or more other employee(s)." Additionally, Grievant's discharge was directly related to the non-performance of his "actual job responsibilities."

12. Respondent's termination of Grievant's employment was justified, because, even after accommodation, Grievant failed to perform the essential duties of his position.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 24, 2001

Footnote: 1

Grievant was represented by Attorney Daniel Huck, and Respondent was represented by Attorney Warren Morford.

Footnote: 2

The emphasis on the wheelchair athletics program was not addressed until Level IV.

Footnote: 3

As there were no other reports relating to mental abilities or cognitive functioning, and this specific report contained no other data of this type, it is assumed these sentences are the basis for Grievant's argument of a mental or cognitive dysfunction.

Footnote: 4

Although not clear from the record, it appears Grievant's supervisors did not have access to this confidential report. There was no evidence submitted to support Grievant's claim that his supervisors had recently read this report, if ever.

Footnote: 5

Grievant testified that one of the employees of this institution helped him complete some of his paperwork during this internship. Grievant still received a passing grade in this course.

Footnote: 6

Multiple examples of Grievant's failure to perform his assigned tasks are contained in the record. The undersigned

Administrative Law Judge has identified only a few examples for demonstration purposes.

Footnote: 7

The type of performance evaluation used by the agency had changed, but still specified Grievant's weaknesses.

Footnote: 8

Although not explained by the parties, this document is apparently a form that is used by employees of all state agencies.

Footnote: 9

Given this information, the undersigned Administrative Law Judge accepted this exhibit as Grievant's statement of what he believed to be his disabilities, but did not assume what, if any, action was required by the employer after the form was submitted.

Footnote: 10

Numerous exhibits were submitted that explained how and why the various forms were to be filled out.

Footnote: 11

For example, it was noted that Grievant did not identify or document which clients he had oriented to the recreation program. Such documentation is necessary to prevent duplication of effort and to insure clients receive the necessary information for their stay at the facility.

Footnote: 12

Grievant asked the various witnesses employed at DRS if Cerebral Palsy caused a mental or cognitive disability. Some said no, others said it might at times. These witnesses did not have a medical background and could not speak specifically to Grievant.