ELAINE RENNER,

Grievant,

v. **Docket No. 01-BCHD-552**

BERKELEY COUNTY HEALTH DEPARTMENT,

Respondent.

DECISION

On October 16, 2001, Elaine Renner filed a grievance at Level IV to grieve her termination from her position as Director of Nursing at the Berkeley County Health Department ("BCHD"). Her Statement of Grievance reads:

> I was terminated effective October 8, 2001 pursuant to the attached letter [Exhibit I]. I believe that I was not terminated for good cause[,] and that my termination was not supported by an adequate basis in law or fact.
>
> Relief Sought: I seek back pay, reinstatement and my attorney's fees and costs. (See footnote 1) A Level IV hearing is requested.

By agreement of the parties, a Level IV hearing was held in Martinsburg, West Virginia, in the law offices of Bowles Rice McDavid Graff & Love on January 18, 2002. This case became mature for decision on March 6, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

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 began work at BCHD as a part-time employee in July 1993. In September 1993, she began work as a full-time employee with the title of Nursing Supervisor, and later she became the Director of Nursing in September or October of 1994.

2. All Grievant's evaluations have been above average.

3. On October 30, 2000, Grievant received a written reprimand for reading an administrative file and sharing it with a co-worker, Sandy LeMaster. (See footnote 3)

4. In March 2001, Grievant received a letter of commendation from Dr. Frank Hamilton, the Medical Director.

5. On September 17, 2001, Grievant was called to Dr. Hamilton's office and presented with the following written reprimand. (See footnote 4) This written reprimand was composed by Mr. Jack, BCHD Administrator, after a discussion between Dr. Hamilton and Mr. Jack on Friday, September 14, 2001.

Subject:

Disciplinary Action

Level: Written Warning

This action is taken in response to the violation of written policy and change order issued under the Breast & Cervical Cancer Screening Program (BCCSP). Specifics of this violation are as follows:

1. On August 17, 2001, three staff members were sent to a meeting outlining changes to the BCCSP. Chief amongst these changes were modifications to definition of who was eligible for services and billing for said services.

2. Specifically spelled out in this meeting was the directive to implement said eligibility directives, immediately.

3. These guidelines prohibited the provision of Pap smear examinations for those program participants who had been identified as “No cervix” or other indications that their cervix had been surgically removed or was no longer present.

4. Those participants having [P]ap smears done in 2000 under this category would not be eligible for another [P]ap until their 2003 examination.

5.

These changes were communicated to you through these staff members upon their return to the Berkeley County Health Department on August 18, 2001. (See footnote 5)

6. Under you[r] specific direction "all" participants at the next scheduled clinic were given Pap smear exams, including those specifically not eligible according to the program changes of which you were informed on 8/18/01.

7. Said actions resulted in the provision of unauthorized services rendered to participants.

8. This action resulted in the billing of unauthorized claims to the BCCSP program. (See footnote 6)

9. Although these bills were prepared, they were held under the authority of the administrator pending this action and clarification of issues with the program management.

Summary of Violation

The following specific violations of process and procedure were found to exist:

. West Virginia DHHR directives pertaining to BCCSP eligibility were knowingly violated at your expressed direction.

. Failure to communicate changes to the clinic physician constitutes a gross dereliction of duty. (See footnote 7)

. Knowingly providing unauthorized services which result in the generation of billing invoices constitutes intent to commit fraud.

Resulting Notice of Action

As a result of your actions, you have placed the Berkeley County Health Department in a difficult situation. In reviewing the policy information provided from the August 17, 2001 meeting, the billing generated and the involved patient charts, a preponderance of evidence exists to substantiate my concern over this situation. I have, therefore, chosen to implement the following disciplinary course of action.

1. This written reprimand will be made a part of your permanent employee record.

2. You are hereby notified that you have been placed on a condition of probationary employment for a period of 12 months.

3. Further infraction of policy, DHHR, State, County, or internal written policies in existence or implemented during the period of probation will result in demotion or dismissal.

4. Any actions taken against staff in retribution or retaliation for information gathered or provided during the inquiry portion of this disciplinary action will be considered an act of harassment and will result in immediate termination of employment.

Acceptance of these terms and compliance to them is a condition of continued employment. I acknowledge the receipt of this Written Warning and agree to comply to the letter and intent of the action.

Resp. Ex. No. 2, at Level IV. (Emphasis added.)

6. This written reprimand was followed by a signature line for Grievant to sign.

7. Grievant was aware of the policy change in time to notify the clients who would no longer be eligible for testing. She planned to institute the changes the following month.

8. The amount in question was $105.58. 9. Grievant refused to sign the written

reprimand because of the language, "Knowingly providing unauthorized services which result in the generation of billing invoices constitutes intent to commit fraud," as she did not intend to commit fraud. She wrote the following statement on the document, "Refuse to sign - find this inappropriate as no intent was meant in direction of individuals regarding billing." Resp. Ex. No. 2.

10. Dr. Hamilton then verbally informed Grievant she was terminated, and stated he had been dissatisfied with her performance for some time. Grievant was somewhat loud during the discussion of her termination. Grievant pleaded with Dr. Hamilton to keep her job, stating she would step down, and he could appoint Ms. LeMasters as the Director of Nursing. Dr. Hamilton did not allow Grievant to take a demotion instead of a discharge.

11. Grievant received the following letter, dated September 21, 2001, detailing the reasons for her dismissal.

> This is to confirm your verbal dismissal from your position as Director of Nurses of the Berkeley County Health Department, issued by me on September 17, 2001 at approximately 9:40 A.M. This action is taken in accordance with Section 12.2 of the Administrative Rule of the West Virginia Division of Personnel and is effective October 8, 2001. Further, as authorized by WV Code § 29-6-10(12), I am requiring your immediate separation from the workplace and you will be paid up to a maximum of fifteen (15) calendar days' severance pay instead of being given the opportunity to work out the fifteen calendar day notice period. You do, however, still have the opportunity to respond to the matters of this letter provided you do so by close of business on October 8, 2001. You will also be paid for all annual leave accrued and unused as of your last working day.
>
> So you may understand the specific reasons for this personnel action, I recount the following events:
>
> Upon their return from a training session conducted by Breast and Cervical Cancer Screening Program BCCSP, on August 17, 2001, Mary Mills RN and Pam Gesford informed you of changes in eligibility for PAP [sic] services. You were informed, under these new standards, effective immediately,patients who had certain medical conditions would not be eligible for certain diagnostic procedures until the year 2003.
>
> You indicated that for the September Clinic patients you wanted the service continued. Further you indicated that regardless of the directive of immediate implementation of the new standards that these were to be delayed until October 1, 2001.
>
> In fact upon completion of the clinic services, billings for the services were

automatically generated for submission for payment from BCCSP. These bills total $105.58. While the bills had not been processed for reimbursement as of September 17, 2001, they may have caused the Health Department to incorrectly bill the agency and triggered compliance penalties.

On September 17, 2001, Jay Jack, Health Department Administrator, and I held a discussion with you regarding the nature of your work deficiencies. We shared with you that disciplinary action was being considered. Your response was to the effect that it was all right to bill the Breast and Cervical Cancer Program erroneously because they wouldn't pay it anyway, if not authorized. (See footnote 8) You refused to sign the Written Warning of Disciplinary Action[.]

Secondarily, but of no less importance, you were advised that:

I was dissatisfied with the way your department was running. It was my conclusion that there was no spirit of cooperation among your employees. In fact it appeared to me that there was general lack of enthusiasm and confidence prevailing among your employees. As one example, nurses on your staff indicate that they lack confidence in the answers you provide to their questions, and that they are reluctant to seek your guidance.

You must realize that in your position as Director of Nurses you have a responsibility to enforce the policies and procedures established by the Department. The employees under your supervision rely on you for training, leadership and direction in complying with rules and regulations. It is then, the subordinate's responsibility to apply your instructions in the work place. Obviously, if there is a lack of positive and supportive supervision, employees cannot perform their duties with confidence that their work product is in compliance with Departmental policy and/or procedure. It is your primary responsibility to plan, assign, supervise, evaluate and securethe resources necessary to ensure the successful performance of the employees under your supervision.

I conclude that your failure to exercise supervisory skills and to follow policy make it difficult, if not impossible, to enforce compliance with policy by your staff. The examples above clearly demonstrate your inadequate leadership, supervisory performance and judgment, as well as your repeated disregard for Department Policy and/or procedure.

The Berkeley [C]ounty Health Department has reason to expect it's employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to its employees capability in discharging their duties and responsibilities. I believe the nature of your

misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the Berkeley county Health Department, thus warranting this dismissal.

You may respond to the matters of this letter, either in writing or in person, provided you do so within the fifteen calendar day notice period.

. . .

12. Approximately two years ago, the three clerks at BCHD complained to Ms. LeMasters that Grievant had treated them rudely on one or two occasions. Shortly thereafter Dr. Hamilton came on staff and asked if there were any problems. The clerks informed him of Grievant's behavior. He talked to Grievant, and there has been no repetition of the problem. Test. Hamilton, Gesford, Traugher, and Albright, Level IV Hearing.

13. After the discussion with Dr. Hamilton, Grievant's conduct with the clerks was professional, competent, and they had confidence in her abilities. There was no difficulty with Grievant's supervision. The clerks and Grievant worked well together. Test. Gesford, Traugher, and Albright, Level IV Hearing.

14. Two of the clerks testified Ms. LeMasters was difficult to work with and frequently critical of Grievant. 15. Two part-time nurses, Pat Dunahugh and Audrey Hall, have worked for BCHD for several years. (See footnote 9) Grievant worked with these two nurses in a professional, cooperative, and helpful manner, and was a good resource for information. These nurses had confidence in Grievant's ability and supervision. Test., Dunahugh and Hall, Level IV Hearing.

16. These nurses also heard Ms. LeMasters frequently be critical of Grievant, and, in general, not trusting of her co-workers. During the two times Ms. LeMasters was off due to illness, the clinics ran more smoothly, and BCHD was a calmer place to work. Although there was more work during this time, because everyone cooperated, there were fewer problems than when Ms. LeMasters was present. Test., Dunahugh and Hall, Level IV Hearing.

17. Ms. LeMasters was hired as a full-time Registered Nurse in 1994. Ms. LeMasters did not like the fact Grievant told her not to deal with administrative issues in her absence. Grievant indicated she would resolve the issue when she returned. As outlined in Finding of Fact 12, the clerks came to

Ms. LeMasters several years ago when they felt Grievant had been critical of them. This issue was resolved by Dr. Hamilton and did not recur. Grievant never criticized Ms. LeMasters in front of others.

18. Ms. LeMasters complained to Dr. Hamilton about what she perceived as Grievant's lying about nonwork related matters. 19. Ms. LeMasters is now the acting Director of Nursing. The majority of those she supervises find her difficult to work with, and are fearful of her responses. (See footnote 10)

20. Grievant sought guidance from Dr. Hamilton several times about Ms. LeMasters' rude and disruptive behavior. Grievant was worried about Ms. LeMasters. Dr. Hamilton told Grievant to be her friend, but Grievant did not feel this would be appropriate because she was Ms. LeMasters' supervisor.

21. Mary Mills, a registered nurse with 16 years of experience, was hired to work full-time on August 1, 2001. Her major area of responsibility was in the Breast and Cervical Cancer Screening Program. She was also expected to assist in the immunization clinic, as well as other clinics.

22. Ms. Mills believed Grievant did not give her sufficient orientation to the immunization clinic. For her orientation, Grievant explained how the clinic worked, gave her a copy of the written guidelines, and answered every question Ms. Mills asked. Up until the time she left, Grievant answered any and all questions Ms. Mills asked, and Grievant frequently told Ms. Mills she was doing a good job. Additionally, the first time Ms. Mills worked in the immunization clinic, she only observed, the second time she wrote down the information while another nurse gave the medications, and the third time Ms. Mills gave the medications while another nurse wrote down the information.

23. Ms. Mills was "scared to death" of working in the immunization clinic, and believed the other nurses were also nervous to give the medications as there were manyrules and guidelines to follow. (See footnote 11) She complained she was expected to do research in the area, and this required her to write things down on note cards. When asked what would have made her comfortable, the response was for Grievant to tell her everything she would ever need to know about the immunization clinic.

24. Ms. Mills complained to Dr. Hamilton about her lack of orientation from Grievant. Dr. Hamilton did not discussed Ms. Mills's complaints with Grievant, but merely believed Ms. Mills had not received an orientation.

25. Ms. Mills found the BCHD atmosphere pleasant, heard no complaints about Grievant, had no lack of confidence in Grievant, and the only concern she had about Grievant's professionalism was when she heard her curse outside the building. (See footnote 12)

26. Ms. Mills indicated Grievant told her to ask questions of her, not of Ms. LeMasters. This guidance is appropriate, given the evidence the other nurses gave about Ms. LeMasters.

27. On or about August 14, 2001, BCHD Administrator Jay Jack submitted an invoice for reimbursement of expenses from a Low Incidence Project Grant for Tuberculosis. He based this invoice, in part, on the number of hours worked by BCHD employees. The only part Grievant played in the submission of this invoice was recordingher work hours and submitting her hours as well as the work hours documented by others as documented by the "Workers Logs." (See footnote 13)

28. Mr. Jack calculated the amount for the personnel costs at $6,700.00, and he also added $15,200.00, for equipment costs. He then submitted this invoice to the grantor.

29. When Carolyn Winkler, the person in charge of this grant, received this invoice, "red flags" went off in her mind. The first and largest flag was raised by the amount of money for equipment. She talked to Mr. Jack, on or about October 2, 2001, and he stated this money was spent on filing cabinets and storage for X-rays.

30. Mr. Jack testified no filing cabinets were ever purchased to use for storage. He indicated Respondent was now going to buy a building for storage, but this had not yet occurred.

31. The second "red flag" dealt with the amount of money charged to personnel, which resulted in a cost of $63.00 per hour, and she believed this was too high.

32. Ms. Winkler (See footnote 14) was also concerned about whether the monies had been charged to the correct grant, as the grant indicated monies could also be used for Tuberculosis prevention and control when monies from another grant had been expended.

Issues and Arguments

Grievant asserts she was wrongfully terminated without good cause. Grievant also notes the termination letter did not identify her alleged misconduct in sufficient clarity to put her on notice of the charges against her, and the general charges of poor leadership and inadequate supervision were untrue.

Respondent asserts Grievant was correctly terminated for insubordination and willful neglect of

duty, even if those terms were not used in the dismissal letter. Respondent avers the charges against Grievant are clear in the letter. Respondent identified three acts of insubordination: 1) the written reprimand received by Grievant on October 30, 2000; 2) the failure to implement the changes in the Breast and Cervical Cancer Screening Program immediately; and 3) the refusal to sign the September 17, 2001 letter of written reprimand. Respondent also asserted Grievant was guilty of willful neglect of duty because she failed to provide training and role modeling for her supervisees, and because she failed to promote a spirit of cooperation among her supervisees.

It is noted Respondent sought to elicit testimony on many issues not identified or discussed in the termination letter, and Grievant objected to this testimony. As the issues were not addressed in the letter, and Grievant was not on notice that they were reasons for her discharge, Respondent was not allowed to present this evidence. An employee is to be given the reasons for her discharge at the time her employment is terminated. Yates v. Civil Serv. Comm'n, 154 W. Va. 696, 178 S.E.2d 778 (1971); Frisenda v. Div. of Corrections, Docket No. 97-CORR-373 (Mar. 24, 1998).

However, one issue will need to be specifically addressed. Respondent asserted it found evidence of "further serious misconduct of the same nature as that for which shewas terminated . . . [and] shows a continuation of a pattern of insubordination and willful ignorance of policy that makes reinstatement wholly inappropriate." Respondent asserted Grievant had engaged in "wrongful billing" which would be a violation of policy. (See footnote 15) Respondent wished to present this evidence pursuant to the guidelines set out in Barlow v. Hester Industries, Inc., 198 W. Va. 118, 479 S.E.2d 628 (1996). Grievant objected to the admission of this evidence citing Yates v. Civil Service Commission, 154 W. Va. 696, 178 S.E.2d 798 (1971), and noting Respondent had not apprized Grievant this evidence would be presented at the hearing. This issue will be addressed toward the end of the discussion.

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 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.

County health 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 meretechnical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). The West Virginia Supreme Court of Appeals has also stated that “the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982).

This grievance requires a determination of whether Respondent proved the facts upon which the dismissal was based. The first issues to address are evidentiary ones relating to credibility and hearsay.

I. Credibility

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). 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). The Grievance Board has applied these factors in many cases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the

administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

The majority of the witnesses appeared to be truthful, but it was clear their testimony was colored by their own personal perceptions or psychological orientations. For example, after Ms. Mills complained to Dr. Hamilton about Grievant's failure to orient her, Dr. Hamilton did not discuss this with Grievant, but just accepted Ms. Mills's statements as true. As shown by the facts stated above, Dr. Hamilton did not have the "whole" story. Ms. Mills had been oriented, and Ms. Mills had not indicated to Grievant she needed much more intensive training before she would ever be able to function comfortably in the immunization clinic.

The undersigned Administrative Law Judge did not perceive any problems with Grievant's credibility. She appeared truthful and admitted her mistakes. She agreed she did not follow the orders to implement the new program immediately, but was going to wait until the next month. Grievant also admitted she was incorrect to share the information shefound in an administrative file, and for which she received a written reprimand back in 2000. She did not grieve this written reprimand.

As for Ms. LeMasters, her hearsay testimony about the clerks was completely discounted by the direct testimony of those same clerks, and no credibility issues were raised by their direct testimony. Indeed, Grievant's former supervisees were willing to testify at hearing on Grievant's behalf, even when they were concerned there could be retaliation against them for this favorable testimony.

Ms. LeMasters' statements about Grievant's alleged falsehoods that she told everyone about her personal life, even if they were true, have no bearing on the issues in this grievance. It very well may be that Grievant did not want Ms. LeMasters's involvement in her private business. Additionally, there was no evidence to support Ms. LeMasters's statements on this issue. Respondent did not question the other employees about these alleged lies.

Mr. Jack's testimony did not ring true. In his letter of October 22, 2001, to Ms. Winkler, he withdrew the prior invoice he had submitted, calculated, and signed. He stated all the information had been reported to him by Grievant, and blamed Grievant for the entire incident. This is just not true. Grievant had given Mr. Jack the hours and type of work done in the "Workers Logs." Mr. Jack calculated the hours, and added $15,200.00 for equipment of his own accord. There were, and never

have been, any invoices to support the equipment expenditures. It is unclear how Grievant can be charged ,in this set of facts, for this "billing" error. The submission of invoices was not her job. She did not even see any of the documents with the exception of the "Workers Logs." She did not sign off on the invoice sent to Ms. Winkler. Mr. Jack was the one who signed the document stating the equipment was for X-ray storage, and he was the one who testified no storagehad been purchased. Grievant did remember discussing the possibility of obtaining a computer with one of the tuberculosis grants.

II. Hearsay

The sum of the testimony of Dr. Hamilton, Ms. LeMasters, and George Kerns, former BCHD Administrator, is obviously hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). The key question is whether these statements are credible, and what weight, if any, to give this testimony. This hearsay testimony dealt with Grievant's interaction with the clerks, and how they were mistreated.

In Borninkhof v. Department of Justice, 5 MSBP 150 (1981), the Merit Systems Protection Board identified several factors that effect the weight hearsay evidence should be accorded. The Grievance Board has applied these factors in many cases, and considers the following in assessing hearsay: 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. See Holmes, supra; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990). Since the clerks testified they were only treated rudely once or twice, and certainly not recently, their testimony will be accepted, and the conflicting hearsay testimony will be rejected. Each clerk's testimony was consistent with the other clerks, and the clerks appeared to be credible witnesses, as supported by their demeanor, attitude, and reputation.

III. Merits of the case

A. Insubordination

The next issue to decide is whether BCHD has proven the charge of 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)). See 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 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). "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)). 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)).

"Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first[,] and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997). See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order."

Reynolds, supra. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, supra. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). Respondent avers Grievant's first act of insubordination, which resulted in her termination, was the written reprimand she received in October 2000. This act of insubordination was not mentioned in the termination letter, nor was the term progressive discipline. There was no indication in Grievant's termination letter that a policy of progressive discipline was being followed. Grievant agreed she acted incorrectly in October 2000, she did not grieve that action, and she has received her punishment for that act. It would be unfair for an employee to be punished twice for the same act. Accordingly, this prior act, for which Grievant has been punished, is not seen as insubordination at this time. (See footnote 16)

Grievant's second act of insubordination was the failure to follow immediately the guidelines for the Breast and Cervical Cancer Screening Program. Grievant agrees she did not follow these guidelines immediately, and she was going to wait for the following month to start the new regulations. This action by Grievant was insubordinate. She knowingly refused to follow a clearly stated policy. This behavior was identified by Dr. Hamilton and Mr. Jack on September 14, 2001, as meriting a written reprimand, which was given to Grievant on September 17, 2001.

Respondent identifies the third act of insubordination as refusal to sign the written reprimand. Grievant stated she did not sign because it would be admitting she intentionally committed fraud, and this she did not do. An employee can be found guilty of insubordination when he or she refuses to sign a written reprimand "indicating receipt." Simons v. Logan County Bd. of Educ., Docket No. 95-23-399 (June 27, 1996). (Emphasis Added.) In Simons, the principal asked the grievant to sign at the bottom of the written reprimand, and told her the signature did not mean she accepted the reprimand, only that she had received it. The grievant refused to sign. This board of education had a policy requiring employees to sign documents indicating receipt whether they contained negative comments or not. Ms. Simmons was found guilty of insubordination.

The facts in this case are not similar, and there was no policy in place about signing documents to indicate receipt. The undersigned Administrative Law Judge cannot find Grievant is guilty of

insubordination for refusing to sign the written reprimand in this set of facts. She was not simply asked to sign to indicate that she received the written reprimand. The statement at the end of Grievant's written reprimand was much broader than that in Simmons, and said, "Acceptance of these terms and compliance to them is a condition of continued employment. I acknowledge the receipt of this Written Warning and agree to comply to the letter and intent of the action." These sentences followed a discussion and finding of Grievant intentionally committing fraud. This waiver was sufficiently ambiguous to justify Grievant's refusal to sign. Accordingly, Respondent has only proven Grievant committed insubordination by her refusal to follow the Breast and Cervical Cancer Screening Program change in policy immediately.

As previously stated, Dr. Hamilton and Mr. Jack thought this behavior warranted only a written reprimand.

B. Willful neglect of duty

The next issue to address is willful neglect of duty. When an employee is disciplined for willful neglect of duty, the respondent must also prove its case by apreponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90- 40-437 (May 22, 1991). To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

Respondent states Grievant was guilty of willful neglect of duty by failing to promote a spirit of cooperation; providing poor supervision and training; failing to follow policies; and failing to inspire enthusiasm and confidence. Much of the evidence provided by Respondent in this regard related to Grievant's failure to orient Ms. Mills, and her poor treatment of the clerks. Respondent did not prove these allegations. As for Ms. Mills, it is unclear what else Grievant was expected to do to help a Registered Nurse with many years of experience, except to spoon-feed her every bit of knowledge, or else remove her from the immunization clinic, which is what it appears Ms. Mills wants. While Ms. Mills indicated to Grievant she was still uncomfortable in the clinic, she did not provide any other information to Grievant, and Grievant answered every question Ms. Mills asked and provided her with

guidelines. There was no willful neglect of duty in Grievant's action with Ms. Mills.

As for the treatment of the clerks, the clerks' testimony was clear. This was a problem that occurred several years ago, and it had been resolved for at least a year and a half. Grievant's supervisees uniformly testified they worked well with Grievant; found noproblems with her leadership; and felt she was professional and helpful at work. They had confidence in her ability. They also testified the problems they saw were with Ms. LeMasters, and her inappropriate and disruptive behavior. Respondent has not proven the charge of willful neglect of duty.

IV. After-acquired evidence

The undersigned Administrative Law Judge, after much deliberation, has decided to address the merits of charges against Grievant for an alleged "billing error." The reasons for this decision are twofold. Since Respondent has failed to prove its case on the other issues, the decision of this Grievance Board is to return the Grievant to her former position. It is possible Respondent could decide to terminate or discipline Grievant again based on this data. In the interest of judicial economy and to provide quick resolution of a grievance, this charge will be addressed. The other reason the undersigned Administrative Law Judge has decided to address this issue is because Respondent has failed to prove this charge, and this allegation should not continue to create a shadow upon Grievant's reputation.

As stated in the discussion on credibility, Grievant did not submit the invoice, and her only input was a listing of the hours she and her supervisees worked. Ms. Winkler testified she had no problems with that portion of the invoice. She stated she had a problem with the large amount of money that had been spent on equipment, and the hourly rate calculated by Mr. Jack. While it is clear Ms. Winkler was concerned that the wrong grant may have been charged for some of the care given, this was not her main focus. It also appears this problem could have been addressed by a review of the "Workers Logs,"and a shifting the fees to the proper grant where necessary. Respondent has not demonstrated Grievant participated in "further serious misconduct of the same nature as that for which she was terminated . . . [and] show[ed] a continuation of a pattern of insubordination and willful ignorance of policy that makes reinstatement wholly inappropriate."

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. County health 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. Dep't of Finance and Admin., 164 W. Va. 461, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). 3. An employee is to be given the reasons for her discharge at the time her employment is terminated. Yates v. Civil Serv. Comm'n, 154 W. Va. 696, 178 S.E.2d 778 (1971); Frisenda v. Div. of Corrections, Docket No. 97-CORR-373 (Mar. 24, 1998).

4. 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).

5. 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).

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 Dept., Docket No. 90-H-128 (Aug. 8, 1990).

7. 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)).

8. 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 constitutethe defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

9. Respondent has demonstrated Grievant was insubordinate in only one of the three charges of insubordination.

10. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

11. Respondent failed to prove the charge of willful neglect of duty.

12. Respondent failed to prove the charge of "further serious misconduct of the same nature as that for which she was terminated' which "show[ed] a continuation of a pattern of insubordination and willful ignorance of policy."

13. Respondent has failed to demonstrate “good cause," meaning “misconduct of a substantial nature directly affecting the rights and interest of the public," in its termination of Grievant. Syl. Pt. 1, Oakes, supra.

Accordingly, this grievance is **GRANTED**. Respondent is directed to reinstate Grievant to her former position, with full back pay and interest, and to remove all reference to her dismissal from all personnel files. The written reprimand given to Grievant onSeptember 17, 2001, is to be reinstated, and placed in her file, as Respondent has proven the one charge of insubordination which caused the original issuance of this written reprimand.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 29, 2002

Footnote: 1

It was explained to Grievant that costs and attorney fees were generally not available at Level IV.

Footnote: 2

Grievant was represented by attorney Harry Waddell, and Respondent was represented by Attorneys Brian Peterson and Claudia Bentley of Bowles Rice McDavid Graff & Love.

Footnote: 3

It does not appear Ms. LeMaster was disciplined for reading the file.

Footnote: 4

The facts in this written reprimand are essentially correct as to the policy change and Grievant's response to it. Where the information is incorrect, it is so noted.

Footnote: 5

This date is incorrect per the testimony of multiple witnesses. Grievant was not aware of the changes until the following week, on or about August 27, 2001.

Footnote: 6

Note this allegation is contradicted by the following statement, Number 9.

Footnote: 7

Dr. Hamilton's testimony seems to contradict this allegation. He testified he believed he was aware of the changes before he performed the Pap tests on the clientswho appeared for the clinic.

Footnote: 8

Grievant indicated in her testimony she did not make this statement.

Footnote: 9

Ms. Dunahugh resigned on December 15, 2001.

Footnote: 10

During the Level IV hearing, it was necessary to reassure these individuals that no retaliation would be taken against them for their testimony. Dr. Hamilton guaranteed these employees that no reprisal would occur.

Footnote: 11

Ms. Mills noted at the Level IV hearing that she was still not comfortable in this area.

Footnote: 12

Ms. Mills indicated she believed that one time she received incorrect information from Grievant. She checked it out, and when she went back to Grievant, Grievant agreed the information she had given Ms. Mills was incorrect.

Footnote: 13

These "Workers Logs" mostly reflected prevention and control activities, such as giving PPD's (skin tests) and reading the results.

Footnote: 14

It must be noted that while giving no evidence of any untruth, Ms. Winkler was unclear about many facts, and, at times, her answers to the same question would vary. She was also confused about dates and times specific events occurred. Although the undersigned Administrative Law Judge is sure Ms. Winkler knew the answers, she was unclear about exactly what services could go with which grant, as there appeared to be some gray areas.

Footnote: 15

See Findings of Fact 27 through 32.

Footnote: 16

Respondent could have used this act of prior insubordinate behavior to increase Grievant's punishment when it gave her the second written reprimand; it chose not to do so.